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(Civil and Criminal)

Third Edition

Vol. 3

B. V. CHITALEY
&
S. APPU RAO

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THE
A. I. R. MANUAL
UNREPEALED CENTRAL ACTS
(CIVIL AND CRIMINAL)

3rd Edition

BY

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VOLUME 3

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PREFACE

(Reprinted from Vol. 1)

When the A.I.R. entered the field with the first edition of its "Manual" in the year 1947, it at once leapt to the first rank and carved for itself an unrivalled position in the field of such publications, although it was a newcomer in that particular field. This was due to certain settled principles of the A.I.R. to which it has been adhering steadfastly since its foundation more than 50 years ago. These principles may be summed up in three rules, which the A.I.R. has been having as its watchwords since the beginning: (1) thoroughness, (2) exhaustiveness, and (3) meticulous study of all possible ways by which the usefulness of a publication to the legal profession can be enhanced. All these three principles were given full effect to in the A.I.R. Manual.

2. The publication proved to be the most exhaustive and reliable collection of central statute law together with all the relevant case-law bearing on it, summarised, arranged and presented in a most conscientious manner with a view to affording the maximum facilities to the legal profession, both on the Bench and at the Bar. These qualities meant very hard work both for the editorial staff engaged by the A.I.R. as well as for the management. But they have built up the reputation of the A.I.R. Manual on a most solid and enduring foundation. This reputation brought correspondingly good results as regards the actual sales of the publication and in a little over 20 years after the A.I.R. entered the field, a third edition of the Manual has become necessary to meet the insistent demand of the legal profession.

3. It is needless to dilate, at length, on the special features of the publication. It gives, as in the previous editions, both civil and criminal Acts, and the inconvenient and illogical division into civil and criminal portions has been rejected as in the previous editions. The post-Independence period has been extraordinarily prolific in the matter of legislative output, both at the Centre and in the States. The A.I.R. Manual aims at placing within the reach of the profession, at a reasonable cost, the entire body of central statute law together with the relevant case-law arranged in a convenient form which has been developed, after patient thought and experimentation, as being the most suitable from the point of view of quick and efficient service to the profession, whenever its members may have to look up a point of law in the statutes of India. Needless to say that our statutes, unlike under the English system, constitute the staple of our law and, therefore, provide the most important and the bulkiest part of our law.

4. In the interval of about 8 years since the completion of the second edition, more than 100 new Acts have been added to the statute book and there have been also a very vast number of amendments and additions to the old Acts. This edition includes all the new Acts and all the up-to-date amendments, besides giving the State amendments also wherever it was possible to trace them.

5. Among the new Acts, special mention may be made of some which are of outstanding importance. Perhaps, the first place in this category will have to be

given to the Limitation Act of 1963 which has taken the place of the Act of 1908 and not only overhauled the entire Law of Limitation but has revolutionised and simplified the law in many respects as, for instance, in regard to suits for possession of immovable property and applications for execution, which were two of the toughest and most confusing topics under the previous Limitation Act. The Advocates Act, 1961, has repealed the Bar Councils Act, 1926, and the Legal Practitioners Act, 1879 and has brought into existence a single unified Bar for the whole of India—which is itself a revolutionary change in the constitution of the Indian Bar and has been looked forward to, for a very long period by the whole Bar as an ideal to be realised.

6. The Arms Act, 1959, is another important Act which, by liberalising the provisions of the Arms Act of 1878 in a marked way, has shown itself to be a product of the post-Independence period. The Income-tax Act of 1961 has overhauled the whole structure of the Income-tax Act, 1922, and made a real attempt at simplification of the provisions of the law. Other Acts of the period also reflect the spirit of the times, each in its own way.

7. Above everything, however, this edition of A.I.R. Manual will be of special value to the Bench and the Bar as perhaps the most exhaustive and up-to-date reference book on the Constitution of India. The period, after the last edition, has witnessed an enormous growth and development of the Constitutional Law of India. Not only have there been a very large number of important amendments of the Constitution during this period but a phenomenally voluminous body of case-law which has accumulated on the Constitution.

8. This edition will not only contain the most authoritative version of the Constitution but also the most exhaustive collection of the case-law bearing on it. The subject is so voluminous that no ordinary text-book can be expected to cope with it and do full justice to it. This edition will be found to be practically unequalled as a book of reference on the Constitution of India.

9. All the special features of the previous editions, such as synopsis, "at-paging" of the Reports, etc., are continued in this edition and have also been considerably improved. These special features have been enumerated elsewhere at the beginning of this volume.

10. Before concluding, it is our pleasant duty to place on record our sense of gratitude to all our colleagues without whose unstinted labour and co-operation it would have been impossible to bring out such a vast publication. The editorial work, as can be seen, consists mainly of two branches: (i) that relating to preparing and editing the text of the various Acts, and (ii) the collection and editing of the notes of case-law bearing on the different Acts.

11. The responsibility for preparing and editing the text of the various Acts has been ably shouldered and executed by Sarvashri D. R. Rajandekar, B.A., LL.B., and A. G. Tambe, B.A., LL.B., assisted by Sarvashri P. A. Bakre, B.A., LL.B., H. G. Pathak, B.A., LL.B., and S. G. Kulkarni, B.A., LL.B.

12. The entire credit for organising and managing the editorial work in connection with the case-law must go to Shri V. B. Bakhale, M.A., LL.B., who has been assisted by a band of devoted workers, among whom may be chiefly mentioned

Sarvashri R. G. Dhobley, B.A., LL.B., D. H. Zadgaonkar, B.A., LL.B., K. S. Bakre, B.Sc., LL.B., M. Kuppuswami, B.A., B.L., G. M. Jatar, B.A., LL.B., S. S. Guru, B.A., LL.B., M. V. Joshi, B.A., LL.B., L. G. Chavhan, B.A., LL.B., B. N. Pradhan, B.Sc., LL.B., C. W. Moharir, B.Com., LL.B., D. V. Thakre, B.Sc., LL.B., G. D. Ruikar, B.A., LL.B., Y. P. Baxi, B.A., LL.B., M. N. Thomare, B.A., LL.B., B. D. Bhave, B.Sc., LL.B., D. G. Bhagwat, B.Sc. LL.B., N. N. Harshe, M.A., LL.B. F.I.A., V. R. Buche, B.A., LL.B., G. G. Modak, B.Sc., LL.B., V. S. Sarma, B.A., LL.B. and S. V. Golwalkar, B.A., LL.B.

13. Shri Gopalrao Udar and his team including among others Sarvashri P. K. Thosar, H. W. Mendhi, Govindrao Udar, D. R. Landge, Ku. S. Naidu, Ku. K. G. Deshpande and Ku. S. Deshpande have done the very arduous and responsible work of correcting and passing the proofs and our thanks are due to them for this.

14. Scarcely less important than the work of the editors has been the work of Shri B. R. Abhyankar, who, with his devoted band of workers including Sarvashri M. S. Savarkar, B. R. Katankar, D. P. Alshi, W. J. Joshi, P. N. Deo, G. D. Deshpande, S. M. Lambe, L. S. Wavde and D. T. Joshi and others has manned the responsibility of preparing the manuscript for the press.

15. Thanks must also be given to Sarvashri M. W. Chitaley, C. R. Banerjee, and G. G. Padhye, M. M. Kanitkar and others of the A.I.R. Rotary Printing Press, who, under the leadership and guidance of Shri J. W. Chitaley, finished the printing of the work in record time.

16. Last, but by no means least, our thanks are due to Shri W. W. Chitaley, B.A., LL.B., who has been in overall charge of the whole undertaking and whose exceptional talents, in organising and managing the business side of the undertaking are of inestimable value for the success of the gigantic undertaking that this publication obviously is.

13th June, 1969.

D.V.C.
S.A.R.

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UNREPEALED CENTRAL ACTS

(CIVIL & CRIMINAL)

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UNREPEALED CENTRAL ACTS
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VOLUME III

148. Enlargement of time.—Where any period is fixed or granted by the Court for doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

[R.S.C., Order 64, Rule 7.]

SECTION 148 — SYNOPSIS

1-A. Inherent power of Court.
1. Period fixed or granted by Court.
2. Time fixed by decree.
3. Time fixed by consent decree.
4. Time fixed by award.
5. "Act prescribed or allowed by this Code."
6. Discretion.
7. Extension after the expiry of period originally fixed.
8. Implied extension.
9. Extension by appeal being preferred.
10. Forum for application.
11. Appeal.
12. Revision.

1-A. Inherent power of Court.— (1) Where the time for payment of the decretal amount had been granted to the judgment-debtor by consent of parties the Court has no power to extend it without the consent of parties. Section 148 would not apply in these circumstances. **AIR 1968 SC 86 (89): (1967) 3 SCR 695** ** AIR 1961 Bom 254 (257): 63 Bom LR 48.

(2) High Court under Section 151 is not powerless to enlarge the time even though it had peremptorily fixed the period for payment. Sections 148, 149 and 151 clothed the High Court with ample power to do justice to litigant if sufficient cause was made for extension.

Held, in the circumstances the High Court was not justified in refusing extension. **AIR 1961 SC 882 (884): (1961) 3 SCR 763.** (AIR 1956 Pat 20, **REVERSED.**) ** (1968) 2 Andh LT 115 (118). **(AIR 1961 SC 882, Rel on.)** ** AIR 1965 Cal 308 (310, 311): 68 Cal WN 1117 (DB). (Extension of time for payment of deficit Court-fee.) ** AIR 1959 J and K 73 (74).

(3) Where the section does not apply and the aggrieved party has another remedy open to him, the Court will not exercise its inherent powers to extend time. AIR 1957 Trav-Co 48 (49): 1956 Ker LT 611 (DB).

(4) Since the Code contains specific provision for the extension of time under Section 148, there is no scope for exercise by the Court of its inherent power under Section 151 for such a purpose. AIR 1962 Raj 54 (55): 1961 Raj LW 382. (AIR 1925 Bom 404, **DISSENTED FROM.**)

[See also AIR 1959 J and K 73 (74). (Amendment of plaint on payment of costs within certain time — Time for filing amended plaint extended. **Held** time for payment of costs should be extended under Section 151.)]

[See however AIR 1969 Andh Pra 550 (551). (Limitations circumscribing power under Section 148 do not govern those under Section 151.)]

[But see AIR 1962 Madh Pra 205 (210).]

(5) Where, however, the time has been granted under Sec. 149 and re-presentation of the plaint has been made after a delay of few days and there has been no order granting time under Section 148 but in fact there has been acceptance of that document as if full Court-fee has been paid as from the date of filing, the Court must be held to have acted under Section 151. AIR 1960 Andh Pra 602 (603): ILR (1960) 2 Andh Pra 208.

(6) See also Notes on Section 151.

1. Period fixed or granted by Court.— (1) The section applies only where any period is fixed or granted by the Court. It does not apply when a period is fixed by law. AIR 1958 Ker 88 (90) (SB) ** AIR 1957 All 558 (560) ** AIR 1962 Madh Pra 205 (210): 1962 MPLJ 255. (Automatic order.) **

Section 148 — Note 1 (contd.)
AIR 1961 Mad 407 (408): (1961) 1 Mad LJ 142.

(2) Where the Court fixes a day for the fulfilment of a condition the person on whom that obligation is imposed will be entitled to the whole of that day for complying with the orders of the Court. AIR 1949 Mad 376 (377) ** AIR 1947 Mad 244 (245) ** (1966) 2 Mad LJ 141 (142): 79 Mad LW 421.

(3) Action under Section 151 or under 148 or 149 would not become void in absence of any notice to the other side, when such notice is not provided for in those provisions. (1963) ILR 42 Pat 704 (DB).

(4) Where while dismissing appeal arising from suit for specific performance of contract time is granted by appellate Court to plaintiff to deposit balance of purchase money the power of trial Court is still intact to consider extension of the time. AIR 1960 Andh Pra 271 (272): ILR (1960) 2 Andh Pra 504 (DB).

2. Time fixed by decree.— (1) The general principle enacted in the section is that, where by an order time is granted by the Court for doing any act prescribed or allowed by the Code, it may be extended by the Court from time to time. ('54) 1954-2 Mad L Jour 601 (602) ** AIR 1957 Cal 598 (600) ** AIR 1933 All 262 (264): 55 All 326 (FB) ** 1967 All LJ 551: 1967 All WR (HC) 186 ** 1963 Mys LJ (Supp) 81. (Preliminary decree directing payment to alienees — Time can be extended.) ** AIR 1961 All 86 (86) ** 1961 Jab LJ 164. (Case under M. P. Accommodation Control Act (23 of 1955), Section 5.) ** AIR 1960 Assam 126 (127): ILR (1960) 12 Assam 93 ** AIR 1959 Cal 35 (36): 62 Cal WN 588 (DB).

(2) There are some exceptions to the above general rule. Where the Court ceases to have jurisdiction over the matter, after the order granting the period is passed, time cannot be extended. AIR 1926 Mad 133 (134) ** 1968 Ker LJ 873: 1969 Ker LR 182 ** AIR 1965 Cal 308 (311): 68 Cal WN 1117 ** AIR 1961 Bom 254 (257): 63 Bom LR 48 ** 1959 Ker LT 1324 (1325): 1959 Ker LJ 1466 * 1959 Ker LT 457: 1959 Ker LR 312 ** AIR 1959 Pat 181 (182): 1958 BLJR 616(DB) ** 1965 Raj LW 520: ILR (1966) 16 Raj 213 (DB).

[See AIR 1965 Cal 354 (355).]

(3) Where the order fixing time finally disposes of the matter and the Court has no longer seisin of the matter, the time fixed cannot be enlarged. AIR 1956 Pat 444 (445) (DB) ** AIR 1958 Mad 453 (453) (90 Cal L Jour 105, **DISSENTED FROM.**) ** AIR 1957 Andh Pra 780 (781): ILR (1956) Andhra 109 (DB) ** AIR 1957 Cal 598 (600) ** AIR 1957 Madh B 13 (13) (DB) ** AIR 1957 Trav-Co 48 (49) (DB). ** AIR 1968 Assam 32 (34) (DB) ** AIR 1933 Mad 207 (207).

[See also ('35) 61 Cal L Jour 512 (514).]

(4) Where an order provides that a suit dismissed for default should be restored to the file on condition that the plaintiff pays the costs of the opposite party on or before a particular date and directs that in case of default the application for restoration is to stand dismissed, the time cannot be enlarged under this section. ('36) AIR 1936 All 477 (478).

[See also ('57) AIR 1957 Madh B 13 (13) (DB).]

(5-6) Where a period is fixed or granted by a decree it cannot be extended by the Court though the decree itself may be varied or reversed by the Appellate Court under Order 41, Rule 32 by granting a different period to that fixed by the lower Court. ('55) ILR (1955) Madh B 67 (72) ** ('13) 35 All 582 (586) (SB) ** ('21) AIR 1921 Lah 6 (7) (FB).

[See ('52) AIR 1952 Nag 145 (152): ILR (1952) Nag 243 (FB).]

[See however ('52) 90 Cal L Jour 105 (113, 114).]

(7) The principle that the time fixed by decree cannot be extended is subject to the qualification that where the decree which fixes the time is not intended to be final and the Court still retains control over the proceeding the Court may extend the time under this section. ('56) AIR 1956 Cal 425 (427) (DB) ** ('56) AIR 1956 Pat 20 (22) (DB) ** ('55) AIR 1955 Sau 50 (52).

[See also ('58) AIR 1958 Cal 284 (286, 287) (DB).]

(8) Where time is fixed for payment in a pre-emption decree, it could be extended by the Court. AIR 1916 Pat 268 (269): 1 Pat L Jour 92.

[See also ('54) AIR 1954 Manipur 4 (4, 5) ** ('55) ILR (1955) Madh B 67 (72).]

(9) Where a decree for specific performance of a contract is passed on condition of a party paying a certain sum by a certain date, the Court can extend the time. ('58) AIR 1958 All 488 (490, 491): ILR (1957) 2 All 453 (DB). (AIR 1923 Oudh 16, **DISSENTED FROM.**) ** AIR 1969 Orissa 7 (8): 34 Cut LT 930 ** (1967) 1 Mys LJ 658 (661): 10 Law Rep 782 ** AIR 1960 AP 271 (272) (DB). (Time fixed by appellate Court — Trial Court can extend time.) ** AIR 1959 Orissa 74 (75): ILR (1959) Cut 142 (DB) ** AIR 1959 Pat 460 (462): 1959 BLJR 439. (AIR 1930 Pat 279, **DISSENTED FROM;** AIR 1923 Mad 284, Ref.)

[But see ('30) AIR 1930 Pat 279 (280) ** ('23) AIR 1923 Oudh 16 (17).]

(10) Where a plaintiff in whose favour a conditional decree is passed, neither fulfils the condition within the time allowed nor applies for extension of time, he cannot execute the decree. ('53) AIR 1953 All 120 (122) ** ('55) ILR (1955) Madh B 67 (70) ** ('24) AIR 1924 Rang 375 (376) (DB).

Section 148 — Note 2 (contd.)

(11) When over the same matter both the appellate Court and the trial Court had concurrent jurisdiction to extend time, and an adverse order was passed by the appellate Court, the same matter cannot be re-agitated before the trial Court though it had power to extend the same if the appellate Court had not been moved in the matter. AIR 1969 Orissa 7 (8): 34 Cut LT 930.

3. Time fixed by consent decree.— (1) A Court can extend the time fixed in a consent decree for the doing of an act directed thereby, where time is not of the essence of the contract of compromise. ('55) AIR 1955 Sau 50 (52) ** AIR 1968 Mad 48 (48): (1967) 1 Mad LJ 251. ((1962) 1 Mad LJ 418, Rel. on.) ** AIR 1967 Mad 397 (398): (1966) 2 Mad LJ 242. (Consent decree in suit for specific performance of agreement to reconvey property — Decree providing that plaintiff should deposit money in Court in certain time — No default clause provided — Failure to deposit within specified time — Application for extension of time to deposit soon afterwards.

Held, suit should be deemed to be pending and not finally disposed of and time was rightly extended. AIR 1923 Mad 284 and AIR 1966 Mad 46 and AIR 1953 Pat 158, Foll.) ** AIR 1965 Cal 308 (311): 68 Cal WN 1117 (DB) ** AIR 1962 Mad 489 (490). (Compromise decree — Draft sale deed to be filed within 15 days of decree — Time essence of contract, cannot be extended.) ** (1962) 1 Mad LJ 418: 74 Mad LW 773: 1961 Mad WN 723. (Compromise decree with condition. Time cannot be extended as condition essential part of decree.) ** AIR 1960 Pat 562 (563). (Time essence of contract — Cannot be extended.) ** AIR 1960 Pat 560 (562): 1959 BLJR 700 (DB). (Time essence of contract — Cannot be extended.) ** AIR 1960 Cal 75 (76): 63 Cal WN 460. (A consent order directing stay of execution pending second appeal on conditions — Breach of condition due to lawyer's default.)

[But see ('29) AIR 1929 All 666 (666) (DB) ** ('12) 1912 Pun Re No. 99. 15 Ind Cas 941 (942) ** ('33) AIR 1933 Pat 563 (564): 13 Pat 1 (DB) ** ('15) AIR 1915 Oudh 197 (198) ** ('15) AIR 1915 Oudh 226 (227): 18 Oudh Cas 58.]

(2) Where a consent decree directed the defendant to deposit a certain amount in Court on or before a certain date and on default the claim of the plaintiff was to stand decreed, but due to the wrongful action of the plaintiff, the defendant could not make the deposit within the time, the Court could extend the time, for making the deposit and the deposit made within the extended period would be compliance with the condition of the decree. ('57) AIR 1957 Nag 86 (87): ILR (1958) Nag 641: 1956 Nag LJ 415 (DB).

4. Time fixed by award.— (1) The Court cannot extend the time fixed by an award. ('18) AIR 1918 Cal 554 (555) (DB).

[But see ('55) AIR 1955 Sau 50 (52).]

5. "Act prescribed or allowed by this Code".— (1) The section applies only where time is fixed for doing an act prescribed or allowed by the Code. ('42) 46 Cal WN 11 (12) ** ('40) AIR 1940 Cal 275 (276) ** 1963 Ker LJ 133 (135). (Act prescribed under Kerala Act 16 of 1959.) ** AIR 1966 Orissa 44 (45): 31 Cut LT 757. (Time granted by Court for payment of costs while setting aside ex parte decree — Section does not apply.) ** AIR 1962 Cal 485 (486): 66 Cal WN 645 (DB).

(2) Where a period is fixed by the Court to do a particular act under its inherent powers, it is an act allowed by Section 151 of this Code and, therefore, this section will apply to such a case. ('33) AIR 1933 Mad 563 (564).

(3) "Code" includes not only the body of the Code but also the schedules and the rules made under Section 122 or Section 125. ('56) AIR 1956 Andhra 108 (109).

(4) The following are some of acts prescribed by the provisions of the Code:

(a) Section 55 (4) — Security for the production of the judgment-debtor within the time fixed by Court. ('25) AIR 1925 Rang 135 (137): 2 Rang 567 (DB).

(b) Order 7, Rule 11 (c) — Supply of deficient stamp paper. ('09) 32 Mad 305 (311) (FB) ** ('58) AIR 1958 Ker 88 (92) (SB) ** AIR 1961 Bom 254 (257): 63 Bom LR 48 ** AIR 1961 Manipur 50 (52).

(c) Order 8, Rule 9 — Time for filing written statement or additional written statement. ('59) AIR 1959 Cal 35 (36) (DB).

(5) The section does not apply when time is fixed for doing an act not prescribed or allowed by the Code. ('50) AIR 1950 All 675 (681) (DB) ** (1962) 64 Punj LR 855.

[But see ('11) 10 Ind Cas 268 (269) (DB) (Cal).]

(6) An insolvency Court can extend the time fixed for applying for discharge, even after the time originally fixed has expired. ('56) AIR 1956 Madh B 256 (256) (DB) ** ('30) AIR 1930 Mad 389 (392): 53 Mad 288 FB).

[But see ('30) AIR 1930 Rang 166 (172): 8 Rang 187 (DB) ** ('25) AIR 1925 Pat 355 (356): 4 Pat 51 (DB).]

(7) A Court can extend the time fixed for payment of deficit court-fee under the Court-fees Act, Section 10, Clause (2) or Section 11 or for deposit of one-fifth of the purchase money in a suit for pre-emption under Section 22 (4) of the Punjab Pre-emption Act. ('58) AIR 1958 Ker 88 (92) (SB). (Time for payment of deficient

Section 148 — Note 5 (contd.)
court-fee.) ** ('97) 19 All 240 (243) (DB). (Section 10 (ii), Court-fees Act.) ** ('11) 10 Ind Cas 268 (269) (DB) (Cal). (Section 11, Court-fees Act.) ** ('23) AIR 1923 Lah 643 (645) (DB). (Section 22 (4), Punjab Pre-emption Act.)

[But see ('16) AIR 1916 Mad 224 (227) (DB).]

6. Discretion. — (1) The power to enlarge time under this section is discretionary. ('38) AIR 1938 Mad 542 (543, 544) ** ('58) AIR 1958 Ker 88 (91) (SB) ** ('58) AIR 1958 Mad 453 (453) ** AIR 1961 Ker 110 (111): 1960 Ker LT 990.

[See also ('52) AIR 1952 Nag 145 (152): ILR (1952) Nag 243 (FB).]

(2) The appellate Court should not interfere with the discretion of a Court under Section 148 except on very strong grounds. ('49) AIR 1949 Lah 121 (122, 123): Pak LR (1948) Lah 202 (DB) ** ('53) ILR (1953) 3 Raj 988 (993) (DB) ** ('25) AIR 1925 Pat 299 (302): 4 Pat 190 (DB).

[See ('53) AIR 1953 Hyd 32 (32): ILR (1952) Hyd 1021 (DB).]

(3) A Court passing orders for extension of time should be taken, on the record as it stands to have exercised its discretion as provided by the section and an Appellate Court cannot go into the question whether, as a matter of fact, the lower Court did exercise such discretion. ('16) AIR 1916 Cal 616 (616) (DB) ** ('38) AIR 1938 Mad 542 (544).

(4) If the party bound to give security has done everything in his power, but owing to circumstances beyond his control. the giving of security could not be finalised, this would be compliance with the order of the Court to give security and the fact that such registration, etc., is, beyond the time prescribed will make no difference and the Court can extend the time to finalise the transaction. ('58) AIR 1958 Mad 453 (454).

7. Extension after the expiry of period originally fixed. — (1) The section empowers a Court to extend the time even after the expiry of the period originally fixed. ('56) AIR 1956 Cal 425 (427) (DB) ** ('58) AIR 1958 Ker 88 (91) (SB) ** ('57) AIR 1957 Cal 598 (600) ** ('56) AIR 1956 Madh B 256 (256) (DB) ** (1967) 71 Cal WN 12 (14) ** 1966 Jab LJ 452. (Time extended for curing defects in execution application.)

8. Implied extension. — (1) No express order is necessary for extension of time. Such extension may be inferred from the fact that the Court has actually allowed a thing to be done beyond the prescribed time. ('07) 34 Cal 20 (24, 29) (FB) ** 1965 Raj LW 489 (491): ILR (1965) 15 Raj 1068.

9. Extension by appeal being preferred. — (1) Where a decree of the primary Court which fixes a date for the performance of an act directed thereby is appealed against, and the appeal is dismissed, the period originally fixed, in such a case is to be calculated from the appellate decree. AIR 1914 Bom 132 (134): 39 Bom 175 (DB) ** ('87) 11 Bom 172 (173) (DB) ** ('06) 1906 Pun Re No. 48 p. 172 (173 to 180 and 185) (FB) ** ('49) AIR 1949 Pat 514 (515): 28 Pat 371 (DB) ** ('86) 13 Cal 13 (16) (DB) ** ('21) AIR 1921 Cal 699 (705) (DB) ** AIR 1965 Tripura 35 (36). (AIR 1949 Pat 514, Foll.) ** AIR 1961 Cal 643 (647).

[But see ('57) AIR 1957 Trav-Co 94 (95): ILR (1956) Trav-Co 1277 (FB) ** ('58) AIR 1958 Madh Pra 7 (8) (DB) ** ('19) AIR 1919 Mad 938 (939) (DB) ** ('96) 18 All 223 (226, 227) (SB) ** ('38) AIR 1938 All 497 (500) (DB) ** ('22) AIR 1922 Cal 329 (329) (DB) ** ('27) AIR 1927 Pat 345 (347): 7 Pat 76 (DB).]

(2) Where an appeal is simply dismissed for default of appearance or want of prosecution, or is withdrawn, or summarily dismissed under Order 41, Rule 11, there is no decree of the Appellate Court in which the lower Court's decree may be said to have merged, and hence the period fixed does not get a fresh start from the decree of the Appellate Court. ('96) 18 All 101 (103) (FB) ** ('17) AIR 1917 Cal 728 (730): 44 Cal 954 (DB) ** ('14) AIR 1914 PC 65 (66): 36 All 284: 41 Ind App 104 ** ('14) AIR 1914 PC 66 (67): 36 All 350 ** ('91) 1 Mad L Jour 745 (746) ** ('91) 15 Bom 370 (374) (DB) ** ('24) AIR 1924 Bom 98 (99): 47 Bom 956 (DB) ** AIR 1962 Raj 54 (56): 1961 Raj LW 382. (AIR 1914 PC 66, Relied on.)

(3) Where a decree awarding future mesne profits is confirmed in appeal, the three years' period under Order 20, Rule 12 runs from the appellate decree. ('01) 23 All 152 (158): 27 Ind App 209 (PC).

(4) Where an appeal from a preliminary decree is dismissed and the preliminary decree is confirmed in toto, it does not follow that the period of payment allowed in the trial Court's decree is extended automatically even though a final decree has been passed in the meantime. **AIR 1967 SC 1236 (1242, 1243):** (1967) 3 SCR 101.

10. Forum for application. — (1) Where an appeal has been preferred from a decree, the only Court that can extend the time fixed by it, assuming that the case is one in which time can be extended, is the Appellate Court. ('10) 37 Cal 548 (550) (DB).

[See also ('55) ILR (1955) Nag 267 (271) (DB) ** ('52) AIR 1952 Cal 411 (412): ILR (1952) 1 Cal 53.]

(2) The lower Court has no jurisdiction to extend the time fixed in an appellate decree. ('53) ILR (1953) 3 Raj 988 (992) (DB) ** ('52) AIR 1952 Pepsu 42 (43) ** ('33) AIR 1933 Cal 83 (85) (DB).

(3) Where an appeal has been dismissed, the trial Court has power to enlarge the time fixed by the order appealed from. ('35) AIR 1935 Rang 500 (501).

149. Power to make up deficiency of court-fees.—Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

[1882, cf. S. 582A.]

Section 148 — Note 10 (contd.)

(4) Executing Court cannot extend time fixed by decree. ('52) AIR 1952 Trav-Co 440 (442): ILR (1952) Trav-Co 340 (DB) ** ('55) AIR 1955 Ajmer 2 (1) (2) ** 1963 Ker LT 677: 1963 Ker LJ 508 (510) ** AIR 1962 Raj 54 (55): 1961 Raj LW 382.

[But see AIR 1966 Pat 266 (267): 1966 BLJR 320.]

(5) Subordinate Judge passing preliminary decree and directing decree-holder to pay deficiency in court-fee within certain time adding that in default decree would be nullity — Munsif merely in charge of routine duties of Subordinate Judge has no jurisdiction to extend time so fixed for payment of court-fee. ('38) AIR 1938 All 497 (499) (DB).

(6) In the case of a preliminary decree for accounts, if the court appoints a special referee to go into the question of accounts and directs him in the decree to submit his report within a stipulated time, it has got jurisdiction to extend the time so stipulated even when an appeal is preferred against the preliminary decree, unless the appeal Court has directed a stay. ('58) AIR 1958 Cal 284 (286, 287) (DB).

[See also AIR 1962 Andh Pra 527 (528): (1962) 1 Andh LT 491. (Trial Court cannot extend time fixed by revisional Court. However, High Court can condone mistake under Section 151.)]

(7) Decree in suit for specific performance — Appellate Court while dismissing appeal granting fresh period to deposit balance of purchase money — Trial Court can extend period. AIR 1960 Andh Pra 271 (272): ILR (1960) 2 Andh Pra 504.

11. Appeal.— (1) No appeal lies from an order under this section as it is neither a decree nor an appealable order under Section 104. ('29) AIR 1929 All 666 (667) (DB) ** ('58) AIR 1958 Cal 284 (285) (DB) ** ('20) AIR 1920 Pat 281 (282) ** ('16) AIR 1916 Mad 694 (695): 39 Mad 876 (DB) ** ('13) 35 All 582 (586) (SB) ** ('24) AIR 1924 Oudh 330 (331).

[But see AIR 1962 Raj 157 (160): 1961 Raj LW 262. (Application for permission to sue as pauper rejected and time given to pay court-fee — Failure to pay court-fee — Fresh application for extension of time under Section 148 rejected — Order operates as rejection of plaint under O. 7, Rule 11 — Being appealable as decree, no revision lies.)]

(2) After a final decree, the Court cannot extend the time fixed by it, under Section 148. Hence, if the Court does extend the time it should be deemed to be acting not under Section 148 but under Section 47 and its order is therefore, appealable as a decree. ('24) AIR 1924 Oudh 179 (179) ** ('51) ILR (1951) 2 Cal 70 (75) (DB).

(3) Where the appellant contends that the Court which granted the extension had no jurisdiction to grant it, being functus officio at the time, while the other side necessarily contends that it had such jurisdiction, an order deciding in favour of the jurisdiction decides a question touching the merits of the controversy between the parties and is appealable under Clause 15 of the Letters Patent (Cal). ('58) AIR 1958 Cal 284 (285) (DB).

12. Revision.— (1) An order under this section is not appealable but is open to revision provided the conditions of Section 115 are satisfied. ('41) AIR 1941 Mad 706 (706) ** ('34) AIR 1934 Lah 537 (538).

[But see AIR 1962 Raj 157 (160): 1961 Raj LW 262. (Application to sue as pauper rejected and time given to pay Court-fee — Failure to pay court-fee — Fresh application for extension of time under Section 148 rejected — Order operates as rejection of plaint under Order 7, Rule 11 — Being appealable as decree, no revision lies. See Ibid, Order 33, Rule 7, as amended in Rajasthan.)

(2) High Court will not interfere in revision unless it is necessary in the interest of justice to do so. ('30) AIR 1930 Pat 279 (280) ** ('57) AIR 1957 Nag 86 (87): ILR (1956) Nag 641 (DB) ** ('26) AIR 1926 Mad 1059 (1060) ** ('33) AIR 1933 Cal 20 (21) (DB).

SECTION 149 — SYNOPSIS

1. Scope.
2. Payment of court-fees after limitation.
3. "Any document".
4. "For the time being in force".
5. "Discretion of Court".
6. "Whole or any part of any fee".
7. "At any stage".
8. Discretion, interference with.
9. Plaints and memoranda of appeals — See also Order 7, Rule 11.
10. Application for leave to sue or appeal as pauper — See also Order 33, R. 7 and Order 44, Rule 1.
11. Power to call for Court-fees after judgment is pronounced.
12. Conversion of proceedings.

Section 149 — Synopsis (contd.)

13. Extension of time by admission Court.

14. Appeal.

15. Revision.

16. Review.

1. Scope. — (1) The institution of a suit or other proceeding or the presentation of a document will not be a legal institution or presentation if the fee chargeable under law is not paid at the time of such institution or presentation. This section enacts an exception to that rule. AIR 1951 All 64 (67, 68): ILR (1952) 1 All 461 (FB) ** AIR 1956 All 63 (65): ILR (1956) 1 All 156 ** AIR 1966 Punj 332 (333): 1965 Cur LJ 578 (DB). (Section 149 is exception to rule contained in Sections 4 and 6 of Court-fees Act, 1870.)

[See AIR 1941 Nag 220 (221): ILR (1941) Nag 467 (DB).]

(2) The section has to be read as a proviso to Section 6 of the Court-fees Act in order to avoid contradiction between the two sections. 1957 All WR (HC) 75 (76).

(3) Where a proceeding is instituted within the period of limitation, with an insufficient court-fee, it will not be time barred, provided the full fee is paid with the leave of the Court under this section although, at the time the full fee is paid, the period of limitation has expired. **AIR 1953 SC 431 (432)** ** AIR 1958 Manipur 7 (13) ** AIR 1940 Mad 934 (936) (DB) ** AIR 1920 Pat 170 (171) (DB) ** (1909) 32 Mad 305 (311) (FB) ** AIR 1967 Goa 99 (100) (FB) ** AIR 1966 Punj 332 (333): 1965 Cur LJ 578 (DB) ** (1963) 65 Pun LR 300: ILR (1963) 1 Punj 798 (800).

(4) Section 149 leaves no room for the ascertainment of any sufficient cause for any delay in re-presentation, but to allow the deficit court-fee to be paid at any stage once the plaint has been filed within time. AIR 1960 Andh Pra 602 (603): ILR (1960) 2 Andh Pra 208.

(5) Deficiency in Court-fee made good after expiry of limitation for filing appeal — Application under Section 149 to condone delay in depositing Court-fee — Each day's delay is not required to be explained unlike the case on application under Section 5, Limitation Act, 1963. AIR 1966 Punj 332 (333): 1965 Cur LJ 578 (DB).

(6) Appeal under Section 17, Payment of Wages Act — District Court has power to extend time to make up deficiency of court-fees. (1962-63) 23 FJR 621 (623) (Punj).

(7) If a document insufficiently stamped is re-presented to Court within the time allowed by it after supplying the deficiency, the document will have under this section the full force of a properly stamped document from the date of its original presentation. AIR 1959 Bom 86 (87): 60 Bom LR 457. (Plaint.)

2. Payment of court-fees after limitation. — (1) It is only where the deficit is made good within the time allowed by the Court that the payment will have the force or effect as if it had been paid on the date of presentation. AIR 1955 Hyd 156 (160): ILR (1955) Hyd 56 (DB) * AIR 1958 Manipur 7 (13). (The Code is followed in Manipur in spirit.) * AIR 1957 Pepsu 14 (17) (DB). (Party is entitled to the whole of the last day of the extended period to make good the deficiency — He can make payment at the last minute of the rising time of the Court.) ** AIR 1938 Mad 560 (562) (DB) ** (1968) Ker LJ 322 (323): 1968 Ker LT 741 ** (1963) ILR 42 Pat 704 (726) (DB).

[See also AIR 1937 Lah 392 (393) ** AIR 1938 Mad 316 (317) (DB).]

(2) Upon the principle underlying Section 9, General Clauses Act, the day on which the order allowing time to make good the deficiency in court-fee is made, has to be excluded from computation of the time allowed. AIR 1957 Pepsu 14 (17) (DB).

(3) If the payment is made beyond the time allowed, the presentation will be deemed to be made only on the date such deficit is made good. If that date itself is within limitation, the suit will not be barred. If that date is beyond limitation, the suit will be barred unless the time originally allowed is extended by the Court up to the date of payment under Section 148 of the Code. (1907) 34 Cal 20 (26) (FB) ** (1910) 7 Ind Cas 578 (581) (DB) (Cal). (Payment beyond limitation.) ** AIR 1934 Lah 537 (538). (Do.)

(4) Where execution of the decree is made conditional upon the payment of the court-fee, the right to apply for execution is not stayed and the starting point of limitation is the date of the decree and not the date of the payment of the court-fee. 1957 Andh LT 308 (312) ** AIR 1963 Mad 207 (208).

(5) Where the Court accepts payment of court-fee after the period of limitation without any express order allowing time under this section the Court must be deemed to have condoned the delay under this section. AIR 1934 Lah 701 (703) (DB) ** AIR 1957 Raj 367 (369): ILR (1957) 7 Raj 460.

3. "Any document". — (1) This section is general in its terms and applies to all documents chargeable with court-fees under the Court-fees Act, such as plaints, memoranda of appeals or cross-objections, written statement claiming set-off. AIR 1951 All 64 (67): ILR (1952) 1 All 461 (FB) ** AIR 1957 Pat 111 (112). (Memorandum of appeal.) ** AIR 1956 J & K 38 (40) ** AIR 1954 Nag 224 (225): ILR (1954) Nag 831 ** AIR 1951 Hyd 57 (62): ILR (1951) Hyd 632 (DB).

(2) The section applies to an application to set aside an award. AIR 1928 Sind 87 (89): 23 Sind LR 91 (DB).

(3) Section 268 of the Succession Act would make Section 149 applicable to pro

Section 149 — Note 3 (contd.)

bate proceedings. 1947 Rang LR 307 (311) (DB).

4. "For the time being in force." — (1) The court-fee payable according to the law "for the time being in force" means the court-fee payable according to the scale which was in force when the memorandum of appeal was filed and not according to the scale which is in force when the payment is made. AIR 1953 Trav-Co 31 (31): ILR (1952) Trav-Co 516 (DB).

5. "Discretion of Court". — (1) Under Order 7, Rule 11 (c) where a plaint is insufficiently stamped, the Court is bound to grant some time to supply the deficient court-fee. AIR 1926 Nag 312 (312).

[See also AIR 1944 Oudh 327 (328): 20 Luck 268 (DB) ** AIR 1927 Oudh 507 (507) (DB).]

[See however AIR 1941 Oudh 30 (31, 32).]

(2) Order 7, Rule 11 applies to appeals also and hence where the memorandum of appeal is insufficiently stamped the Court must afford the appellant an opportunity to make good the deficiency of court-fee payable on the memorandum of appeal and not dismiss the appeal summarily. AIR 1957 Pat 111 (112).

(3) Except in cases of deficient court-fee on plaints, in all other cases, the Court has a discretion under the section to allow the Court-fee to be paid at any stage. **AIR 1953 SC 431 (432)** ** AIR 1951 All 64 (68): ILR (1952) 1 All 461 (FB) ** AIR 1958 Ker 88 (91) (SB) ** AIR 1956 J & K 38 (40) ** AIR 1955 Ajmer 64 (64).

(4) The discretion must be judicial and not arbitrary discretion. AIR 1958 Ker 88 (91) (SB) ** 1957 All WR (HC) 75 (76) ** AIR 1968 Bom 309 (310): 70 Bom LR 50 ** AIR 1968 Delhi 165 (166) (DB) ** ('64) 68 Cal WN 536 (540, 541). (Government cannot be treated as favoured litigant in the matter of exercise of discretion under Section 149.)

(5) Where time is fixed by the decree the Court has no jurisdiction to extend the time after the expiry of the period so fixed. (1967) 71 Cal WN 12 (14).

(6) The discretion to allow Court-fee to be paid at any stage cannot be exercised in favour of a party who has not been bona fide, that is, who is not under any honest mistake or doubt or who has not made an honest attempt to comply with the law. AIR 1932 Cal 482 (484, 485): 59 Cal 388 (DB) ** AIR 1922 Pat 56 (56) (DB) ** AIR 1929 Pat 731 (732): 8 Pat 906 (DB) ** ILR (1955) 5 Raj 608 (613) ** AIR 1929 Nag 294 (295).

(7) Negligence of the party, his counsel or his clerk can be no good reason for exercise of Court's discretion in favour of the erring party. AIR 1968 Bom 309 (310): 70 Bom LR 50.

(8) Court should consider bona fides as defined in the General Clauses Act and not in the Limitation Act — When deficiency is made good with application under Section 149 discretion should be exercised in applicant's favour. AIR 1968 Delhi 183 (184, 185): (1968) 70 Pun LR (D) 7.

(9) Mere poverty or ignorance or inability to pay the full Court-fee at the time of presenting the suit or appeal is not a ground for indulgence under the section. AIR 1951 All 64 (69): ILR (1952) 1 All 461 (FB) ** ILR (1955) 5 Raj 608 (612) ** AIR 1950 All 499 (500) (DB) ** AIR 1950 Mad 769 (770): ILR (1950) Mad 775 (DB) ** AIR 1934 Cal 659 (661): 61 Cal 663 (DB) ** AIR 1967 Andh Pra 141 (143): (1966) 1 Andh WR 360.

[See AIR 1938 Nag 322 (323).]

(10) The discretion is not limited to cases where the party is under a bona fide misunderstanding of the law as to valuation. AIR 1914 Bom 249 (251): 38 Bom 41 (DB).

(10-A) The discretion conferred on the Court by this section is normally expected to be exercised in favour of the litigant except in cases of contumacy or positive mala fides or reasons of a similar kind. AIR 1938 Lah 361 (365) (FB) ** AIR 1968 Delhi 183 (184, 185): (1968) 70 Pun LR (D) 7 ** AIR 1966 Him Pra 66 (68).

[See also AIR 1966 Punj 332 (333, 334): 1965 Cur LJ 578 (DB). (Payment of Court-fees after limitation — Appeal presented within time but slight delay in making up deficiency in Court-fees — Delay on account of reasons beyond control of appellant — No want of bona fides on appellant's part — Discretion to condone delay in payment should be exercised.) ** AIR 1940 Lah 446 (447): ILR (1941) Lah 552 (DB). (Application to sue in forma pauperis found mala fide — Extension of time not granted.) ** AIR 1935 Lah 448 (450): 17 Lah 122 (DB).]

(11) Order under the section can only be made when an application is presented to the Court and the Court has heard both the parties on the merits as to whether time should be granted or not. AIR 1954 Ajmer 15 (16).

[But see AIR 1966 Punj 332 (333): 1965 Cur LJ 578 (DB). (Order under Sec. 149 can be passed by Court suo motu. (Obiter).) ** AIR 1958 Manipur 7 (13).]

(12) Having regard to the facts that the question of Court-fee was not so simple and that no objection was raised as to insufficiency of Court-fees by the office the discretion under Section 149 must be exercised in favour of the appellants. AIR 1953 Kutch 46 (47).

(13) As a memorandum of appeal filed with an application for special leave can be considered only after the application for special leave is decided it is proper to consider the question of deficiency in Court-fee after that application has been allowed and to grant reasonable time to the appellant to make good the deficiency

Section 149 — Note 5 (contd.)
after the date of the granting of the application. AIR 1952 All 448 (449) (DB).

(14) Where a party has been contesting with some show of justification the correctness of the order requiring him to pay an enhanced Court-fee, he should be allowed reasonable time in which to pay the deficiency on an adverse order being finally passed against him. AIR 1938 Mad 921 (922).

(15) When the original order calling upon the plaintiff to put the correct valuation on the plaint and to pay the requisite Court-fee is passed, it is open to the plaintiff to amend the plaint and abandon part of the claim. If upon doing so a report is made that there exists some deficiency after the amendment the Court is perfectly justified in granting the plaintiff further time to make up the deficiency on the amended plaint and to set right any formal defects that existed in the plaint. 1957 All WR (HC) 75 (76).

(16) Memo of appeal filed by Government with deficit Court-fees — Inability to pay full Court-fee not due to lack of funds but due to office procedure in obtaining money for purchase of stamps — Not a ground for exercising discretion to extend time — High Court however extended time due to past long standing practice as a last chance. ('64) 68 Cal WN 536 (540, 541).

6. "Whole or any part of any fee."— (1) The discretion under Section 149 applies not only where the Court-fee paid is not sufficient but also where no Court-fee has been paid at all. AIR 1929 PC 147 (148): 56 Ind App 232: 10 Lah 737 ** AIR 1935 Pat 100 (111) (DB).

[But see AIR 1933 Cal 796 (797) (DB).]

(2) The section contemplates cases in which payment of duty is insufficient ab initio. Hence, it does not apply where a plaintiff is allowed to sue on the basis of a tentative valuation, as in suits for accounts or mesne profits, and, on a decree for a higher amount being passed, is required under Court-fees Act, Section 11, to pay additional Court-fees. AIR 1916 Mad 224 (227) (DB).

[See also AIR 1933 Mad 330 (331, 332): 56 Mad 705 (DB).]

(3) The appellant in an insufficiently stamped appeal should be heard on the proportionate part of his claim in appeal, and the appeal should not be straightway dismissed. AIR 1931 Lah 237 (238) (DB) ** 1961 Raj LW 641 (641).

7. "At any stage."— (1) The present section gives legislative effect to the view expressed by the Allahabad High Court in the Full Bench case of Hari Ram v. Akbar Hussain, (1907) 29 All 749 (764, 765) and enables a defective document to be retrospectively validated at any stage if the insufficiency of the stamp is subsequently made up within the time allowed by the Court. AIR 1953 SC 431 (432) ** AIR 1956 All 63 (65): ILR (1956) 1 All 156 (DB) ** AIR 1954 Nag 224 (225): ILR (1954) Nag 831 ** AIR 1951 Hyd 57 (62): ILR (1951) Hyd 632 (DB) ** AIR 1947 Cal 176 (177): ILR (1947) 1 Cal 160 (DB) ** AIR 1929 PC 147 (148): 10 Luck 727: 56 Ind App 232 ** AIR 1937 Pat 550 (551): 16 Pat 600 (SB).

(2) The words "at any stage" contemplate that the Court can order a deficiency in stamps to be made, even after the period of limitation for filing an appeal has expired. And upon such payment, the document in respect of which the deficiency is to be made good must have the same force and effect as if such fee has been paid in the first instance. AIR 1957 Raj 367 (370): ILR (1957) 7 Raj 460.

(3) The Court can also enlarge the time even after the lapse of the period originally fixed by it. AIR 1950 All 536 (538, 539): ILR (1951) 2 All 688 (DB) ** AIR 1922 Cal 234 (234) ** AIR 1935 Pat 201 (201) ** AIR 1938 Mad 560 (562) (DB) ** **AIR 1961 SC 882 (883, 884): (1961) 3 SCR 763.** (AIR 1956 Pat 20, **REVERSED.**) ** AIR 1958 Ker 88 (91, 92): 1957 Ker LT 1167 (SB). (Time granted under O. 7, Rule 11 (c).) ** AIR 1968 Delhi 165 (166) (DB) ** AIR 1965 Cal 308 (310, 311): 68 Cal WN 1117 ** AIR 1960 Andh Pra 602 (603). (Inherent power to accept plaint re-presented after period granted.)

(4) Deficit Court-fees on a plaint may be allowed to be made good even in appeal. But it is desirable that in such cases the matter is disposed of at the earliest possible moment after the deficit is discovered. AIR 1936 Cal 245 (246) (DB) ** AIR 1958 Ker 88 (91) (SB). (There is no contradiction between Sections 148 and 149.) ** AIR 1921 Pat 88 (89): 6 Pat L Jour 293 (FB).

[See also AIR 1951 Hyd 57 (62): ILR (1951) Hyd 632 (DB).]

(5) Where no time is fixed in the decree for the payment of the Court-fee which is payable under it, the executing Court can allow time for such payment. AIR 1937 Lah 720 (720).

(6) Where a decree is passed on condition that a certain Court-fee is deposited and the decree-holder deposits the same after three years and the Court accepts it, it cannot be said that execution is barred by limitation inasmuch as the decree is complete only when the Court-fee is deposited and limitation cannot begin to run under Article 182 of the Limitation Act until there is a decree capable of execution. AIR 1938 All 539 (540): ILR (1938) All 848 (DB).

(7) Where execution of the decree is made conditional upon the payment of the Court-fee, the right to apply for execution is not stayed and the starting point of limitation is the date of the decree and not the date of the payment of the Court-fee. 1957 Andh LT 308 (312).

Section 149 — Note 7 (contd.)

(8) Conditional decree to be effective on payment of deficit Court-fee within specified period — Further extension of time allowed before expiry of first period — Held that extension of time was within jurisdiction of Court under Sections 148 and 149. AIR 1960 Assam 126 (127, 129): ILR (1960) 12 Assam 93.

8. Discretion, interference with.— (1) An Appellate Court should not interfere with the discretion of the lower Court under the section except on very strong grounds. AIR 1942 Pat 234 (235, 236) (DB) ** AIR 1941 Nag 304 (305): ILR (1941) Nag 629 ** AIR 1914 Cal 735 (736): 41 Cal 1092 (DB) ** AIR 1914 All 216 (216) (DB) ** AIR 1938 Mad 560 (562) (DB) ** AIR 1966 Him Pra 66 (68).

(2) Where a Judge has allowed deficient Court-fee to be made up under this section, he must be taken, on the record as it stands, to have exercised his discretion in the matter and it is not open to the Appellate Court to go into the question as to whether he exercised his discretion. AIR 1916 Cal 616 (616) (DB) ** AIR 1938 Mad 542 (544).

[See AIR 1938 Nag 322 (323).]

(3) It is not open for the Judge while granting time for the payment of deficit Court-fee to leave open the question of limitation. AIR 1933 Lah 598 (599): 14 Lah 312.

(4) Where a Judge refuses to allow a party to make up deficit Court-fee under this section, there must be something to show that he did exercise his discretion in the matter. AIR 1923 All 349 (349) (DB).

(5) Where the lower Court has exercised its discretion under this section in an outrageous fashion, the aggrieved party must immediately move the High Court in revision and if he does not do so, he cannot afterwards impeach the order of the Court in the appeal from the final decision. AIR 1937 Pat 550 (552): 16 Pat 600 (SB).

(6) Appeal by State — Deficiency of Court-fees on memo of appeal — Reason urged was that the Court-fee stamps could not be purchased in view of the fact that purchases of high valuation Court-fee stamps take some time — Court allowing seven days time to pay up deficiency — Exercise of discretion cannot be said to be in gross violation of law requiring any interference. 1966 Raj LW 141: ILR (1966) 16 Raj 454.

9. Plaints and memoranda of appeals.— See also Order 7, Rule 11.— (1) Where the plaint is rejected under Order 7, R. 11 (c) and the plaintiff subsequently files an application under Section 151, Civil Procedure Code, with a deposit of the deficit Court-fee for restoration of the plaint, there is nothing to debar the Court from treating the application as a fresh plaint under Order 7, Rule 13. The old Court-fee paid on the rejected plaint can be computed towards the Court-fee on the fresh plaint under Section 149. AIR 1959 Ker 406 (407, 408): 1958 Ker LT 562. (AIR 1935 All 985 and AIR 1954 All 719 and AIR 1935 Cal 336 (2) and AIR 1955 Hyd 156, Rel. on; AIR 1923 Pat 354 and AIR 1950 Pat 358 and AIR 1955 Pat 370 and AIR 1956 Pat 20, Not foll.; **OVERRULED** on another point in AIR 1964 Ker 8 (FB).)

(2) Under Section 149 it is only after the Court permits the appellant to make good the deficiency in Court-fee and the deficiency is made good that the document acquires the force of memorandum of appeal retrospectively from the date it was originally filed. AIR 1964 All 552 (555): 1964 All WR (HC) 334 (FB). (Memorandum with deficit Court-fee filed on 8-11-1962 — Deficit made good on 20-12-62 voluntarily and appeal admitted on 3-1-63 — Held that no appeal was pending on 12-11-62 within Section 3 (2) of the U. P. High Court (Abolition of Letters Patent Appeals) Act (14 of 1962) — The Appeal held not maintainable.)

(3) Counsel of appellant misled by Court-fee paid on plaint and the note made by Court reader on memo of appeal at time of admission — Time extended under Section 149. AIR 1960 Him Pra 1 (4): 1960 Cri LJ 62.

(4) Insufficient Court-fee on memorandum of appeal — Conditional order under Section 149 — Validity — Non-payment of deficit Court-fee within time cannot operate as automatic dismissal — Court has discretion to extend time under Section 148. AIR 1961 Manipur 50 (52).

(5) Partition suit — Deficit Court-fee — Court granting time to pay — Default — One of defendants applying to be transposed as plaintiff and offering to pay Court-fee — Court has jurisdiction to allow application — Plaint, though imperfect is still there for purposes of order for transposition so long as it is not rejected by an order under Order 7, Rule 12 — Order 1, Rule 10 (2) gives wide discretion. AIR 1966 Ker 150 (155): 1966 Ker LT 199. ((1893) ILR 15 All 65 (FB) and AIR 1917 Cal 77, **DISSENTED FROM**; AIR 1934 All 989, Explained and Not foll; (1897) ILR 20 Mad 319, **HELD OVERRULED BY** (1909) ILR 32 Mad 305 (FB) and Not foll.)

10. Application for leave to sue or appeal as pauper.— See also Order 33, R. 7 and Order 44, Rule 1.— (1) On the rejection of an application to sue as pauper, the Court may grant time under Section 149 of the Civil P. C. (1908), to pay Court-fees if there is a prayer to that effect. AIR 1961 Assam 113 (114): ILR (1962) 14 Assam 241 ** AIR 1968 Pat 1 (3): 1967 BLJR 594 (FB). (Court does not become functus officio.) ** AIR 1967 Madh Pra 1 (3): 1966 MPLJ 724 (FB). (Separate order under S. 149 granting time to plaintiff to pay Court-fee can be made.)**AIR 1968 Pat 285 (286, 287). (DB). (Court does not become functus officio and can grant time to pay

Section 149 — Note 10 (contd.)
Court-fees, and register application as plaint.)

(2) When an application to sue in forma pauperis was filed within limitation and the Court-fee was permitted to be paid beyond limitation after the prayer to sue as pauper had been rejected, the plaint must be treated as one having been filed on the date of the application. AIR 1960 Andh Pra 381 (382): (1959) 2 Andh WR 420 ** AIR 1959 Madh Pra 169 (172): 1959 MPLJ 727 (DB). (Once given the time to pay Court-fee, the time can further be extended by the Court if sufficient cause is shown.)

(3) Plaintiffs permitted to sue as paupers — Certain person subsequently joining as plaintiff — Under Section 149, the Court can at any stage allow co-plaintiff to pay the Court-fee due. AIR 1961 Ker 128 (129): 1960 Ker LT 826.

11. Power to call for Court-fees after judgment is pronounced.— (1) A Court has no power to call for deficient Court-fee after it has pronounced its decision. AIR 1933 Mad 321 (321) ** AIR 1933 Lah 208 (208) ** AIR 1932 Pat 228 (231): 11 Pat 532 (DB) ** AIR 1932 All 316 (317) ** ILR (1963) Andh Pra 560 (564).

(2) An order stating that in the event of Court-fee not being paid by a certain date, the suit will stand dismissed, is final, and the Court has no jurisdiction to extend the time under this section. AIR 1946 Oudh 52 (52) (DB) ** AIR 1957 Madh Pra 92 (93) (DB) ** AIR 1942 Pat 234 (236) (DB).

12. **Conversion of proceedings.**— (1) Where an application is made under Sec. 95 of the Code the Court may allow it to be converted into a suit on payment of the requisite Court-fee. In such a case, the suit will be deemed to be instituted when the application was made and not when the Court-fee is paid. (1912) 16 Ind Cas 443 (444) (DB) (Cal).

(2) The High Court can, in a fit case, allow an application for revision to be converted into an appeal upon payment of the requisite Court-fee although the period of limitation for an appeal may have expired, provided that it had not expired when the application for revision was filed. AIR 1925 Pat 16 (17): 3 Pat 344 (DB).

(3) Award — Objection instead of application to set aside award filed by one party within limitation — Requisite Court-fee not paid — Contention as to absence of requisite application, duly stamped, not raised in Courts below — Court acting under Section 149 can treat the objection as petition filed for setting aside award and permit the party to deposit requisite Court-fee. (1968) 1 Mys LJ 577 (582): (1968) 15 Law Rep 90.

13. Extension of time by admission Court.— (1) Where the admission Court allows deficit Court-fee to be paid after the expiry of limitation subject to objections by the other side at the hearing of the appeal, the question can be gone into at the hearing. AIR 1950 Mad 769 (770): ILR (1950) Mad 775 (DB) ** AIR 1918 Pat 336 (338): 3 Pat L Jour 484 (DB) ** AIR 1914 Mad 386 (386) (DB) ** AIR 1922 Lah 233 (234): 2 Lah 1 (DB).

[See also AIR 1947 Lah 210 (214, 215) (DB) ** (1898) 21 Mad 269 (270) (DB).]

(2) Where the admission Court allows the deficit Court-fee to be paid after limitation without reserving any right to the opposite party to object at the hearing of the appeal and the respondent does not object as soon as he receives notice of the admission, he will be precluded from raising the objection at the time of hearing of the appeal. AIR 1956 All 63 (65): ILR (1956) 1 All 156 (DB) ** AIR 1933 All 572 (574) (DB).

(3) Under the Rules of the Oudh Chief Court (Chapter VIII, Rule 1 (1) or R. 1 (xv) (b) and (c) the single Judge hearing the motion for admission of appeal has jurisdiction to entertain and pass order on an application under this section. The order cannot be impugned on the ground that on the value of the appeal it was cognizable by a Bench of two Judges only and therefore the single Judge could not have passed the order. AIR 1956 All 63 (65): ILR (1956) 1 All 156 (DB).

(4) The respondent is entitled to notice before time is granted to the appellant for payment of deficit Court-fee on memo of appeal. When time is granted without notice to the respondent, it is open to him to file an application to the Court to dismiss the appeal on the ground that the delay ought not to have been excused: AIR 1967 Andh Pra 141 (142): (1966) 1 Andh WR 360. (Respondent must raise objection at earliest possible opportunity.)

14. Appeal.— (1) An order made in the exercise of discretion under this section can be reviewed by the appellate Court in appeal and the fact that the order is interlocutory does not render it insusceptible of review. AIR 1949 Lah 121 (124): Pak LR (1948) Lah 202 (DB).

(2) An appeal lies against an order dismissing an appeal on the ground of deficiency of Court-fee, the appellant having failed to make good the deficiency within the time allowed for the purpose. Such an order is not a mere order of dismissal for default under Order 41, Rule 19 and hence is a decree. AIR 1922 Pat 281 (282): 6 Pat L Jour 625 (DB) ** AIR 1922 Nag 62 (63, 64): 18 Nag LR 15 ** AIR 1939 Pat 83 (84): 17 Pat 687 (DB) ** AIR 1959 Mad 14 (14): (1958) 1 Mad LJ 97.

(3) The Court will not in appeal interfere with an order passed under this section when on the materials brought before it there is no reason to hold that in the exercise of the discretion any recognised principles of law have been violated or any gross injustice had been done. AIR 1953 SC 431 (432).

Section 149 (contd.)

15. Revision.— (1) An order requiring a plaintiff to pay additional Court-fee within certain time is not one that would be interfered with in revision, inasmuch as he has another remedy open to him, namely, an appeal against dismissal of suit if the order is not complied with. AIR 1954 Punj 205 (205) ** AIR 1919 Cal 840 (841) (DB) ** AIR 1921 Pat 180 (180): 5 Pat L Jour 400 (DB).

(2) Where a Judge on an erroneous view of the Court-fee payable refuses to proceed with the suit until the proper Court-fee is paid, it amounts to a refusal to exercise jurisdiction and the order is therefore revisable. AIR 1942 Mad 585 (585) ** AIR 1928 Mad 416 (418): 51 Mad 664 (DB) ** AIR 1954 Nag 224 (225): ILR (1954) Nag 831 ** AIR 1953 Madh B 81 (81): ILR (1953) Madh B 39.

(3) An order by a Judge refusing to extend time for payment of deficit Court-fee under this section on the ground that he had no power to do so is open to revision. AIR 1934 Lah 537 (538).

[See also (1937) 169 Ind Cas 672 (672) (Lah).]

(4) An order refusing to give time to a party to make up the deficiency is not open to revision as the order does not amount to the decision of a "case" within the meaning of Section 115 of the Code. AIR 1923 All 118 (119): 45 All 218 (DB) ** AIR 1957 All 339 (340).

(5) Even if it be held that in deciding the question of Court-fee and valuation the Court has indirectly decided the question of jurisdiction and has held that he has jurisdiction to entertain the suit, his decision can, at the most be held to be a decision on a preliminary issue which arose in the suit itself, and cannot on that account be held to be revisable. AIR 1957 All 339 (340).

(6) Where the plaintiff deliberately and to suit his own convenience undervalues the appeal and the non-payment is not due to honest and bona fide mistake, the order refusing to extend time for payment cannot be interfered with. Madh BLJ 1954 HCR 120 (121).

(7) Where the Court had given fifteen days to the decree-holder to make good the deficient Court-fee or in default his right to execute the decree was to come to an end, it was held that on merits the order could not be revised and the time could not be further extended after the default of the decree-holder. AIR 1957 Madh Pra 92 (93) (DB).

(8) Two out of three plaintiffs permitted to sue in forma pauperis — Third plaintiff allowed to pay Court-fees on his one third share — Revision by defendant is maintainable matter involved not being purely of Court-fee but closely connected with pauperism. AIR 1967 Pat 310 (311).

(9) Plaint with insufficient Court-fee presented — Court granting time under Section 149 for representation — Plaint represented beyond time after a delay of few days Court accepting represented plaint purporting to act under Section 149 — Held that the Court must be taken to have acted under Section 151 and it cannot be said that it acted without jurisdiction or with material irregularity so as to call for interference in revision. AIR 1960 Andh Pra 602 (603): ILR (1960) 2 Andh Pra 208.

16. Review.— (1) A Court granting time under this section has power to review its order when it has been obtained by false pretences in the absence of the opposite party. AIR 1937 Nag 87 (88): ILR (1938) Nag 359.

(2) There is an error apparent on the face of the order when a memo of appeal is rejected before the expiry of the period allowed for making up deficiency in Court-fee — By refusing to review such order on the ground that it has no power, the Court fails to exercise a jurisdiction vested in it by law. AIR 1955 Vind Pra 46 (47).

(3) Review is not the only remedy open to a party to whose detriment an order under Section 149 has been made without his being given notice — It would always be open to the party at a subsequent stage or even at the hearing of the appeal to contend that the delay should not have been excused. AIR 1950 Mad 769 (770): ILR (1950) Mad 775 (DB).

(4) Deficit Court-fee to be paid by 25-1-1945 — Application for extension of time filed on 24th rejected on 25-1-1945 — Illness of one of plaintiff's sons sent to raise money and his subsequent death on 25-1-1945 held sufficient cause for review of order refusing to extend time. AIR 1947 Mad 84 (85): ILR (1947) Mad 220 (DB).

(5) Court has jurisdiction to accept the Court-fee and restore the plaint rejected as being insufficiently stamped if deficiency in Court-fee could not be paid within time allowed due to illness of plaintiff. AIR 1939 All 452 (454).

(6) If without an application for review, a Court sets aside its own previous order rejecting a plaint for non-payment of deficit Court-fees and gives a further extension of time under Section 149, C. P. C., its subsequent order is not a nullity but remains a perfectly good order until it is set aside by a superior Court or in proper proceedings. AIR 1939 Cal 722 (722): 69 Cal L Jour 379 (380).

150. Transfer of business.—Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

SECTION 150 — SYNOPSIS

1. "Save as otherwise provided."
2. Transfer of business.
3. Abolition of Court.
4. Powers and duties of transferee Court.

1. "Save as otherwise provided."— (1) The mere fact that the Court by which a certain power is to be exercised is specified does not preclude any Court to which the business of the former Court is "transferred" from exercising the power under Section 150, unless it is expressly or impliedly provided that no Court other than the one specified can exercise the power. AIR 1942 Oudh 226 (228, 229): 17 Luck 739 (DB).

(2) A decree is passed by a Court A. The business of Court A is transferred to Court B within the meaning of Section 150. But Court B does not come within any of the categories mentioned in Sections 37 and 38. Nevertheless Court B can execute the decree passed by Court A. The reason is that there is no express or implied exclusion of the competency of any Court not mentioned in Sections 37 and 38 to execute the decree. AIR 1920 Cal 532 (533): 47 Cal 1100 (DB).

(3) A Court to which the business of another Court is "transferred" under Section 150 can punish for disobedience of an injunction granted by the latter Court. AIR 1957 Pat 73 (75, 76): 35 Pat 639 (DB).

(4) Section 98 of the Probate and Administration Act, 1881 (corresponding to the present Section 317 of the Succession Act, 1925) imposes on the grantee of a probate, the duty of furnishing an inventory to the Court which issued the probate. The power of the Court which could grant probate to receive the inventory was held to be saved from the operation of Sec. 150. AIR 1916 Mad 908 (909) (DB).

2. Transfer of business.— (1) A, a Munsif in Bengal (whose ordinary pecuniary jurisdiction extends only up to Rs. 1000) who is specially empowered to try suits up to Rs. 2000, passes a preliminary decree in a mortgage suit for over Rs. 1000. A is then transferred and his successor B is not similarly empowered. The final decree is, therefore, passed by the Subordinate Judge having jurisdiction in the matter. B also is transferred and C, who is specially empowered succeeds. As soon as C succeeds to B, the business of the Subordinate Judge's Court, so far as it related to suits up to the value of Rs. 2000, must be taken to have been transferred to the Court of C and that Court is, therefore, competent to execute the decree. AIR 1920 Cal 532 (533): 47 Cal 1100 (DB).

[See AIR 1957 Pat 73 (75, 76): 35 Pat 639 (DB).]

(2) Unless a business is removed from the hands of one Court and placed in the hands of another, there cannot be a "transfer" of business, and that a business cannot be said to have been removed or transferred from Court A to Court B if Court A continues to have power to deal with that business. It is a general principle of law that where a Court has jurisdiction to entertain a suit or proceeding at the time of its institution, such jurisdiction is not lost by the subsequent transfer of the area or territory with reference to which the suit, or proceeding was instituted. In other words, the suit or proceeding pending in one Court at the time of the transfer of the local area is not removed or transferred to the Court to which the area is transferred. It follows, therefore, that there is no "transfer of business" effected by the transfer of a particular area so far as pending suits and proceedings are concerned. AIR 1957 Trav-Co 69 (73, 75): ILR (1956) Trav-Co 1314 (FB). (AIR 1932 Mad 418 (FB); AIR 1956 SC 87, Rel. on; AIR 1952 Trav-Co 390, Not foll.) ** AIR 1958 Andh Pra 763 (763, 765) (DB) ** AIR 1957 Raj 241 (244, 245): ILR (1957) 7 Raj 702 ** AIR 1956 Pat 280 (281, 282): 35 Pat 610 (DB) ** AIR 1916 Mad 80 (83): 39 Mad 239 (FB) ** AIR 1932 Mad 418 (420, 421): 55 Mad 801 (FB). (Madras cases holding contrary view Overruled.) ** AIR 1962 Punj 394 (395, 398): 1961 Cur LJ 22 (FB).

[But see AIR 1936 Pat 546 (547): 15 Pat 704 (DB) ** AIR 1952 Trav-Co 390 (390) (DB).]

(3) A mortgage decree was passed by a Court at Berhampore. Subsequently, Berhampore was transferred to Orissa. But the place where the mortgaged property was situated remained in the Madras Presidency and came within the jurisdiction of the Court at Chicacole. It was held that this effected a transfer of business within the meaning of this section and that an application for scaling down the debt under the Madras Agriculturists' Relief Act could be made to the Chicacole Court. AIR 1943 Mad 617 (625) (DB). (AIR 1932 Mad 418: 55 Mad 801 (FB), Distinguished.)

(4) The section cannot be invoked in a case where there has only been a transfer of jurisdiction as to future business subject to an express reservation as regards pending cases. Thus, a Court in which a suit was pending at the time of the transfer has exclusive jurisdiction to entertain an application for restitution arising out of such a suit. AIR 1937 All 515 (522): ILR (1937) All 670 (DB).

151. Saving of inherent powers of Court.—Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court.

Section 150 — Note 2 (contd.)

(5) An assignment of business by the District Judge under the Civil Courts Act is not a transfer of business within the meaning of Section 150. AIR 1942 Cal 321 (323): ILR (1942) Cal 289 (DB) ** AIR 1938 Cal 193 (194) (DB) ** AIR 1921 Pat 152 (155): 6 Pat L Jour 364.

[See AIR 1957 Pat 73 (75, 76): 35 Pat 639 (DB).]

[But see AIR 1923 Mad 92 (94): 46 Mad 83 (DB) ** AIR 1932 Mad 260 (262).]

(6) Section 150, Civil P. C. (1908), refers to a change of territorial limits of the Court's jurisdiction. When there is a mere distribution of work among Courts by transfer of a suit or proceeding from one Court to another, Section 150, Civil P. C. (1908), cannot apply. AIR 1962 Cal 519 (520): 66 Cal WN 43.

(7) Establishment of new Court after passing of decree — Execution levied at new Court — Decree not transmitted under Section 39 — Nor transferred under Section 24 — No transfer of pending business under Section 150 — Court which passed the decree held did not lose jurisdiction — New Court held not competent to execute decree. AIR 1964 Mys 34 (35, 36).

(8) Territorial jurisdiction over mortgaged properties transferred to another Court after the decree was passed — Execution application filed directly in the new Court without obtaining transmission of the decree — No notification under Section 24, Civil P. C. (1908) transferring the business of the Court passing the decree to the newly established Court issued — Court passing the decree continuing to exist — Application for execution held filed in Court having no jurisdiction to entertain it. AIR 1964 Andh Pra 68 (69): (1963) 2 Andh WR 324 (325).

(9) Where on the establishment of a new Court at Cochin the entire case is transferred to the Court at Cochin, though there is no specific order on the case for such a transfer, the transfer of the case from the District Court at Ernakulam to the newly established Court at Cochin amounts to a 'transfer of business' of the Court within the meaning of Section 150. AIR 1962 Ker 105 (106): 1961 Ker LT 795.

(10) Territorial jurisdiction of Court passing decree transferred — Application for execution can be filed before transferee Court. AIR 1959 Punj 350 (351): ILR (1958) Punj 378.

3. Abolition of Court.— (1) Where a Court is abolished, its proceedings can be continued by the Court which would have jurisdiction to entertain the suit if it was instituted at the time when the proceedings are sought to be continued. (1904) 31 Cal 1057 (1063) (DB) ** AIR 1915 All 219 (220): 37 All 450 (DB) ** AIR 1920 Cal 532 (532): 47 Cal 1100 (DB).

(2) If a new Court is established in the place with the same jurisdiction as the old one it can continue the proceedings unless they have been transferred to some other Court. AIR 1926 Pat 209 (210): 4 Pat 688 (DB) ** AIR 1929 All 677 (680) (DB).

[See **AIR 1956 SC 29 (30, 31):** 1955-2 SCR 872.]

(3) Ex parte decree for possession passed by A Court — Delivery of property in execution — Ex parte decree set aside and suit posted for rehearing in A Court — Abolition of A Court — Property falling within jurisdiction of B Court newly established — Suit transferred to B Court and ultimately dismissed — Application for restitution under Section 144 to B Court — B Court held had jurisdiction to entertain it. AIR 1960 Mys 273 (274, 275): 38 Mys LJ 617.

(4) Where the new Court, although substituted in the place of the old one, is essentially of a different jurisdiction, it cannot be said to be a successor or a transferee of the business of the old Court and cannot continue the proceedings instituted therein. AIR 1915 Lah 171 (172): 1915 Pun Re No. 30 (DB).

(5) Section 150 applies only to cases of transfer from a Court and not to cases of a Court ceasing to exist. AIR 1927 Mad 627 (628): 50 Mad 882 (DB).

4. Powers and duties of transferee Court. — (1) The Court to which the business of another Court has been transferred has the power to grant leave under Order 3, Rule 4, sub-rule (2) for the determination of the appointment of a pleader. AIR 1935 Pesh 145 (145).

(2) If a suit with an order of injunction passed therein is transferred from one Court to another, the transferee Court will have powers co-extensive with the powers of the transferring Court. Section 150 would apply and the transferee Court could exercise powers under Order 39, Rule 2 (3). AIR 1957 Pat 73 (75, 76): 35 Pat 639 (DB). (See also Note 1.)

(3) The transferee Court can enforce the obligation of a receiver already appointed by the transferor Court in a case. AIR 1962 Ker 105 (106): 1961 Ker LT 795.

(4) Business of the Court A transferred to Court B on transfer of territorial jurisdiction — Court B can set aside an ex parte order passed by Court A. AIR 1964 Mad 463 (465): 77 Mad LW 245.

SECTION 151 — SYNOPSIS

1-A. Analogous law — See Section 561-A Criminal P. C. and also Note 6.

1. Inherent power.

2. Court cannot override express provisions of law.

Section 151 — Synopsis (contd.)

3. Court cannot override general principles of law.
4. Ends of justice.
5. "Prevent abuse of the process of the Court."
5-A. Expunging of objectionable matter.
6. Criminal cases.
7. Contempt of Court, proceedings for.
8. Proceedings under Press (Emergency Powers) Act. (Since repealed.)
9. Insolvency Court.
10. Legal Practitioners Act, cases under.
11. Appeal.
12. Revision.

1A. Analogous Law. — See S. 561-A Criminal P. C. and also Note 6.

1. Inherent power. — (1) Cases and circumstances not covered by express provisions of Code but where justice has to be done always arise. (1913) 40 Cal 955 (959) (DB) ** (1895) 17 All 29 (31) (DB) ** AIR 1928 Pat 187 (188) (DB) ** AIR 1918 Mad 580 (584): 40 Mad 1069 (FB) ** (1966) 5 LR 236: (1966) 1 Mys LJ 1 ** AIR 1960 Mad 482 (484): 73 Mad LW 106.

(2) As Legislature could foresee and provide rules to regulate only the most natural and ordinary events Code has no rules to regulate for all time to come and for all cases that may probably happen. AIR 1941 Cal 670 (672): ILR (1941) 1 Cal 490 ** (1868) 9 Suth WR 402 (406) (FB) ** AIR 1960 Mad 482 (484) (DB): 73 Mad LW 106.

(3) The prescribed rules of procedure may be abused or so used as to give mere formality the significance of substantive effect, and obstructing administration of justice. (1879) 4 App Cas 504 (525) ** AIR 1923 PC 128 (130): 55 Ind App 183: 2 Pat 676 ** AIR 1928 PC 261 (262) ** AIR 1960 Mad 482 (484): 73 Mad LW 106 (DB).

(4) Merely because there is no express provision of the Code or reported decision of a Court, Courts are not rendered powerless to do justice or redress a wrong. AIR 1953 Mad 897 (900): ILR (1953) Mad 958 (DB) ** AIR 1940 Rang 162 (167): 1940 Rang LR 512 (FB) ** (1897) 19 All 155 (164): 24 Ind App 22 (PC) ** (1893) 15 All 84 (95) (FB) ** (1968) 16 Law Rep 469: (1969) 1 Mys LJ 32 ** AIR 1964 Orissa 91 (92). (Absence of rule in Code to regulate order in which sale is to take place does not take away the inherent power of Court to control the sale as taking place in a particular mode.) ** AIR 1960 Mad 482 (484): 73 Mad LW 106 (DB).

(5) Courts are not to act on the principle that every procedure not expressly provided for by Code is prohibited but on the principle that every procedure is permissible till it is shown to be prohibited by law. (1883) 5 All 163 (172) (FB) ** AIR 1957 Nag 83 (83): ILR (1956) Nag 657 ** AIR 1965 Madh Pra 21 (23): 1967 MPLJ 625.

(6) Every Court must be deemed to possess inherent powers necessary to do right and to undo wrong in the administration of justice. AIR 1955 Mad 455 (458) ** AIR 1958 Madh Pra 260 (261) ** ILR (1955) Patiala 481 (484) ** (1856) 6 Moo Ind App 393 (410, 411) (PC) ** AIR 1967 Orissa 182 (184): 1967 Cri LJ 1549: 32 Cut LT 1194 ** (1963) ILR 42 Pat 704 ** AIR 1960 Mad 482 (484) (DB): 73 Mad LW 106.

(7) Court has power to recall order made contrary to law. AIR 1965 Andh Pra 395 (398): (1965) 1 Andh WR 262.

(8) "Court" means all Courts whether Civil or otherwise. AIR 1950 Mad 219 (220) ** AIR 1915 Cal 49 (51) (DB) ** AIR 1919 Pat 343 (344): 4 Pat L Jour 371 (DB).

(9) A Court has inherent power to determine how its proceedings should be conducted. AIR 1933 PC 43 (44, 45) ** AIR 1953 Sau 30 (31) ** AIR 1950 Madh B 59 (59) ** (1913) 40 Cal 955 (959, 960) (DB).

(10) Courts have inherent jurisdiction to control matters relating to taxation of costs and such jurisdiction extends to empower courts to permit, in a proper case, a party to withdraw a bill already submitted and to substitute it with a fresh bill of costs. 1956-2 All ER 660 (664, 666): (1956) 1 WLR 818.

(11) Court has inherent power where circumstances require it to do so to act according to justice, equity and good conscience. AIR 1939 All 668 (669) (DB) ** 1957 Jab LJ 243 (247) ** (1884) 6 All 351 (355, 357) (DB) ** AIR 1928 Oudh 262 (263) (DB) ** AIR 1966 Orissa 24 (26): 31 Cut LT 769.

[See also AIR 1962 All 207 (208). (High Court, as a Court of equity, will not exercise its discretion in favour of a student who by his demeanour in the suit itself has proved himself devoid of all sense of discipline.)]

(12) In India, every Court is a Court of Equity as well as of Law. ILR (1955) Patiala 481 (484) ** AIR 1914 Cal 129 (131): 41 Cal 137 (DB) ** (1884) 6 All 370 (373) (DB) ** AIR 1930 Mad 618 (621): 53 Mad 533 (DB).

[See however AIR 1930 Lah 657 (658) (DB).]

(13) Section does not confer new powers on Courts but only saves their inherent powers to make orders necessary for ends of justice or to prevent abuse of process of Court. ILR (1955) Patiala 481 (481) ** AIR 1950 Cal 217 (223) ** (1913) 35 All 331 (336, 337): 49 Ind App 151: 16 Oudh Cas 194 (PC) ** AIR 1935 All 599 (599): 57 All 977 (FB) ** AIR 1936 Rang 208 (210): 14 Rang 173 (FB) ** AIR 1968 Delhi 215 (216) ** ILR (1966) Cut 400: 32 Cut LT 999 **

Section 151 — Note 1 (contd.)

AIR 1965 Andh Pra 143 (156): (1964) 2 Andh WR 197 (DB) ** AIR 1964 Ori 134 (135, 136): ILR (1964) Cut 18 ** AIR 1963 All 518 (523): ILR (1961) 2 All 298 (DB). (Election tribunal is not a Court and as such cannot exercise inherent power.) ** AIR 1960 Mad 482 (484): 73 Mad LW 106 (DB) ** AIR 1959 Pat 121 (125, 127): 1958 BLJR 783 (FB).

[See also 1963 Kant LJ 91 (Mys). (The power conferred under Section 151, C. P. C. is not an implied power. It is an inherent power.)]

(14) Object of section is to show that powers expressly conferred by Code apply only so far as they go, but cannot restrict Court's inherent powers to do complete and substantial justice. AIR 1955 Bom 39 (40): ILR (1954) Bom 1422 (DB) ** AIR 1950 Pat 350 (352) (DB) ** AIR 1933 All 295 (297): 56 All 216 (DB) ** AIR 1969 Andh Pra 216 (220) ** ILR (1966) Cut 400: 32 Cut LT 999 ** AIR 1961 Mad 32 (33): (1960) 2 Mad LJ 157 (DB).

(15) Courts exist only for administration of substantial justice. AIR 1953 Him Pra 102 (102) ** AIR 1953 Hyd 130 (130): ILR (1952) Hyd 1001 (DB) ** AIR 1950 Cal 217 (223).

(16) Inherent powers of Court are very wide and indefinable. AIR 1924 Oudh 11 (13) (DB) ** AIR 1969 Andh Pra 216 (220) ** 1966 BLJR 314: ILR 45 Pat 1401 ** AIR 1960 Mad 482 (484): 73 Mad LW 106 (DB).

(17) Limits of inherent jurisdiction should be carefully guarded and its exercise in arbitrary and capricious manner effectively prevented. AIR 1951 Cal 357 (358): ILR (1951) 1 Cal 635 (DB) ** 1956 Madh BLJ 959 (961) ** AIR 1941 All 314 (315, 316): ILR (1941) All 612 (DB) ** AIR 1936 Rang 208 (210): 14 Rang 173 (FB) ** AIR 1960 Mad 482 (484): 73 Mad LW 106 (DB).

(18) Section 151, however widely couched, has never been resorted to for the purpose of assisting parties to establish their case by creation of evidence. AIR 1965 Orissa 72 (73).

(19) Power under section is discretionary. In considering propriety of invoking that power Court will take into account several matters such as complexity of questions involved, availability of more complete and efficacious remedy by means of suit and apparent justice of claim. AIR 1958 Madh Pra 391 (393) ** 32 Cut LT 733: ILR (1966) Cut 556 ** (1965) ILR (1965) 2 Punj 590.

(20) Where there are express provisions of law applicable to a particular case, there is no inherent power in Court to override them. AIR 1958 Him Pra 9 (10).

[See also AIR 1931 All 443 (447): 53 All 804 (SB) ** AIR 1959 Pat 121 (125, 127): 1958 BLJR 783 (FB) ** AIR 1967 Orissa 182 (184): 32 Cut LT 1194 ** AIR 1967 Orissa 172 (173): ILR (1967) Cut 321 ** AIR 1967 Pat 378 (380) ** (1962) 66 Cal WN 810 ** 1961 Ker LT 431 ** (1959) 2 Andh WR 301.

(21) Inherent powers can be exercised only where there is no express provision of Code. AIR 1943 Oudh 136 (138) (DB) ** AIR 1925 Mad 42 (44): 48 Mad 494 ** AIR 1927 Cal 657 (658) (DB) ** AIR 1916 Lah 350 (351) (DB) ** AIR 1934 Pat 582 (582) (DB).

(22) Exercise of power by Court must be consistent with sound general principles of law, and with intention of Legislature. AIR 1927 Cal 420 (420) (DB) ** AIR 1936 Rang 208 (210): 14 Rang 173 (FB).

(23) Powers saved by Section 151 are not powers over substantive rights which a litgant possesses. **AIR 1961 SC 218 (219, 220): (1961) 1 SCR 884.** (AIR 1959 All 707, **REVERSED** — Right to account books is a substantive right — No inherent power to appoint commissioner for seizure of plaintiff's account books at instance of defendant.)

(24) Court has special inherent jurisdiction derived from Crown as parens patriae to protect interests of minors. AIR 1942 All 150 (152): ILR (1942) All 144.

(25) Action can be taken by the Court under this section on its own motion. 1950 All WR 275 (278) (DB) ** AIR 1957 Tripura 50 (51) ** ILR 46 Pat 1171 ** ILR 42 Pat 704.

(26) Although section gives no right to party to make application under it party can bring to notice of Court by application an abuse of process of Court or existence of necessity in ends of justice to pass a particular order and then Court may satisfy itself whether an order should be passed for either of the reasons. ILR (1953) 3 Raj 146 (148).

(27) Change in officer presiding over Court does not prevent exercise of power under section in suitable case. AIR 1950 Cal 209 (210, 211) (DB).

(28) The inherent jurisdiction to order restitution, apart from the provision of Section 144, can be exercised not only by a Court but also by a persona designata statutorily entrusted with the duties and powers normally exercised by a Court of law. AIR 1960 Mys 337 (338): 38 Mys LJ 922.

(29) Inherent powers — Implied only in Civil Courts having general jurisdiction — Special authorities, under special statute, cannot invoke them. AIR 1963 Bom 233 (234, 235): 64 Bom LR 483 (DB).

(30) Principle of inherent power to remedy injustice applies also to quasi judicial authorities like Rent Controller or appellate tribunal. AIR 1957 Punj 72 (73): ILR (1957) Punj 305. (AIR 1949 Mad 53; AIR 1951 Mad 745; AIR 1948 Mad 235 and AIR 1953 Nag 191, **DIS-**

Section 151 — Note 1 (contd.)

SENTED FROM.) ** AIR 1967 Mad 464 (464): (1967) 1 Mad LJ 195. (Claims tribunal.)

[See also **AIR 1958 SC 79 (83): 1958 SCR 514.**]

(31) Suit for ejectment of tenant pending on date when W. B. Premises Tenancy Act came into force — Application by sub-tenant under Section 16 (3) of the Act — Rent Controller granting declaration under the section — Decree for ejectment of tenant passed subsequently — Rent Controller's order dismissing application under Section 16 (3) while proceeding with fixation of fair rent is wrong — Though Section 29 (5) of the Act gives Rent Controller power to act under Sections 151 and 152, C. P. Code the order cannot be justified under Section 29(5) of the Act as the conditions necessary to act under Sections 151 and 152 are absent. **AIR 1966 SC 935 (939): (1966) 1 SCR 235.**

(32) Inherent powers which every Civil Court exercises are vested in the Election Tribunal also. AIR 1958 Madh Pra 260 (261) ** AIR 1968 J and K 90 (91): 1968 Kash LJ 96.

(33) Appellate authority under Industrial Employment (Standing Orders) Act (20 of 1946) not being a "Court" has no inherent power to correct mistakes in Standing Orders finally certified by it under Section 6 (1) of that Act. AIR 1958 Pat 427 (430): 36 Pat 1162.

(34) Tribunal appointed under W. B. Estates Acquisition Act (1 of 1954) — Proceedings before — Principle of inherent power to remedy injustice applies. AIR 1959 Cal 386 (387): 63 Cal WN 354 (DB).

(35) In India from the beginning the jurisdiction of Courts to interfere with arbitrations has always been statutory. The High Court cannot exercise inherent jurisdiction independently of a statute to set aside private award on the ground of an error apparent on the face of the record. AIR 1963 All 113 (117): 1962 All LJ 876.

(36) An arbitrator acting under the Co-operative Societies Act has no inherent implied or incidental or consequential power in the exercise of which he can pass an order of stay or in the nature of an injunction. An arbitrator cannot be likened to a Court or a Judge. Chapter XIV of the Rules under the Act provides the arbitrator many of trappings of a Court. That does not give him the status of a Court. That has been done to prevent him from exercising the powers to decide the referred dispute, arbitrarily. AIR 1968 All 22 (28): 1967 All LJ 454.

(37) Interim Committee of management appointed for certain term of management — Proceedings before High Court under the Companies Act 1956 are regulated by Companies Court Rules — Rule 9 of said rules authorises exercise of inherent power notwithstanding Rule 6. AIR 1964 All 75 (76): ILR (1963) 1 All 135 (DB).

(38) Jurisdiction under Section 151 can be exercised only in a matter which is before the Court. Section does not confer jurisdiction to entertain proceedings. AIR 1958 Mad 284 (285) ** AIR 1965 Cal 308 (311): 68 Cal WN 1117 (DB).

[See AIR 1958 Mad 462 (463): ILR (1958) Mad 417.]

[But see (1963) ILR 42 Pat 704.]

(39) Applications under Section 151 may be entertained by the regular Bench and, except in very special circumstances, need not await a hearing before the same or the original Bench. (1967) 71 Cal WN 1034 (DB).

(40) Writ petitions on civil side are civil matters and the provisions of the Civil Procedure Code apply to them. (1965) 67 Pun LR 576. (Amendment of writ petition.)

2. Court cannot override express provisions of law. — (1) Inherent power of Court exists only where there is no express provision of law applicable to the case. AIR 1950 Trav-Co 100 (102) (FB) ** AIR 1957 Raj 11 (13): ILR (1956) 6 Raj 926 (DB) ** 1958 Andh LT 500 (503) ** (1956) 98 Cal L Jour 87 (88) ** AIR 1956 Raj 49 (50): ILR (1955) 5 Raj 175 ** 1956 All L Jour 856 (857) ** AIR 1955 Andhra 142 (143): ILR (1955) Andhra 143 (DB) ** (1876) 2 Cal 233 (261): 4 Ind App 23 (PC) ** AIR 1965 SC 1144 (1145): (1965) 2 SCR 186 ** AIR 1964 SC 993 (1003, 1004, 1005): (1964) 5 SCR 946 ** AIR 1969 Andh Pra 216 (220) ** AIR 1969 Guj 55 (62) ** 1961 Ker LT 431 ** AIR 1960 Pat 132 (134).

(2) Where there is a specific prohibition of particular act or order, Court cannot do the act or make the order under its inherent powers. AIR 1965 Bom 39 (40): ILR (1954) Bom 1422 (DB) ** AIR 1958 Tripura 24 (25) ** AIR 1968 Bom 250 (253): 69 Bom LR 629 ** AIR 1968 Pat 112 (113) ** AIR 1965 Andh Pra 395: (1965) 1 Andh WR 162. (Power to sanction refund of Court-fee — Court apart from what is found under Court-fees Act Court has no inherent power.) ** AIR 1964 Mys 169 (173): (1963) 2 Mys LJ 346. (Partition of estate by Collector under Section 54 — Civil Court which passed decree cannot review and correct mistake under its inherent powers.) ** (1959) 2 Andh WR 309: 1959 Andh LT 777 ** AIR 1959 Madh Pra 52 (57): 1958 MPLJ 361 ** AIR 1959 Punj 297 (303): 61 Pun LR 683. (Resort to inherent power to nullify Section 96, Motor Vehicles Act not permissible.)

(3) Where there is a special provision in the Code in regard to a specific relief sought but the grant or refusal of that relief does not strictly fall within the purview of the special provision, excep-

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tional circumstances should be made out to invoke the provisions of Section 151 in the interests of justice. (1968) 16 Law Rep 469: (1969) 1 Mys LJ 32.

(4) The power created by Section 151 is an independent power, uncontrolled by other provisions of the Code. That power could be exercised even if there is another specific provision in the Code authorising an order such as the one which is sought under Section 151. AIR 1968 Mys 270 (273): (1968) 1 Mys LJ 277. (AIR 1954 Trav-Co 123 and AIR 1953 Mad 420 no longer good law in view of AIR 1962 SC 527.) ** (1963) 29 Cut LT 159. (AIR 1962 SC 527, Rel. on.)

(5) Where decree is silent as to further interest after date of decree, Court cannot grant it under inherent powers. AIR 1924 Rang 275 (277) (DB).

(6) No appeal can be allowed from non-appealable order, under inherent powers of Court. AIR 1940 Bom 10 (11, 12): ILR (1939) Bom 708 ** AIR 1923 Oudh 177 (179): 26 Oudh Cas 10.

(7) Court cannot under its inherent powers set aside its own decree or recall an order made by it previously or question validity of a decree in execution. AIR 1954 Madh B 14 (16): ILR (1954) Madh B 227 ** AIR 1952 Pat 478 (479, 480): 31 Pat 737 (DB) ** AIR 1950 All 338 (339): ILR (1931) 2 All 121 (DB) ** AIR 1968 Delhi 215 (217) ** AIR 1968 Madh Pra 42 (45): 1967 MPLJ 532 (DB) ** AIR 1964 Punj 249 (258): 66 Pun LR 318 (FB). (AIR 1959 Punj 457, **OVERRULED.**) ** 1961 BLJR 829.

[But see AIR 1944 Nag 148 (149): ILR (1944) Nag 379 ** AIR 1934 Rang 108 (109) (DB) ** AIR 1934 All 287 (288) (DB) ** AIR 1962 All 623 (623) ** (1962) 66 Cal WN 437.]

(8) Rule 4 of Order 37 expressly gives power to a Court to set aside a decree passed under the provisions of that Order. Express provision is thus made for setting aside a decree passed under Order 37 and hence if a case does not come within the provisions of that rule, there is no scope to resort to Section 151 for setting aside such a decree. **AIR 1965 SC 1144 (1145): (1965) 2 SCR 186.**

(9) Court has inherent power to set aside judgment delivered by it without jurisdiction. 1958-2 WLR 52 (57).

(10) Court cannot set aside order under Order 21, Rule 58 even if it be order of dismissal for default under its inherent powers. AIR 1934 Mad 699 (699) ** AIR 1936 Pesh 115 (116) (DB).

(11) Court cannot allow set-off in execution proceedings under its inherent powers apart from provisions of O. 21, Rule 19 at instance of stranger auction-purchaser who has failed to make deposit of purchase price as required by Order 21, Rules 84 and 85. **AIR 1954 SC 349 (352):** 1953-1 SCR 108.

(12) Court cannot exercise its inherent powers to extend period of 15 days fixed by Order 21, Rule 85 for deposit of purchase money. AIR 1957 All 558 (560).

(13) Court cannot set aside sale of moveable property under its inherent powers for irregularity in publishing or conducting sale. AIR 1930 All 513 (513) ** 1962 Jab LJ 371: 1962 MPLJ (Notes) 313.

(14) The Court has no inherent power to revive a suit for a fresh hearing even if it appears to it that there had been a miscarriage of justice. AIR 1961 Assam 124 (126).

(15) Application for review in respect of decree or order passed in suit under Section 9 of Specific Relief Act cannot be entertained under inherent powers. AIR 1918 Cal 925 (927): 45 Cal 519 (DB).

(16) No injunction can be granted under Court's inherent powers in contravention of provisions of Section 56, Specific Relief Act. AIR 1919 Oudh 154 (159) (DB) ** AIR 1966 Punj 212 (213): 67 Pun LR 172 (DB).

(17) Even where mortgage property cannot be sold in execution, Court cannot grant personal decree under its inherent powers. AIR 1951 All 195 (198, 199) (FB). (AIR 1928 All 321, **OVERRULED.**) ** AIR 1958 Madh Pra 391 (393).

(18) Provision of Code must be deemed to be exhaustive of matters dealt with by it. (1936) 33 Cal 927 (931) (DB) ** (1902) 29 Cal 707 (715): 29 Ind App 196 (PC) ** AIR 1924 Mad 114 (115, 116): 47 Mad 171 (DB).

(19) Even where case in which inherent powers are invoked falls within intendment of provision which provides procedure to be followed in particular case or class of cases there is no inherent power to act except under conditions specified by such provision. AIR 1950 Mad 779 (780): ILR (1951) Mad 458. (In view of the fact that security for costs has been specifically dealt with under O. 25, R. 1 it is not open ordinarily for Courts to invoke Section 151.) ** AIR 1940 Nag 349 (351, 352) : ILR (1940) Nag 538 (DB) ** AIR 1940 Oudh 298 (300) (DB) ** (1876) 2 Cal 233 (261): 4 Ind App 23 (PC) ** AIR 1937 All 141 (142) (SB) ** AIR 1962 Pat 403 (405): 1962 BLJR 291. (Execution — No application by decree-holder under O. 21, Rule 97 alleging obstruction — Third party cannot ask for adjudication on his title or possession by invoking inherent powers of the executing Court under Section 151.)

[See also AIR 1945 PC 5 (8): ILR (1945) Kar (PC) 43 ** AIR 1963 Bom 233 (234, 235): 64 Bom LR 483 (DB). (Case under Cl. 13 (3) of C. P. and Berar Letting of Houses and Rent Control Order (1949).]

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(20) In partition suit, Court has no inherent power to direct sale of property by public auction apart from provisions of Partition Act, (1893). (1968) 72 Cal WN 837, 72 Cal WN 299 and AIR 1952 Cal 893, Followed though doubted.)

(21) Inherent power by way of anticipatory jurisdiction having been specifically provided for by Code it is not permissible to exercise that power except in a case which falls in the class of cases in which settled practice of Courts permits such procedure being adopted. AIR 1955 Trav-Co 225 (225): ILR (1955) Trav-Co 363 (FB) ** AIR 1952 Orissa 120 (125): ILR (1951) Cut 543 (FB).

[See AIR 1958 Mad 462 (462): ILR (1958) Mad 417.]

(22) Court cannot, under its inherent powers, refuse to be bound by limitation prescribed by Limitation Act, 1908, AIR 1954 Trav-Co 526 (534): ILR (1954) Trav-Co 929 (FB) ** AIR 1958 Pat 27 (29) ** AIR 1957 Manipur 13 (14) ** AIR 1968 Pat 110 (112): 1968 BLJR 155 (DB) ** AIR 1965 All 64 (65): 1963 All LJ 651 ** AIR 1964 All 124 (125) ** 1961 Ker LT 431. (Sale in execution — Petition to set aside made beyond limitation — Sale set aside under Section 151 — Order setting aside sale is without jurisdiction.)

[See also AIR 1933 Mad 418 (420, 424): 56 Mad 490 (FB).]

(23) Where there is doubt or difficulty as to which provision will apply to particular case inherent powers may be invoked. AIR 1925 Pat 435 (437): 4 Pat 180 (DB).

(24) In exercising power under section Court can apply analogous provision applicable to circumstances which stand nearest to case on hand. AIR 1947 Sind 1 (2): ILR (1946) Kar 349 (FB) ** ILR (1951) 1 Raj 607 (609) ** AIR 1921 Mad 599 (605): 44 Mad 919 (FB) ** (1893) 15 All 84 (95) (FB) ** AIR 1950 Cal 217 (223).

[See also AIR 1939 Pat 678 (681): 19 Pat 159 (FB). (AIR 1926 Pat 27: 4 Pat 704, **OVERRULED.**)]

[But see AIR 1930 Rang 280 (281): 8 Rang 423 (DB).]

(25) Ejectment suit remanded to trial Court for re-hearing — Provision of Section 17 (1), W. B. Premises Tenancy Act, revived — Court has no power to condone delay in depositing monthly rent. (1963) 67 Cal WN 501.

Setting aside ex parte decisions and restoration of suits or appeals dismissed for default.— (26) Ordinarily when once a matter is disposed of, finality attaches to the order and unless Court is clothed with special powers to set aside that finality and restore an application, it has no inherent jurisdiction to do so. 1957-1 Mad L Jour 349 (350).

(27) Where a case falls within the ambit of either Order 9, Rule 9, or O. 41, Rule 19 or Order 9, Rule 13 Court can only act in accordance with those provisions and cannot fall back on its inherent power under this section, for restoring case dismissed for default or for setting aside ex parte decision. AIR 1958 Pat 27 (29) ** AIR 1958 Tripura 19 (20) ** ILR (1958) Kerala 196 (199, 200) ** AIR 1957 Raj 11 (14) : ILR (1956) 6 Raj 926 (DB) ** 1957 All WR (HC) 189 (190) ** ('56) 98 Cal L Jour 87 (88) ** AIR 1940 Rang 162 (166): 1940 Rang LR 512 (FB) ** AIR 1931 All 294 (296): 53 All 612 (FB) ** AIR 1925 All 610 (614): 48 All 175 (FB) ** AIR 1920 Mad 640 (642, 643): 43 Mad 94 (FB) ** ILR (1965) Cut 562: 32 Cut LT 501 ** (1962) 66 Cal WN 810 ** AIR 1961 Cal 534 (537): 65 Cal WN 535 (DB) ** (1961) 2 Ker LR 176: 1961 Ker LJ 810: 1961 Ker LT 522.

[But see AIR 1954 Bom 214 (215): ILR (1954) Bom 330 ** AIR 1954 Assam 168 (169): ILR (1953) 5 Assam 290 (DB) ** AIR 1954 Nag 135 (142): ILR (1953) Nag 911 (DB) ** AIR 1950 Pat 497 (499) (DB) ** (1905) 32 Cal 253 (256) (FB) ** AIR 1962 Raj 12 (17): ILR (1961) 11 Raj 76.]

(28) Fraud on the Court itself and mistake of the Court and the protection of minors are categories of cases in which the powers given to the Court under Section 151 of the Code may be exercised in suitable cases. Independently of the provisions of Order 9, Rule 13, under which provision an application for setting aside an ex parte decree has to be made, the Court is not entitled to set aside an ex parte decree under its inherent powers, unless the case falls under either of the above categories of cases. AIR 1960 All 360 (361, 362): 1959 All LJ 818.

(29) Application under Order 9, R. 4 dismissed for default — Restoration application is maintainable. AIR 1960 Pat 504 (504): 1960 BLJR 325.

(30) Dismissal of suit for default by mistake or otherwise, under circumstances not justifying such dismissal is not covered by Order 9, R. 9 and suit can be restored under inherent powers. AIR 1950 Nag 194 (195) : ILR (1951) Nag 443. (Plaintiff's application for adjournment on date of adjourned hearing refused and Court wrongly dismissing suit for default under O. 17, Rule 2 instead of deciding it on merits — Court can rectify its error and restore suit under inherent powers.) ** AIR 1957 Trav-Co 197 (199): ILR (1955) Trav-Co 714 ** AIR 1946 All 506 (507) (DB) ** AIR 1929 All 811 (812) (DB) ** AIR 1968 Pat 110 (111): 1968 BLJR 155 (DB). (Order of Court requiring plaintiff to file process-fees, etc. is not one passed by mistake— Suit dismissed for non-compliance with order — Section 151 cannot be invoked to restore suit when application for restoration is beyond limitation.) **

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(1963) 65 Pun LR 1001. (Dismissal of suit for default of appearance after passing of preliminary decree.) ** 1961 Raj LW 235: ILR (1961) 11 Raj 860.

[But see AIR 1933 All 41 (41) (DB).]

(31) Where on death of sole plaintiff a suit is dismissed for non-appearance of either party on the hearing date but the Court proceeds to take evidence after filing of two separate cases by two different persons for substitution claiming to be the legal heirs of the deceased, it is a case which, on revision by one of such persons, demands a suo motu exercise of the inherent powers for the restoration of the suit. AIR 1968 Patna 112 (113).

(32) In case of dismissal for default or ex parte order not falling within ambit of Order 9, Rule 8, or Order 9, R. 13, Court can restore case or set aside ex parte order in exercise of its inherent power. AIR 1958 Andh Pra 341 (342) ** AIR 1958 Pat 410 (411) ** AIR 1958 Pat 107 (107) ** AIR 1957 Nag 83 (83): ILR (1956) Nag 657 ** AIR 1969 Pat 79 (82) ** AIR 1967 Ker 135 (139): 1967 Ker LT 777 ** AIR 1965 Mys 300 (301): (1965) 1 Mys LJ 297 ** 1965 Pun LR (Sup) 117 ** AIR 1964 Pat 509 (510) ** AIR 1962 J and K 21 (22) ** AIR 1960 All 569 (570).

(33) Madras High Court on its appellate side has inherent jurisdiction to restore a copy application struck off for default. 1958-2 Mad L Jour 552 (554).

(34) Where application under O. 9, Rule 9 is itself dismissed or an execution application is dismissed for default or an ex parte order is passed in execution proceedings and by virtue of Section 141, Order 9, Rules 9 and 13 apply to such proceedings, there is no scope for application of inherent power of Court. AIR 1953 Raj 201 (201, 202): ILR (1953) 3 Raj 678 (DB) ** AIR 1958 Him Pra 9 (11) ** AIR 1933 Pesh 59 (61) (DB) ** AIR 1959 Pat 121 (125, 127): 1958 BLJR 783 (FB). (AIR 1925 All 773 and AIR 1927 Cal 534 and AIR 1954 Assam 1 (FB), **DISS. FROM.**)

[See however ILR (1954) Mys 428 (430).]

(35) Where application under O. 9, Rule 9 or execution application is dismissed for default or an ex parte order is passed in execution proceedings and Section 141 does not apply to such proceedings, inherent power can be invoked in proper cases. AIR 1954 Assam 1 (5): ILR (1953) 5 Assam 538 (FB) ** AIR 1953 All 467 (468): ILR (1953) 2 All 381 (FB) ** AIR 1958 Orissa 200 (201): ILR (1958) Cut 351 ** AIR 1957 Pat 575 (586): 36 Pat 323 ** 1958 BLJR 473 (474) ** 1957 Jab LJ 257 (258) ** AIR 1956 Vindh Pra 17 (18) ** 1956 Madh BLR (Civil) 322 (324) ** AIR 1955 Nag 297 (298): ILR (1955) Nag 962 (DB) ** AIR 1955 Nag 41 (42): ILR (1955) Nag 598 (DB) ** 1955 Ker L Tim 870 (873) ** AIR 1933 All 783 (784, 785): 55 All 891 (FB) ** AIR 1931 Sind 97 (98): 25 Sind LR 475 (FB) ** AIR 1968 Bom 250 (253, 254): 69 Bom LR 629 (DB) ** ILR 46 Pat 1171. (Order recalling dismissal of execution case for default.) ** AIR 1966 Orissa 24 (26): 31 Cut LT 769 ** AIR 1963 J & K 12 (14): 1962 Kash LJ 167 (DB) ** AIR 1963 J & K 10 : 1962 Kash LJ 115 ** AIR 1962 Madh Pra 64 (65, 66) : 1961 MPLJ 145 (DB) ** AIR 1961 Manipur 35 (36).

[But see AIR 1948 Mad 204 (205).]

(36) Application to set aside ex parte decree — Dismissal for default — Appeal against dismissal filed, but subsequently withdrawn — On withdrawal, application for restoration — Court of fact has discretion to exercise or not to exercise inherent jurisdiction. AIR 1966 Orissa 24 (27) : 31 Cut LT 769.

(37) Application to set aside ex parte decree dismissed for default — Another application to set aside this dismissal is itself dismissed for default — Appeal from the second dismissal order does not lie under O. 43, R. 1 (3) — Relief can be granted under S. 151. AIR 1966 Tripura 2 (4).

(38) Order dismissing application under S. 47 for default — Not appealable — Application for restoration under S. 151 lies. AIR 1963 Pat 59 (59) : 1963 BLJR 85. ** AIR 1963 Orissa 160 (161) : ILR (1963) Cut 321 (DB). (Satisfaction of decree — Application by judgment-debtor under O. 21, R. 2 dismissed for default — Court may restore it in exercise of its inherent powers under S. 151. 1959 OJD 331. **Held** incorrect.)

(39) A specific statutory provision has been made in O. 21, R. 105(1) under which an execution petition could be restored on sufficient cause being shown for default. Consequently, in Andhra Pradesh the question of restoration of an execution petition by the exercise of inherent powers by the Court under S. 151 does not arise at all after the insertion of R. 105. AIR 1963 Andhra Pra 127 (128, 129, 130) : (1962) 2 Andh WR 21.

(40) Application for bringing on record legal representatives of deceased respondent — Application time-barred — Opposite party not given formal notice — Ex parte order passed granting application — Party to whose prejudice it was passed ex parte is entitled to object to it. AIR 1965 Punj 367 (368) : 67 Pun LR 634.

(41) Execution application dismissed for default not under O. 21, R. 57 could be restored by Court by exercise of its inherent power. AIR 1954 Raj 15 (16) : ILR (1953) 3 Raj 267 (DB).

(42) Provisions of O. 9, R. 9 do not extend to execution cases dismissed for default — Section 151 can however be invoked in appropriate cases. AIR 1962 Raj 107 (108) : 1961 Raj LW 218.

(43) Execution petition — Decree-holder represented by counsel — Counsel not pre-

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sent before Court — Dismissal is for default — Presence of decree-holder not material — Restoration governed by O. 21, Rules 104 and 105 and not by inherent powers. AIR 1962 Mad 386 : (1962) 1 Mad LJ 319.

(44) Election Tribunal not competent to dismiss election petition for default — Wrong order of dismissal for default — Subsequent order to proceed with petition valid — No question of restoration can arise. AIR 1964 All 181 (183) (DB).

(45) Jammu and Kashmir Representation of the People Act (4 of 1957) Section 106 — Election petition — Dismissal for default not permissible — Petitioner proved to have been prevented from appearing for want of sufficient time — Petition so dismissed can be restored by High Court — Provisions of O. 9, R. 9 and S. 151 applicable. AIR 1968 J & K 90 (91) : 1968 Kash LJ 96.

(46) Representation of the People Act (1951) Section 87 — Default by petitioner in prosecuting election petition — Provisions of C. P. C. will be applicable — Court will have to dismiss petition under Order 9 or Order 17 — Court can exercise inherent powers also — High Court as a Court of record possesses all inherent powers of Court while trying election petitions (per Grover J.) AIR 1968 Punj 152 (159): ILR (1967) 2 Punj 830 (FB).

(47) Proceeding for ascertainment of mesne profits dismissed for non-payment of commissioner's fee — Such proceedings can be restored in exercise inherent powers of Court. 1967 BLJR 938.

(48) Where petition to record compromise of suit has been dismissed for default proper course is to apply for setting aside dismissal under this section. (1939) 43 Cal WN 1113 (1114) (DB).

(49) Where appellant who had moved Court for re-admission of appeal wrongly dismissed for default it was held that Court had inherent power to order stay of proceedings in lower Court. 1956 Madh BLJ 660 (662).

(50) Appellate Court can restore under its inherent powers appeal dismissed for default, although O. 41, R. 19 does not apply to case. AIR 1968 Mys 329 (332): (1968) 1 Mys LJ 557. (Appeal dismissed for non-payment of paper-book costs — Application for restoration — Article 137 and not Art. 122, Lim. Act (1963) applies — AIR 1968 Pat 110, **Dissented from.)** ** ILR (1963) Andh Pra 1022. (Court wrongly dismissing appeal for default on a date of which appellant had no notice — Court can rectify error under S. 151 by restoring the appeal.) ** AIR 1962 All 622 (623) ** AIR 1962 Cal 110 (111) : ILR (1962) 2 Cal 33 (DB).

(51) An appeal dismissed for non-payment of deficit court-fees can be restored by the Court under S. 151, where the order dismissing the appeal cannot be reviewed under O. 47, R. 1. AIR 1964 Orissa 86 (87) : 29 Cut LT 598.

(52) Appellate Court cannot rehear appeal heard ex parte under its inherent powers. AIR 1950 Mys 55 (57) (FB) ** AIR 1944 Mad 571 (572) (DB).

(53) Order dismissing restoration petition in second appeal not appealable — Petition for restoration under S. 151 is maintainable. (1962) 28 Cut LT 129.

(54) Counsel though not reporting no instruction, unable to argue appeal due to non-arrival of clerk with brief — Non-arrival of clerk due to missing of bus — Appeal should not be dismissed under O. 41, R. 17 for non-appearance — Restoration of appeal — Proper provision — There is no specific provision for dismissal of the appeal for non-prosecution and the source of power in each case would be under S. 151, Civil P. C. 1962 MPC 90: 1962 Jab LJ 1063.

(55) There is no inherent power to restore revision petition dismissed for default. AIR 1945 Mad 103 (104).

[But see AIR 1953 Him Pra 102 (102, 103) ** ('51) ILR (1951) 1 Raj 607 (609) ** AIR 1967 J and K 93 (95) : 1967 Kash LJ 220 ** AIR 1962 Madh Pra 308 (309) : 1962 MPLJ 317.]

(56) High Court hearing revision petition ex parte and passing ex parte orders — It can set aside the ex parte order under its inherent powers. 1965 Jab LJ 997 : 1966 MPLJ 65. (AIR 1945 Mad 103, **Dissented;** AIR 1957 Nag 83 and 1962 Jab LJ 374 and AIR 1953 Him Pra 102, Rel. on.)

(57) Writ petition — Non-petitioner absent at the time of hearing — Application for adjournment by an Advocate on the ground of illness of principal advocate's son, presented at close of arguments — Prayer rejected as being not fit for consideration even on account of its being made too late after the Court had spent two hours of its time. 1963 Raj LW 406 : ILR (1963) 13 Raj 716.

(58) Election petition filed to challenge certain election of panchayat — On election petitioner's withdrawal under O. 23. R. 1, Tribunal dismissing election petition without giving notice of such withdrawal to other parties to apply for transposition — Order of dismissal is not erroneous — Hence tribunal cannot set aside the order under O. 47, R. 1 or S. 151. (1964) 1964 Raj LW 76.

(59) Election petition — Adjourned hearing — Counsel for respondent withdrawing from proceedings — Tribunal deciding to proceed ex parte — Subsequent application before judgment by respondent to adduce evidence — Previous order to proceed ex parte — No bar to allow subsequent application. AIR 1965 Punj 58 (61): 66 Pun LR 1076 (DB).

(60) Record of suit for partition of agricultural plots sent to Revenue Court for preparation of final decree — Notice of preparation of final decree should be

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given to parties — Final decree prepared without notice can be set aside by application under O. 9, R. 13 and also under inherent jurisdiction of Court. AIR 1963 All 361.

(61) Suit for arrears of rent decreed by trial Court but dismissed by High Court in revision in view of S. 6(2) of Bihar Act (3 of 1947) — Application for restoration can be entertained by High Court under S. 151, C. P. C. 1963 BLJR 800.

(62) Court cannot under its inherent powers restore a suit dismissed under O. 7, R. 11 (c) even if good cause is shown. AIR 1956 Raj 164 (165) ** AIR 1955 Hyd 156 (157) : ILR (1955) Hyd 56 (DB). (It is open to a party aggrieved by a decree to file an appeal or seek for a review.) ** AIR 1968 Pat 48 (49) ** AIR 1962 Guj 59 (61) : (1962) 3 Guj LR 71 ** AIR 1959 Ker 406 (408) : 1958 Ker LT 1024.

[But see AIR 1954 All 719 (720) (DB) ** AIR 1957 All 825 (826) ** AIR 1939 All 452 (454) ** ILR 42 Pat 704.]

(63) Where an order rejecting plaint does not fall within the terms of O. 7, Rule 11 and is passed without any warrant of law, the plaint can be restored to file under the Court's inherent powers. AIR 1961 Bom 96 (97) : 62 Bom LR 945.

(64) Appeal which has been dismissed for default of payment of Court-fee on memorandum of appeal cannot be restored under Court's inherent powers. Remedy of appellant is to apply for review of judgment under Order 47, Rule 1 on payment of proper court-fee. AIR 1955 Pat 370 (371, 372): 34 Pat 723 (FB). (AIR 1950 Pat 358, **OVERRULED.**)

(65) Order 9, Rule 7 and Order 9, Rule 13 between them exhaust the whole gamut of situations that might arise owing to non-appearance of defendant during course of trial — There is no hiatus between reservation of judgment and pronouncing of it — No inherent power to be exercised for orders on lines of Order 9, Rule 7. **AIR 1964 SC 993 (1003, 1004, 1005):** (1964) 5 SCR 946. (F. A. F. O. No. 116 of 1959 dated 6th May 1963 (All), **REVERSED.)]**

(66) Copy application struck off for failure to furnish stamps — High Court in Appellate jurisdiction can direct restoration in exercise of its inherent powers. AIR 1959 Mad 406 (407): (1958) 2 Mad LJ 552.

[But see (1968) Ker LJ 837: 1968 Ker LT 959.]

Interim injunction and appointment of receivers. — (67) In cases falling within scope of S. 94 and O. 39, R. 1 and O. 40. there is generally no inherent power to grant injunction or to appoint a receiver. AIR 1955 Andhra 142 (143, 144) : ILR (1955) Andhra 143 (DB) ** 1957 Jab LJ 914 (915) ** AIR 1961 J and K 29 (30) (Case not falling under Rule in Code empowering Court to grant temporary injunction) ** AIR 1959 Ker 45 (46) : 1958 Ker LJ 1093 (DB).

[See also AIR 1964 Assam 81 (83) : ILR (1963) 15 Assam 448.]

(68) Order for temporary injunction under inherent powers in the course of the proceedings relating to the application to sue in forma pauperis cannot be passed before registering case since specific provisions in S. 94(c) read with O. 39 prohibit temporary injunction being passed at that stage. AIR 1952 Mys 76 (77) : ILR (1952) Mys 354 (DB).

[See also ILR (1968) 1 All 209.]

[But see AIR 1951 Cal 357 (358): ILR (1951) 1 Cal 635 (DB).]

(69) Order 39, R. 2(3) does not provide any relief to the party in whose favour the order of temporary injunction is passed. The object of such an order is to safeguard the rights of a party against a threatened invasion by the other party. If in disobedience of the order of injunction such rights are invaded during the pendency of the suit relief can only be granted to the aggrieved party by invoking the inherent power of the Court under S. 151, Code of Civil Procedure. AIR 1963 Raj 3 : 1961 Raj LW 217.

(70) In cases like arbitration proceedings, which fall outside scope of S. 94 read with O. 39, Court can grant temporary injunctions under its inherent powers. AIR 1956 Bom 598 (599) ** (1968) 70 Punj LR 354: 1968 Cur LJ 265 ** AIR 1967 J and K 75 (77) : 1966 Kash LJ 71 ** ILR (1966) Cut 400: 32 Cut LT 999 ** AIR 1965 J & K 35 (36, 37): 1965 Kash LJ 58 ** (1963) 67 Cal WN 603 ** AIR 1959 Cal 386 (387): 63 Cal WN 354 (DB).

[See however AIR 1949 Mad 45 (45, 46): ILR (1948) Mad 494.]

[But see ILR (1954) Madh B 284 (287) ** AIR 1945 Pat 483 (484, 485) : 24 Pat 496 (DB).]

(71) Issue of temporary injunction — Circumstances not covered by O. 39 — Court can issue injunction in its inherent jurisdiction (Majority view). **AIR 1962 SC 527 (532) :** 1962 Supp (1) SCR 450.

(72) Suit for injunction dismissed — Order issued maintaining status quo as it existed before suit for injunction filed — Stronger grounds than those justified for granting injunction have to be established. AIR 1967 J and K 13 (16) : 1965 Kash LJ 268.

(73) A's suit against B pending at appellate stage — C obtaining decree against B, attaching B's property — C neither necessary nor proper party to suit by A—Steps by C neither endanger rights of A nor do they wrongfully seek execution of decree by C — No injunction can be granted against C and in favour of A — The case is also not fit to issue injunction against C under inherent powers of Court under Section 151. ILR (1968) 2 Mad 541: (1968) 2 Mad LJ 544.

(74) Miscellaneous proceedings — Court has inherent power to grant temporary

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injunction — Injunction granted ex parte but vacated on the ground that it had no jurisdiction to pass such an order — Order vacating injunction must be deemed to pertain to jurisdiction under Sec. 151. AIR 1965 Mys 34 (35): (1964) 1 Mys LJ 242.

(75) Court in issuing an injunction to Court of co-ordinate jurisdiction staying its proceedings acts against express provision of Section 151. AIR 1951 Pepsu 78 (79, 80): 3 Pepsu LR 214.

(76) Rent Controller under West Bengal Premises Tenancy Act, 1951 as a Court has jurisdiction under Section 151, Civil P. C. to issue injunction in appropriate cases. (1959) 63 Cal WN 246 (248): ILR (1959) 1 Cal 261.

(77) The Chief Judge, Small Cause Court, Calcutta has no inherent jurisdiction to issue a temporary injunction in circumstances not covered by Chap. 37 of Rules framed under Section 9, Presidency Towns Small Cause Courts Act. AIR 1968 Cal 234 (237).

(78) Disobedience of injunction — Is punishable under Rule 2 (3) of Order 39, even where it is granted under Section 151. AIR 1968 Raj 212 (213): 1968 Raj LW 375.

(79) Apart from the provisions of the Code it is competent to the Court in exercise of its inherent power, to appoint a Receiver notwithstanding the limitations in Order 40 Rule 1 (2). AIR 1965 Andh Pra 143 (156): (1964) 2 Andh WR 197 (DB).

Interim reliefs — (80) Courts, apart from powers conferred by Code itself to grant interim reliefs such as attachment before judgment. Interim injunctions and appointment of receivers have no inherent jurisdiction in the matter. AIR 1953 Mad 420 (421): ILR (1953) Mad 922 (DB).

[But see AIR 1957 Trav-Co 286 (286): ILR (1956) Trav-Co 869.]

(81) Appeal disposed of by High Court. No application for leave to Supreme Court yet filed — Still High Court has jurisdiction under Section 151 to pass interim orders ordering the parties to maintain status quo regarding the matters in dispute. AIR 1964 Orissa 72 (73) : 29 Cut LT 554 (DB).

(82) Court cannot pass under inherent powers order for payment of interim maintenance when claim for maintenance is fully contested. AIR 1955 Mad 571 (575) ** AIR 1953 Mad 420 (421): ILR (1953) Mad 992 (DB).

(83) Grant of interim maintenance to wife — When there is no difficulty in assessing reasonable maintenance and marriage is not hotly contested, Court should grant interim maintenance by invoking powers under S. 151. AIR 1968 Cal 305 (308).

(84) Court can pass an order granting interim maintenance to the wife while the suit for arrears of maintenance and future maintenance instituted by her is pending, when the wife succeeds in establishing a prima facie case with overwhelming documentary evidence in the hand-writing of the husband describing or addressing her to be a wife. AIR 1968 Cal 405 (406): 73 Cal WN 78 (DB). (AIR 1953 Mad 420 and AIR 1959 Mys 152, Not foll.)

(85) Interim maintenance — Power of Court to grant — Does not flow from Section 151 — Power is attracted with reference to the Hindu Adoptions and Maintenance Act, 1956 as also the general provisions of Hindu law. AIR 1968 Cal 567 (571) (DB).

(86) In a suit by a wife claiming separate maintenance against her husband on the ground of cruelty no interim maintenance should be given to the wife unless she establishes a prima facie case of cruelty of the husband on her. AIR 1960 Orissa 157 (158): 26 Cut LT 159.

(87) Court cannot pass under inherent powers order for payment as interim maintenance of larger amount than that admitted by defendants. AIR 1954 Trav-Co. 123 (123, 124).

(88) Inherent power under Section 151 relates to matters of procedure — Section does not apply to interlocutory order going beyond scope of suit — Right to get subsistence allowance not being related to matter of procedure, order under Section 151 cannot be made. AIR 1966 Cal 603 (605).

(89) Application under Section 25, Guardians and Wards Act — Court has inherent power to make interlocutory order for minor's interim custody. AIR 1962 Guj 227 (228): (1962) 3 Guj LR 566.

(90) High Court has no jurisdiction to entertain petition for grant of interim orders of interlocutory nature before the results of election are declared and an election petition is filed before it. AIR 1968 Pat 49 (49): 1967 BLJR 459 (DB).

Remand. — (91) Appellate Court has inherent power of remand in cases not covered by Order 41, Rule 23. AIR 1956 Bom 246(247)** AIR 1958 All 562 (563) ** AIR 1958 Manipur 22 (23, 25, 26) ** AIR 1957 Him Pra 61 (64) ** AIR 1969 J and K 22 (23): 1969 Kash LJ 16. (Order of attachment before judgment — Remand by District Judge on appeal — Order of remand, held, was one under Section 151 and not under Order 41, Rule 23.) ** 1968 Jab LJ 383 ** AIR 1967 Pat 378 (380). (But power cannot be resorted to in respect of matters regarding which there are specific provisions in the Code.) ** 1964 All WR (HC) 625 (628) (DB) ** (1963) 67 Cal WN 334. (There is no provision under Order 41, Civil P. C. or any where else what direction the Appeal Court is expected to give in a case where there is a remand ex debito justitiae i.e. under Section 151, Civil P. C.) ** 1963 Ker LT 444 ** (1963) 1963 Cur LJ 291 (Punj) **

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(1962) 3 Guj LR 651. (Amendment of written statement in appeal — Additional issue raised — Appellate Court to have recourse to O. 41, Rules 24 and 25 — Exercise of inherent power not justified.) ** AIR 1961 Manipur 10 (11, 12) ** (1961) 3 Orissa JD 308 ** AIR 1960 All 655 (655, 656): 1960 All LJ 586 ** AIR 1960 Bom 543 (547): 62 Bom LR 341 ** ILR (1960) Cut 118 ** (1960) 2 Orissa JD 82 ** AIR 1960 Pat 41 (43): 1959 BLJR 316 ** AIR 1959 Madh Pra 384 (387): 1959 MPLJ 1000.

[See also AIR 1966 Pat 422 (424). (Grounds on which remand felt necessary specifically covered by Rule 23 or R. 25 of Order 41 — Question of resort to inherent powers for remand does not arise: AIR 1957 Raj 71, Doubted.) ** AIR 1966 Pat 142 (143). (Remand against specific provisions of Order 41, Rr. 27 and 28 cannot be ordered in exercise of inherent powers.) ** 1958 Andh L T 500 (503).]

[See however AIR 1931 Mad 791 (791).]

(92) When the remand order is silent as to the provisions of law under which it was passed it must be presumed to be referable to the specific provisions of the Code, viz., Order 41, Rule 23, unless the contrary intention is established from the facts of the case. AIR 1969 Andh Pra 216 (220).

(93) When there is no grievance by a party that full opportunity to lead evidence was not given nor any prayer for amendment of pleadings was made, a Court is not justified suo motu to order remand of the case to allow them to lead additional evidence or to amend the pleadings. 1962 Jab LJ 371.

(94) Remand not to be granted where defect in proceedings is due to default or negligence of party who will benefit by remand. AIR 1964 Orissa 250 (251).

(95) Suit based on cash consideration — Execution admitted but cash consideration denied and not proved — Plaintiff not entitled to any relief on basis of admission by debtor as to previous account and part payment — Remand to give fresh opportunity to plaintiff to prove previous account would be justified. AIR 1963 Madh Pra 15 (16, 17): 1963 Jab LJ 113.

(96) That parties could have led better evidence is not sufficient ground for remand — Circumstances justifying remand not present — Court ordering remand acts illegally — Inherent powers cannot be invoked for remand. ILR (1963) Cut 482.

(97) The Mysore High Court has amended Rule 23 of Order 41 bringing within its scope the power to remand not only in cases where the trial Court had disposed of the suit on a preliminary issue but also in all cases in which the appellate Court while setting aside the decree of the trial Court considers it necessary in the interest of justice to remand the case. Hence, the source of the power to make a remand order is Rule 23 of Order 41 and not Section 151. A mistaken reference to Section 151 would not however make any difference to the substance of the matter. AIR 1968 Mys 266 (267): (1968) 1 Mys LJ 288.

Joinder of parties.—(98) Court has inherent power to ascertain whether or not proper parties are before it. AIR 1954 All 11 (12) (DB) ** (1906) 33 Cal 927 (932) (DB) ** (1913) 40 Cal 955 (959, 960) (DB) ** (1888) 10 All 223 (239) (FB) ** (1958) 62 CWN 290: ILR (1959) 1 Cal 369. (Addition of auction purchaser.)

[See also AIR 1960 Ker 342 (343): 1960 Ker LT 526.]

(99) Court has inherent power to add proper parties at any stage. AIR 1955 Bom 39 (42): ILR (1954) Bom 1422 (DB) ** AIR 1954 Pat 61 (62) ** ILR (1947) 1 Cal 22 (29) (DB) ** AIR 1941 Lah 402 (403, 404): ILR (1942) Lah 603 (DB) ** AIR 1959 Punj 277 (287): 61 Pun LR 326 (FB). (Joinder of parties in appeal—Apart from Order 41, Rule 20 Court can add party.) ** (1968) 70 Pun LR 883. (Joinder of parties in appeal.) ** 1965 Jab LJ 781 ** AIR 1961 J and K 9 (11) (DB). (Certain persons not added as respondents — Addition of such parties in appeal after expiry of period of limitation under Section 151 is allowed.)

(100) The Court is not to invoke its inherent powers under Section 151, for the purposes of impleading the legal representatives of a deceased respondent if the suit had abated on account of the appellant not taking appropriate steps within time to bring the legal representatives of the deceased party on the record and when its application for setting aside the abatement is not allowed on account of its failure to satisfy the Court that there was sufficient cause for not impleading the legal representatives of the deceased in time and for not applying for the setting aside of the abatement within time. **AIR 1964 SC 215 (219):** (1964) 3 SCR 467.

(101) Where an application for bringing the heirs and legal representatives of one of several plaintiffs-respondents has been dismissed and the appeal qua that plaintiff has abated, the appellate Court cannot permit the heirs and legal representatives of the deceased plaintiff to be brought on record in exercise of its powers under Section 151 read with Order 41, Rule 20. AIR 1959 Bom 221 (224, 225): 60 Bom LR 715 (DB).

(102) Suit against dead person — No amendment for substitution of another person will be allowed— Suit is a nullity. AIR 1964 Mys 293 (295): (1963) 2 Mys LJ 341.

Substitution of parties — (103) Appeal filed in name of dead person is a

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nullity and cannot be resuscitated either under Order 1, Rule 10 or Sections 151 and 153 by addition of legal representatives to be substituted as appellants. AIR 1961 Punj 57 (58): 62 Punj LR 776 (DB).

Stay of proceeding — (104) Court can under its inherent powers stay its own process except where its jurisdiction in that respect is taken away. AIR 1951 Mad 321 (322) ** AIR 1958 Andh Pra 156 (157) ** 1957 Jab LJ 696 (697) ** (1901) 5 Cal WN 781 (796) (SB) ** AIR 1961 Ker 178 (179): 1960 Ker LT 1251.

[See however AIR 1946 Nag 428 (431): ILR (1946) Nag 908.]

(105) Court can stay execution of decree on application for leave to appeal to Privy Council or on special leave thereto. AIR 1925 Sind 216 (217) (DB) ** AIR 1933 All 18 (18) (DB) ** AIR 1931 Cal 79 (81) (DB).

[But see AIR 1954 Orissa 114 (116, 117) (DB) ** (1913) 40 Cal 955 (959) (DB).]

(106) High Court has inherent jurisdiction to stay operation of order passed by it under Article 226 of Constitution in expectation of application for leave to appeal to Supreme Court. AIR 1953 Hyd 73 (76): ILR (1953) Hyd 59 (DB) ** AIR 1957 Manipur 35 (35).

[See AIR 1954 Raj 301 (303): ILR (1955) 5 Raj 121 (DB) ** AIR 1953 Assam 159 (160) (DB).]

[See also AIR 1957 All 505 (519, 520). (Per Beg J. — Desai J. contra.)]

(107) Court passing decree cannot order stay of execution under inherent powers in derogation of provisions of Order 41, Rule 5 (3). AIR 1945 Oudh 96 (101) (DB) ** ILR (1961) 2 All 224.

(108) Order of stay of execution proceedings — Not communicated to the Court — Court does not lose jurisdiction to deal with execution — Even after such order is brought to its notice, it had power to set aside proceedings taken between time when stay order was issued and time when it was brought to its notice, if it is asked to do so and it considers that it is necessary in interest of justice that interim proceedings be set aside — Where no such steps are taken to set them aside they remain good. **AIR 1967 SC 1386 (1390):** (1967) 3 SCR 84.

(109) Court has inherent powers to stay suit pending decision in connected proceeding, apart from Section 10. AIR 1956 Cal 33 (35) ** (1968) 16 Law Rep 469: (1969) 1 Mys LJ 32 ** AIR 1967 Orissa 196 (196): 34 Cut LT 126 ** AIR 1966 Cal 382 (386): 70 Cal WN 375 (DB) ** AIR 1966 Orissa 53 (54): 32 Cut LT 563 ** 1964 Kash LJ 66 (J and K) ** AIR 1962 Cal 88 (91): 65 Cal WN 786 ** 1961 MPLJ 533: ILR (1959) Madh Pra 791 ** AIR 1960 Cal 45 (46. 47): 64 Cal WN 269 ** AIR 1960 Madh Pra 169 (170, 171): 1960 MPLJ 967 ** (1949) 1 Orissa JD 496 (499) ** 1958 Andh LT 956. (But in considering whether such an order could be made, all the relevant circumstances and the conduct of the parties must be taken into account.)

[See AIR 1957 Assam 120 (122): ILR (1955) 7 Assam 560.]

[See also AIR 1966 Bom 216 (217): 1965 Mah LJ 823 ** (1963) 1963 Cur LJ 131 (Punj). (Stay refused under inherent powers as it would not serve ends of justice.) ** AIR 1962 Punj 16 (17).]

[But see AIR 1940 Lah 85 (87.)]

(110) Order restraining party to proceed with suit or other proceedings — Power of Court to issue — A filing suit against B at place X — B, relying on contract between them, filing counter-suit against A at place Y — Court at Y issuing order restraining A from proceeding with his suit at X — Order held not justified on facts and set aside. **AIR 1962 SC 527 (534, 535, 536, 537):** 1962 Supp (1) SCR 450. (Decision in Misc. Civil Appeal No. 26 of 1954, dated 10-5-1955 (MB), **REVERSED.** ILR (1883) 24 Ch. D 531, Relied on; AIR 1954 Bom 176: ILR (1954) Bom 334: 55 Bom LR 934, **OVERRULED.**)

(111) Section 34, Arbitration Act does not apply to the case of a foreign arbitration, the Court can in a proper case, exercise the cognate or similar power, possessed by it under Section 151 of the Code of Civil Procedure. AIR 1960 Cal 47 (55): 63 Cal WN 717 (DB).

(112) Application by A against C and D to Revenue Officer under Jammu and Kashmir Land Revenue Act, for partition of certain land — D and one more person, alleged to be adopted son of a person in possession of suit land, filing civil suit against A for declaration of title and injunction on grounds of adverse possession.

Held, proceedings in the civil suit could not be stayed either under S. 10 or S. 151. AIR 1965 J and K 99 (100).

(113) Bhagchasi case filed by 'A' on 4th June, 1966 for declaration of bhagtenancy right under Land Reforms Act — Opposite party filing title suit on 7th July, 1966 for permanent injunction against A as a trespasser — 'A' filing application for stay of suit until disposal of bhagchasi case held that in absence of specific provision in Orissa Land Reforms Act corresponding to S. 11-A (2) of Relief Act there was no particular reason to invoke Section 151 of C .P. Code unless special reasons were made out. 34 Cut LT 640: ILR (1968) Cut 406.

(114) Proceedings by husband for restitution of conjugal rights — Order under Section 24, Hindu Marriage Act for payment to wife of pendente lite maintenance and litigation expenses — Enforcement of — Court can stay proceedings

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for restitution of conjugal rights under inherent powers till the payment of amount. AIR 1961 Punj 42 (44, 45): 62 Pun LR 575 ** AIR 1969 Mys 76 (77): (1968) 2 Mys LJ 127 ** AIR 1963 Madh Pra 259 (260): 1963 MPLJ 346.

(115) Suit against foreign firm based on contract containing an arbitration clause entered into foreign country — Application under Section 34, Arbitration Act by foreign firm — Court has inherent powers to stay suit — By Exception 1 to Section 28 of Contract Act, the contract is not rendered illegal — Foreign firm cannot be denied benefit of Section 151. (1966) 70 Cal WN 199.

(116) Once the conditions of S. 10 are fulfilled, the operative part of the section comes into play so as to stay the trial of the suit. The inherent powers under S. 151 cannot be used to impose terms while staying the trial of a suit under S. 10. AIR 1963 Andh Pra 14 (15): (1962) 2 Andh WR 257.

(117) Where act is both civil wrong and crime and suit for damages and also criminal case is filed, stay of suit is desirable — But where both proceedings are not based on same cause of action stay of suit is not justified — Where party waits till suit has reached advance stage, Court would be justified in refusing stay on ground that it would be unfair to other party. 1966 All LJ 811.

(118) There is nothing in the Code of Civil Procedure which confers jurisdiction on civil Courts to stay proceedings pending in Criminal Courts between the parties to the civil litigation. AIR 1960 Ker 148 (148): 1960 Cri LJ 593: 1959 Ker LT 1036.

(119) Court can under its inherent powers stay proceedings in execution of decree in independent suit to serve interests of justice. AIR 1955 Andhra 4 (5).

(120) Suit filed under Order 21, R. 103 to establish title to property of plaintiff — Stay of execution of decree sought to be executed should be allowed. AIR 1963 Tripura 54 (55).

(121) Claim suit against execution of decree for costs — Court competent to entertain suit under Section 15 read with Section 6, can stay execution of decree — Decree whether passed by Superior Court is immaterial. AIR 1969 Andh Pra 236 (237).

(122) Appellate or Revision Court has inherent power to stay further proceedings in suit in lower Court apart from Order 41, Rule 5. (1904) 31 Cal 722 (724) (FB) ** AIR 1932 All 655 (656) (DB) ** AIR 1921 Pat 328 (329, 330) (DB) ** AIR 1932 All 238 (238): 54 All 344 (DB) ** AIR 1931 Bom 384 (384): 55 Bom 801 (DB).

[See also AIR 1961 Mys 83 (86): 39 Mys LJ 681 (DB). (Revision against order restoring suit dismissed for default—Revisional Court ordering lower Court not to pass judgment till disposal of revision — Judgment passed before communication of order is not nullity.)]

(123) Where appeal has been preferred to Privy Council, High Court can under its inherent powers, stay further proceedings in trial Court apart from Order 45, Rule 13. (1948) 52 Cal WN 209 (211) (DB) ** AIR 1954 Raj 301 (303): ILR (1955) 5 Raj 121 (DB) ** AIR 1934 Lah 238 (238, 239).

[But see AIR 1934 All 585 (586): 56 All 907 (DB).]

(124) Leave to appeal to Supreme Court granted to petitioner against order refusing to issue certiorari to quash certain notifications under Section 68-G, Motor Vehicles Act and mandamus commanding State and other Transport Authorities not to interfere with his right to ply his stage carriage on certain route — High Court has no jurisdiction to grant interim relief to petitioner under Order 45, Rule 13 or Section 151 to enable him to ply his stage carriage on route concerned during pendency of Supreme Court appeal. AIR 1961 All 619 (623, 625, 626, 627, 629, 630): 1961 All LJ 571 (FB). (AIR 1955 All 589. **OVERRULED** — Per Desai, C. J. and Jagdish Sahai J.; Bishambhar Dayal, J. contra.)

(125) Decree of first appellate Court becoming final, not having been disturbed in second appeal — Application for stay of execution during pendency of review application not maintainable — Provision of Section 151 not attracted. AIR 1968 All 362 (363): 1968 All LJ 733 (DB).

(126) Court in U. P. is not competent under section to issue stay order to Court in another province. AIR 1938 All 434 (434): ILR (1938) All 650 (DB).

(127) In proper case High Court has power under this section to direct stay of collection of arrears of income-tax pending disposal of reference under Section 66 (2), Income-tax Act. AIR 1957 Andh Pra 672 (674).

(128) A money-suit by a landlord against his tenant for arrears of rent for a certain period cannot be stayed under Sections 10 and 151, C. P. C., pending disposal of the tenant's application before the Rent Controller under Ss. 5 and 8 of the Orissa House Rent Control Act for fixation of fair rent. The proceeding before the Rent Controller is not a suit and the subject-matter of inquiry in the two proceedings is not the same. AIR 1967 Orissa 172 (173): ILR (1967) Cut 321.

(129) Application under S. 34, Arbitration Act for stay of hearing in second appeal on ground that copy of award had since been filed by Arbitrator in Court — Granting stay would be contrary to Section 34 — Application not maintainable. AIR 1965 Pat 239 (249).

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Setting aside execution sales. — (130) Courts have inherent power to set aside or refuse to confirm execution sale in cases not provided for by Order 21, Rules 89 to 91. AIR 1955 Bom 337 (337, 338): ILR (1955) Bom 649 ** AIR 1942 Lah 153 (160): ILR (1942) Lah 559 (FB) ** (1893) 20 Cal 8 (11): 19 Ind App 154 (PC) ** AIR 1968 Madh Pra 196 (199): 1968 MPLJ 356 (DB) ** AIR 1966 Mad 84 (85): (1965) 2 Mad LJ 197 ** 1962 MPLJ 872: 1963 Jab LJ 52 ** AIR 1960 Mad 499 (501): (1960) 2 Mad LJ 93.

[See AIR 1928 Nag 265 (272): 24 Nag LR 127 (FB).]

[But see AIR 1942 Bom 306 (308): ILR (1942) Bom 704 ** AIR 1941 Mad 399 (401) ** AIR 1932 All 403 (404) (DB).]

(131) In cases covered by provisions of Rules 89 to 91 of Order 21 Court has no inherent power to set aside or refuse confirmation of sale. AIR 1947 Mad 268 (270): ILR (1947) Mad 721 (DB).

[See also AIR 1968 Cal 604 (607, 608): 71 Cal WN 1044. (Application to set aside sale not falling under O. 21, R. 90, C. P. C. or Section 174, Bengal Tenancy Act or barred by limitation — Court cannot set it aside under inherent power.)]

(132) Where for the irregularity in conducting sale suit for compensation under Order 21, R. 87 lies the sale cannot be set aside under inherent powers. ILR (1958) Cut 337 (340).

(133) Court auction sale — Application by judgment-debtor for scaling down debt under Madras Agriculturists' Relief Act — Confirmation of sale by Court and then scaling down debt — The procedure held was erroneous and as there were equitable reasons the High Court should exercise its inherent jurisdiction in setting right the palpable injustice of all the items of property going to the auction purchaser when the confirmation of sale of a few items would have been sufficient to satisfy the scaled down debt as it stood eventually. (1967) 2 Andh WR 260: (1967) 2 Andh LT 273.

(134) Application under Order 21, Rule 91 must be filed within time prescribed by Article 166 of Limitation Act (1908)— No jurisdiction to invoke powers under Section 151 after expiry of prescribed period. 1968 MPLJ 293: 1968 Jab LJ 394.

(135) Sale by Court in execution of decrees — Same property sold twice — Court can set aside second sale in exercise of its inherent powers, though other remedy exists under the Code. ILR (1963) Cut 24: 29 Cut LT 159.

Striking out defence .— (136) Court has inherent power to strike out defence apart from specific provisions contained in Order 11, Rule 21. AIR 1956 Bom 245 (245, 246) ** ILR (1954) 2 All 153 (161, 162) (DB) ** AIR 1932 Mad 263 (264) ** AIR 1928 Oudh 262 (263) (DB) ** 1966 Cur LJ 69: ILR (1966) 1 Punj 617: 1965 Pun LR (Supp) 470.

[See however AIR 1947 Mad 92 (93): ILR (1947) Mad 397 (DB).]

(137) Court is not authorised to strike out defence under inherent powers if defendant's failure to appear was not on summons of plaintiff to appear as defendant but as witness for him. AIR 1952 Raj 157 (157, 158).

(138) Where defendant fails to make deposit as required under Section 12 (4) of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, Court cannot strike out defence. (1951) 4 Sau LR 90 (94).

(139) In striking out defence for failure to deposit rent as directed by order under Section 14 (4), West Bengal Premises Rent Control (Temporary Provisions) Act, 17 of 1950, Court does not act improperly. (1957) 61 Cal WN 835 (837).

(140) Normally, the Court in the exercise of its matrimonial jurisdiction cannot order that the defence of a party should be struck off for failure to pay interim maintenance unless the refusal is contumacious. AIR 1960 Bom 315 (318): 62 Bom LR 47.

(141) Application for judicial separation by wife — Order for payment of expenses of suit and alimony pendente lite against husband — Disobedience by husband — Order for striking out defence of husband — Not justifiable under Section 151, C. P. C. (1964) 5 Guj LR 417.

(142) Striking out a defence is a serious matter, and it has to be done after taking every circumstance into consideration. There can be no anticipatory or conditional order for striking out a defence for the simple reason that the Court has got to consider the materials as they exist on the date when the order striking out is passed. (1964) 77 Mad LW 488: (1964) 2 Mad LJ 131.

(143) Director of Company failing to appear in Court when so required under Order 29, Rule 3 — Court is competent to make suitable order under Section 151 as may be necessary for ends of justice or to prevent abuse of process of Court — But unless there is finding of collusion between company and its director that former prevented latter from appearing in Court, company cannot be held constructively liable for director's default of non-appearance and company's defence cannot be struck off. **AIR 1966 SC 1899 (1902):** (1966) 3 SCR 856. (ILR (1966) 1 Punj 617, **REVERSED.)**

Issue and expenses of Commission.— (144) Court has no jurisdiction to direct party applying under Order 26, R. 15 for issue of commission to deposit prospective costs of opposite party even under Section 151. AIR 1956 Trav-Co 260

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(262): ILR (1956) Trav-Co 727 (DB) ** AIR 1955 Mad 654 (656): ILR (1956) Mad 361 (DB). (AIR 1949 Mad 490 and AIR 1955 Mad 179, **OVERRULED.**)

[But see AIR 1955 Raj 32 (32): ILR (1955) 5 Raj 68 (DB).]

(145) Court has no inherent powers under Section 151 to appoint a Commissioner to seize account books in the possession of the plaintiff, upon an application by the defendant that he has apprehension that they would be tampered with. Powers saved by S. 151 are not powers over substantive rights which a litigant possesses. Party has full rights over his account books. Court cannot seize them forcibly. It can summon them and if not produced, it can penalise the party and draw adverse presumption against him. **AIR 1961 SC 218 (220):** (1961) 1 SCR 884. (AIR 1959 All 707, **REVERSED.**)

(146) Under Section 151, read with Rule 82 of the Civil Rules of Practice, the Court has the power to direct additional fee to be deposited or paid to the Commissioner in appropriate cases. AIR 1960 Andh Pra 387 (387): 1959 Andh LT 722.

(147) Court has inherent power to order payment of further sum for expenses of commission. AIR 1947 Sind 1 (2): ILR (1946) Kar 349 (FB).

(148) If the party concerned asks the the Court to issue a commission for the examination of the party itself the Court has ample jurisdiction to put that party to terms under S. 151 and direct him to pay the expenses of the opposite party. which the opposite party might have to incur. 1968 All LJ 97 : 1967 All WR (HC) 836.

(149) A Court has jurisdiction to cancel suo motu its earlier order for the issue of commission for the examination of witnesses, and issue a fresh commission, if sufficient reasons exist. Even otherwise, the Court has inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. AIR 1968 Delhi 226 (228).

Other instances.—(150) Apart from S. 35 Court can under inherent powers award costs in suitable cases. AIR 1955 Orissa 65 (65) : ILR (1954) Cut 623 : 1955 Cri LJ 823 (SB).

(151) Interlocutory order staying another proceeding or granting injunction — Stay or injunction to continue if a certain sum of money is paid within a specified date and otherwise to stand vacated — Court having seisin of main proceedings can extend time, even after default, in exercise of its power under S. 151 read with S. 148. AIR 1965 Cal 308 (311) : 1965 (2) Cri LJ 89 (DB).

(152) Inherent powers cannot be exercised to extend time allowed by order allowing redemption under Section 16, U. P. Agriculturists' Relief Act, to deposit amount. AIR 1950 All 675 (681, 682) (FB).

(153) Courts may allow under inherent powers a chance to applicant to sue in forma pauperis to amend formal or technical defect in application. AIR 1955 Raj 78 (80): ILR (1953) 3 Raj 231 (DB).

(154) In suit which is essentially for possession and not for damages Court, to protect interests of plaintiff during pendency of suit, has jurisdiction to order defendant to furnish security and submit accounts. AIR 1954 All 113 (114): ILR (1954) 1 All 136 (DB).

(155) Where on rejection of plaint for deficiency of Court-fee plaintiff pays deficiency and pays for restoration, Court can under inherent power treat application as fresh suit under Order 7, Rule 13. AIR 1944 Oudh 327 (328): 20 Luck 268 (DB).

(156) Remedy against surety who in his security bond for restitution has not undertaken personal liability lies under Section 151. AIR 1943 PC 189 (191): ILR (1944) Kar (PC) 16 ** AIR 1964 Andh Pra 339 (341): (1964) 1 Andh WR 374 (DB) ** AIR 1962 Assam 23 (27): (1960) 1 Assam LR 243 ** AIR 1960 Mad 324 (325): (1960) 1 Mad LJ 148 ** AIR 1960 Punj 16 (18): ILR (1959) Punj 532.

(157) Where because of Court's failure to pass formal order of substitution of legal representatives, names of deceased appeared in decree and in consequence thereof also in memorandum of appeal against that decree, Court could order correction of both memo of appeal and decree even at that late stage under Sections 151, 152 and 153. AIR 1958 Madh Pra 307 (307).

(158) It is open to Court at any time, in exercise of its general power, to allow amendments to cure any defect in an execution petition. AIR 1957 Orissa 5 (7) (DB) ** AIR 1966 Cal 585 (587) (DB). (Change in name of decree-holder company — Substitution of name in execution proceedings.)

(159) Question to serve interrogatories arising in interlocutory proceeding under Section 24 of Hindu Marriage Act (1955)— If Section 141 has no application to interlocutory proceedings in a suit, Court can issue interrogatories in exercise of its inherent powers under Section 151. AIR 1967 Orissa 19 (22): 31 Cut LT 294.

(160) The jurisdiction to try a suit, appeal or proceeding by a High Court under the power reserved by Section 24 (1) (b) (i) arises only if the suit, appeal or proceeding is properly instituted in a Court subordinate to the High Court, and the suit, appeal or proceeding is in exercise of the power of the High Court transferred to it. Section 151 does not authorise the High Court to invest itself with jurisdiction where it is not conferred by law.

The High Court is not competent to assume to itself jurisdiction which it does

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no otherwise possess, merely because an "extraordinary situation" has arisen. **AIR 1965 SC 1449 (1450, 1451): (1965) 2 SCR 800.** (Observations of Narayana Pai, J. in (1962) 40 Mys LJ (SN) 1, Disapproved.)

(161) Amendment of written statement without leave of Court —, Inconsistency with previous written statement — Court can ignore the amendment. AIR 1961 Him Pra 46 (48).

(162) Where provision under which relief is sought is sufficiently wide to consider and afford relief claimed it is unnecessary in exercise of inherent powers to allow amendment of application to include another provision of law, under which also same relief may be claimed. AIR 1957 Pat 198 (199).

(163) Amendment of plaint to reduce suit claim in a case represented to a Court of competent pecuniary jurisdiction does not come within either Section 151 or Section 153 and such amendment which will deprive Court of jurisdiction will not be allowed. AIR 1943 Nag 293 (294): ILR (1943) Nag 603 (DB).

(164) Amendment of plaint — Suit heard and posted for judgment — Munsif allowing plaintiff to amend plaint in order to keep evidence in par with pleadings — In no circumstance amendment of plaint should be suggested and allowed merely because evidence and pleadings do not tally. AIR 1967 Orissa 58 (59) : 33 Cut LT 65.

(165) Decree not in conformity with judgment — Amendment must be allowed — Non-mention of costs in judgment — Decree mentioning costs — Decree must be amended so as to bring it in conformity with judgment. AIR 1966 Orissa 225 (226): (1965) 7 OJD 275.

(166) Scheme framed under Section 92, particularly one relating to Muslim Wakf, can be modified by application under Section 151. AIR 1940 Oudh 421 (423): 15 Luck 730 (DB).

(167) Amendment of scheme of trust — Application maintainable under Section 151 — Relief for removal of trustee can also be included provided prior sanction of Advocate General under Section 92 has been obtained. AIR 1966 All 509 (509).

(168) Court can, apart from Order 23, Rule 3, record or refuse to record compromise. AIR 1928 All 494 (496): 50 All 748 (DB).

(169) The language of Order 23, Rule 1, Civil Procedure Code, is unambiguous and cannot at all be taken to provide for withdrawal of a suit by a defendant. When the Civil Procedure Code gives power only to a plaintiff to withdraw a suit, the same powers cannot be conceded to a defendant by the use or application of Section 151, Civil Procedure Code (1908). AIR 1960 Andh Pra 590 (591, 592): (1960) 2 Andh WR 64.

(170) Execution of mortgage-decree — Property sold — Sale confirmed — Objection to delivery of possession to auction perchasser is not within purview of Section 47 — Order of executing court dismissing the objection was one under Section 151. AIR 1969 Orissa 144 (145): 35 Cut LT 287.

(171) Inherent power to order attachment before judgment — Trial Court has inherent jurisdiction to order attachment under Order 38, Rule 5 (3). AIR 1965 Ker 288 (292): 1965 Ker LT 341.

(172) Confirmation of sale — Suit by third party — Judgment-debtor found to have no saleable interest in property — Dispossession of auction-purchaser — Auction purchaser can recover purchase money from decree-holder — Remedy of auction-purchaser is not by application in execution or under Section 144 or 151 but independent suit — On recovery of money from decree-holder execution is revived. AIR 1964 Raj 140 (147): 1964 Raj LW 178 (DB). (AIR 1961 Raj 193, REVERSED.)

(173) Parties agreeing to case being decided on statement made by referee — 'Agreement not adjustment' within meaning of Order 23, Rule 3 — Party not debarred from resiling from agreement before referee makes statement — Such an agreement cannot be enforced in the same suit — Inherent powers cannot be invoked for enforcement of such agreement. AIR 1961 Punj 31 (33): 63 Punj LR 137.

(174) Where in a suit for gratuity and other claims, that Court gives a finding on a preliminary issue that the suit for gratuity is incompetent, the suit cannot be deemed to have been dismissed and the order is no bar to any amendment being allowed by the Courts under Order 6, Rule 17 or Section 151, regarding the claim to death-cum-retirement gratuity. AIR 1961 Punj 3 (5): 63 Pun LR 23.

(175) Sale of lunatic's estate—Sale can be effected by manager only after obtaining sanction of Court as required under Section 75, Lunacy Act — Court has no express or inherent power to receive offer for purchase and to communicate it to manager to ascertain views as regards its acceptability. AIR 1966 Mad 89 (93): ILR (1965) 1 Mad 274.

(176) Properties charged under maintenance decree — Charge is not extinguished even if property is sold in execution to satisfy claims of arrears of maintenance — Court in exercise of its inherent powers directed that other properties be first exhausted. AIR 1967 Mad 126 (127): (1966) 2 Mad LJ 245.

(177) Choice between two forums — Suit instituted in one forum returned — Same presented in other forum —Order returning plaint set aside in appeal —

Section 151 — Note 2 (contd.)

Plaintiff not entitled to return of plaint for presentation in Court of his first choice. There is no question of abuse of process of Court. AIR 1962 Mad 249 (250): (1962) 2 Mad LJ 83.

(178) High Court has jurisdiction to hold trials or part of a trial in camera or to prohibit excessive publication of a part of its proceedings. AIR 1967 SC 1 (10): (1966) 3 SCR 744.

(179) Liability of surety not deferred until remedies against principal debtor are exhausted — Decree obtained by creditor against debtor and surety directing creditor to first exhaust remedies against debtor — Direction held not justified under Order 20, Rule 11 (1) or S. 151, Civil P. C. AIR 1969 SC 297 (299): (1969) 1 SCJ 380.

(180) Abatement of partition suit can be set aside under inherent power at instances of legal representatives of deceased defendant. AIR 1960 Cal 291 (293).

(181) Where the Arbitration Act contemplates that the parties should follow the provisions contained in Chapter II, passing of an order under S. 25 which is in Chapter IV is not warranted by the application of the principle of inherent powers. AIR 1963 Guj 141 (143): (1963) 4 Guj LR 498.

(182) Even if time granted originally has expired Courts have ample jurisdiction to extend time though the application is filed after the expiry of the period fixed in the original order, in view of the provisions contained in Sections 148, 149 and 151. (1965) 2 Ker LR 137.

(183) In suitable and appropriate cases restitution can be ordered by the Court under its inherent jurisdiction and Section 144 is not exhaustive of the powers of the Court to order restitution. For instance, variation of a decree or the setting aside of the decree need not necessarily be in an appeal but it may be in a separate proceeding in which case restitution is ordered under inherent jurisdiction apart from the provisions under S. 144. AIR 1964 Mad 404 (406): 77 Mad LW 233 (DB) ** (1966) 2 Andh WR 144 (DB).

(184) Determination of compensation — Market value — Award of Court fixing market value of comparable lands, both in time and quality, serves as piece of evidence and can be looked into. But where no attempt is made by claimant in trial Court to produce award of trial Court in respect of land sought to be relied on as comparable with lands under acquisition he cannot be allowed to produce as additional evidence, appellate judgment of High Court in that case, in appeal filed against award of trial Court — Such evidence was not allowed either under Order 41, Rule 27, nor could on facts of case be admitted under S. 151 of the Code. (1967) 8 Guj LR 37 (DB).

(185) Bihar Buildings (Lease, Rent and Eviction) Control Act (III of 1947), Section 11-A — No inherent power can be exercised by Court to vary date fixed by statute for deposit of rent in Court when the statute has not conferred any discretion on Court in that respect. 1966 BLJR 1006 (1007): ILR 46 Pat 446.

(186) The High Court of Mysore which is a repository of the jurisdiction exercised by the former High Court of Mysore does not have inherent power to appoint a guardian for a Hindu minor in respect of his undivided interest in a joint family property. Nor does the proviso to Section 12 of the Hindu Minority and Guardianship Act (1956) confer such power on the High Court. Since it does not exercise any original jurisdiction, it cannot entertain a petition for appointment of such guardian. AIR 1968 Mys 178 (184): (1967) 2 Mys LJ 342 (DB).

(187) If circumstances warrant Court can give an opportunity to party to recall a witness for examining, cross-examining or re-examining in exercise of inherent powers. AIR 1966 Andh Pra 295 (296): (1966) 1 Andh WR 22.

(188) Arbitration — Umpire dying before filing of award without authorising anyone to file award on his behalf — Order for filing award — Court has inherent power to make. AIR 1959 Cal 84 (87): 63 Cal WN 382 (DB).

(189) Security bond to Court by judgment-debtor — Bond cannot be enforced under Section 145 — Bond can be enforced under Section 151 in execution proceedings. AIR 1966 Andh Pra 151 (152): (1965) 1 Andh LT 245 (DB). (AIR 1964 Andh Pra 339, foll.)

(190) Jurisdiction of executing Court to extend date of payment of first instalment — Section 151 can be invoked in appropriate case. AIR 1966 Pat 266 (268): 1966 BLJR 320.

(191) In an election petition, the Court has power to hear any person, besides those mentioned in Section 82 of the Representation of the People Act by virtue of its inherent power under Section 151 and Order 1, Rule 10, Civil P. C. Section 82 of the Act cannot be a bar. AIR 1968 J and K 13 (15): 1968 Kash LJ 23.

(192) Section 151 cannot be resorted to, to assist party to establish case by creation of evidence. AIR 1965 Orissa 72 (73).

Restitution — See Notes on Section 144.
Extension of time—See Notes on S. 148.
Rejection of plaint—See O. 7, R. 11.

3. Court cannot override general principles of law. — (1) No inherent power can be exercised so as to conflict with sound general principles of law. (1904) 26 All 407 (427) (FB) ** AIR 1957 Andh Pra 172

Section 151 — Note 3 (contd.)

(181): ILR (1957) Andh Pra 1 (FB) ** AIR 1962 Pat 219 (220): 1961 BLJR 836.

(1-A) Remitting of award under Section 16 (1) (c), Arbitration Act — Can be only for reconsideration — Order remitting award for re-submission after duly stamping and registration — No reconsideration involved — Order cannot be based on Section 16 (1) (c) — Not supported even by Section 14 (1), Section 13 (d) or Section 15, Arbitration Act or by S. 151. Civil P. C. **AIR 1962 SC 551 (554) :** 1962 Supp (1) SCR 475. (AIR 1928 Nag 166, **OVERRULED.)**

(2) Court has no inherent power to recall order previously made by it, or entertain application raising questions barred by general principles of res judicata. AIR 1927 Cal 57 (60) (DB) ** AIR 1924 Cal 830 (831): 51 Cal 715 (DB) ** AIR 1963 Punj 92 (95): 64 Pun LR 884.

[But see AIR 1961 Cal 118 (121) ** AIR 1947 All 477 (479) (DB). (Award set aside by trial Court but upheld by appellate Court — Consequential order of trial Court dismissing application for judgment on award becomes ineffective. Trial Court can under Section 151 declare that order ineffective and recall if it necessary in order to do justice between the parties.)]

(3) Court has no inherent powers to deal with matters over which it has no jurisdiction. AIR 1947 Oudh 232 (233): 22 Luck 207 (DB) ** (1909) 34 Bom 467 (483) (DB) ** AIR 1918 Mad 580 (584): 40 Mad 1069 (FB) ** AIR 1916 Mad 554 (554) (DB) ** AIR 1967 Ker 193 (194): 1967 Ker LT 1148 ** AIR 1962 All 624 (624).

(4) Obiter.— It is doubtful whether an application will lie under S. 151 Civil P. C. before a Division Bench of the High Court for a declaration that an order of a single Judge of the High Court issuing a rule nisi is null and void. AIR 1962 Mad 458 (471): 75 Mad LW 316 (DB).

(5) Court has always jurisdiction to determine whether it has jurisdiction. AIR 1915 Cal 49 (51) (DB) ** (1862) 1862 Marsh 99.

(6) When no such right is given by statute Court cannot, under its inherent powers, hear appeal or review its previous order. AIR 1950 Mys 55 (57) (FB) ** AIR 1957 All 67 (70) (DB) ** AIR 1957 Manipur 39 (47) ** ILR (1965) Cut 574 (582, 583).

[Compare AIR 1927 Cal 534 (536): 54 Cal 405 (DB).]

[See however AIR 1944 Nag 143 (149): ILR (1944) Nag 379 ** AIR 1929 Nag 185 (189, 190) (DB).]

[But see AIR 1936 Pesh 213 (214) ** AIR 1960 All 152 (156): 1959 All WR (HC) 651.]

(7) On a writ petition by A for cancellation of the order of allotment passed by the Director of Rehabilitation in favour of B the High Court cancelled the order in favour of B though he was not a party to the writ proceedings. Subsequently B filed a petition under Article 226 of the Constitution for impleading him as a party to A's writ petition and re-hearing the whole matter.

Held, that the High Court had not acted without jurisdiction in reviewing its previous order at the instance of B who was not a party to the previous writ proceedings. **AIR 1963 SC 1909 (1911).**

(8) Discharge of order for public examination made under Section 478 (1) of Companies Act, 1956 — Application for review — No review as there was no error apparent on face of record — Order not perfected — High Court has jurisdiction to recall order — Inherent powers could be exercised — Such powers not exercised for want of sufficient grounds. AIR 1965 Cal 372 (377): 69 Cal WN 938.

(9) Appellate Court remanding the case for fresh trial — Court also allowing amendment of plaint on payment of costs within a certain date and ordering that the appeal shall stand dismissed on default of such payment — Court must be held to have finally disposed of the matter and hence could not interpret that on a result of default the appeal stood dismissed — Such order is possible only under Section 151 or 152 or review. 1966 All LJ 1108.

(10) Written statement purporting to be by defendant filed in suit — Defendant himself filing another written statement containing inconsistent pleas and also a petition under Section 151, praying that the first statement should not be taken as it was a fabrication — Court dismissing the petition as not maintainable on the view that the question could be decided by the Court ultimately at the trial — Defendant moving successor Judge at trial to decide which of the two statements should be accepted and allow him to adduce evidence in the light of the second statement.

Held, that the dismissal of plaintiff's prayer on the view that to decide the question under Section 151 would amount to review of the order of the predecessor in office was wrong. 1963 BLJR 489.

(11) Where Court following Supreme Court decision modifies its previous order, review must be held to be one passed not under Order 47, Rule 1, but under the inherent powers of the Court. AIR 1963 Orissa 126 (127): 29 Cut LT 373 (DB).

(12) Hearing of application under O. 9, Rule 13 after disposal of appeal — Application is not competent — 'Trial Court can review its order and restore decree in its power under this section, if it has already set aside the decree without knowledge of dismissal of appeal. AIR 1967 Bom 310 (312): 68 Bom LR 461.

(13) Additional Director passing order in absence of parties and on ground not raised by parties at previous hearing — Order could be reviewed. AIR 1965 Punj 145 (146).

Section 151 — Note 3 (contd.)

(14) Apart from power given by statute itself Court has no inherent power to transfer a case. (1905) 32 Cal 875 (881) (DB) ** AIR 1934 All 677 (679).

[But see AIR 1924 Lah 306 (310) ** (1931) 133 Ind Cas 876 (876) (Lah).]

(15) High Court has no inherent power of revision over proceedings in Subordinate Courts. AIR 1938 FC 1 (3): ILR (1939) Kar (FC) 1: 1939 FCR 13 ** AIR 1935 All 599 (600): 57 All 977 (FB). (**OVERRULING** AIR 1928 All 108: 50 All 335.) ** AIR 1958 Mad 462 (463): ILR (1958) Mad 417.

[See however AIR 1942 Oudh 392 (394).]

[But see ILR (1961) 1 Cal 125. (Decree for ejectment against thika tenant passed by Rent Controller — Compensation for structure not assessed by following correct procedure — Tenant not having knowledge of the assessment.

Held, Rent Controller should under Section 151 have set aside the assessment.)]

(16) There is no inherent power to alter because of subsequent events a decree or certificate which was correct when it was made or given. AIR 1956 Bom 343 (345) (DB) ** 1951 Ker L Tim 207 (208) ** AIR 1940 FC 7 (8): ILR (1940) Kar (FC) 45: 1940 FCR 31.

(17) Court has no inherent power to force unwilling party to submit to blood test. AIR 1951 Mad 910 (1) (910): ILR (1952) Mad 150 ** AIR 1968 Bom 388 (389): 70 Bom LR 222.

(18) Inherent power cannot be exercised to compel a party to a medical examination. AIR 1955 Andhra 207 (207) ** AIR 1955 Mad 546 (547): ILR (1956) Mad 66 ** AIR 1966 Mad 443 (446): (1966) 2 Mad LJ 383.

(19) Sale of land by landowner in favour of tenant — Suit to pre-empt sale — Suit decreed with consent — Dispossession of tenant in execution of decree also with consent — Subsequent application by tenant to restore possession on ground that sale was not pre-emptible under Section 17-A of Punjab Act (10 of 1953) — Executing Court could not be deemed to possess any inherent power to order restoration of possession on payment of the pre-emption money. ILR (1965) 2 Punj 590.

(20) Section 151 of the Civil Procedure Code could confer no power on a Court to vary consent decree under which a limited estate was given before the coming into force of the Hindu Succession Act, 1956, into a decree granting her an absolute right. The section is wide as it cannot grant power to any Court to grant such a substantial declaration. AIR 1961 Mad 32 (33): (1960) 2 Mad LJ 157 (DB).

(21) Grounds for remitting award — Court cannot add — Award not on stamped paper — Order remitting award on that ground not legal. ILR (1964) 1 Punj 816.

(22) Hindu Law — Partition — Mother remaining ex parte in suit and not filing appeal but filing application in appeal for allotment of share to her.

Held, so long as the application was not opposed to any express provision of law Section 151 could be invoked by her. (1966) 5 LR 236: (1966) 1 Mys LJ 1.

(23) Resort cannot be had to the inherent powers of the Court under Section 151 for taking measures which affect the fundamental rights of a citizen in the absence of express provisions of law in that respect. AIR 1964 All 203 (208).

(24) Inherent power cannot be used to correct an erroneous view of law. 1966 BLJR 314: ILR 45 Pat 1401.

(25) Where relief claimed could not be given on general equitable grounds, it is doubtful whether relief by way of restitution can be given in exercise of inherent powers. AIR 1965 Andh Pra 60 (63): (1964) 2 Andh WR 487. (Sales tax collected from assessee declared illegal by Court — Amount collected refunded — Claim for interest on sales tax amount from date of collection to date of decree — Claim is not maintainable.)

4. Ends of justice. — (1) Inherent powers can be used only to secure ends of justice or to prevent abuse of process of Court. AIR 1956 Madh B 125 (127) ** AIR 1921 PC 80 (84): 48 Ind App 76: 48 Cal 481 ** AIR 1938 Bom 199 (205) (SB) ** (1968) 70 Punj LR 154 (DB). (Inherent jurisdiction cannot be invoked for reviving application for execution which cannot possibly be proceeded with result in any benefit to decree-holder.) ** AIR 1966 J & K 1 (8): 1966 Kash LJ 49 (DB). (Order of reference — Application for, not signed by all parties to suit — All parties participating in arbitration proceedings upto last — Non-signatories having no grievance against award.

Held, to allow signatories to attack award would be against all canons of substantial justice, equity and fair play.) ** ILR (1961) 1 Cal 791.

[See also AIR 1968 All 167 (168). (Omission of counsel's name in cause list — Such name with names of parties and case number shown in list put by the Court — No miscarriage of justice — Rehearing cannot be granted.) ** AIR 1961 Pat 103 (106). (Contribution — Suit for — Joint decree for costs against A and B — B not contesting suit in any way — Payment of full decretal amount by A — A cannot in equity recover from B, B's share of cost.)]

(2) Application for permission to sue as pauper — Application not rejected under Rule 5 of Order 33 — Notice to opposite party — Court has jurisdiction to entertain objection by opposite party regarding valuation of relief, jurisdiction of trial Court and limitation and reject application.

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AIR 1966 All 84 (87): 1965 All LJ 726 (FB).

(3) Ends of justice require that an injury should be remedied and needless expense and inconvenience to parties avoided. AIR 1954 Andhra 40 (43) ** AIR 1949 Pat 259 (261): 27 Pat 949 (DB) ** AIR 1923 Bom 419 (419) (DB) ** AIR 1934 Pat 683 (685) (DB) ** AIR 1961 Raj 191 (193): 1961 Raj LW 352. (Sale certificate — Misdescription of property — Court has power to amend.)

(4) Claim for compensation for death under Section 110-A, Motor Vehicles Act dismissed by Tribunal — One of claimants not having appealed added as respondent to appeal under Section 110-D — Decision of Tribunal reversed and claim allowed — High Court in exercise of its power under Order 41, Rule 33 read with Section 151, Civil P. C. can award compensation in favour of respondent claimant in order to do complete justice between parties. AIR 1969 Delhi 183 (193) (DB).

(5) Suit dismissed under Order 17, R. 3 — Application under Order 9, Rule 9 for restoration also dismissed — Appeal against dismissal of application allowed — Revision against appellate order allowed — Appeal filed against dismissal of suit dismissed at instance of plaintiff — After order of Revisional Court application for revival of appeal.

Held, appeal could be revived. AIR 1965 Madh Pra 21 (23): 1967 MPLJ 625.

(6) Court will remedy an obvious injustice by refund of court-fee levied. AIR 1956 Nag 281 (285): ILR (1956) Nag 296 (DB) ** AIR 1957 Madh B 160 (160, 161) ** AIR 1957 Madh B 136 (137) ** 1957 Andh LT 258 (259) ** AIR 1955 Bom 332 (333): ILR (1955) Bom 540 (DB) ** AIR 1966 Goa 1 (16) (FB). (Refund of court-fee in Goa where Civil P. C. was not applicable.) ** AIR 1969 Ker 203 (204): 1968 Ker LT 705 ** AIR 1968 Delhi 249 (261) (DB). (Excess court-fee paid under compulsion or bona fide mistaken impression.) ** AIR 1967 Mad 231 (232): (1965) 2 Mad LJ 554. (Refund of poundage.) ** AIR 1966 Mad 423 (424): (1966) 2 Mad LJ 159. (Court has limited inherent power of refund.) ** (1962) 2 Mad LJ 186. (Withdrawal of revision petition before it was taken on file — High Court has inherent power to order refund of fees in such circumstances.) ** AIR 1961 Punj 79 (80, 81) ** AIR 1960 Andh Pra 34 (35): (1959) 1 Andh WR 389 (DB).

[See AIR 1936 Rang 208 (210): 14 Rang 173 (FB). (AIR 1926 Rang 129: 4 Rang 66, **OVERRULED.**)]

[See also AIR 1961 Pat 390 (393): ILR 39 Pat 550 (FB). (Court-fee paid on review application allowed on grounds other than those of mistake of law and fact — Court cannot grant refund under Section 151.)]

[See however AIR 1964 Him Pra 29 (30) ** AIR 1961 Guj 31 (32, 33): (1960) 1 Guj LR 193. (Unnecessary appeal numbered and registered but withdrawn before admission — Refund cannot be ordered.) ** AIR 1957 All 734 (737) ** AIR 1955 Cal 52 (56) ** AIR 1953 Bom 73 (73): ILR (1953) Bom 170 (DB) ** AIR 1949 Mad 895 (896) ** AIR 1946 Oudh 9 (10).]

[But see ILR (1954) 4 Raj 727 (730) (DB) ** AIR 1935 Cal 707 (709) (DB) ** (1966) 79 Mad LW 392: (1966) 2 Mad LJ 238.]

(7) When a memorandum of appeal is presented with proper court-fees but out of time, with an application for condonation of delay and if the delay is not condoned, the Court cannot under its inherent powers give a certificate for refund of the court-fees paid. AIR 1966 Cal 267 (271, 272): 69 Cal WN 1025 (FB). (AIR 1934 Cal 615, **OVERRULED;** 55 Cal WN 417, Approved.)

(8) Inherent power to make order for refund of court-fee must be confined to cases authorised by precedent and cannot arbitrarily be extended. AIR 1957 Andh Pra 255 (256): ILR (1956) Andhra 658.

(9) Sale in execution — Auction-purchaser deprived of possession by third party — Auction-purchaser not entitled to recover amount from decree-holder. AIR 1961 Raj 193 (196): 1961 Raj LW 553.

(10) Revision to High Court under Madras General Sales Tax Act — Remand by High Court to Tribunal — Order for refund of court-fees cannot be made. AIR 1961 Andh Pra 86: (1960) 2 Andh WR 244 (FB).

(11) No question of refunding court-fee under inherent power can arise where same had been properly paid for instituting a proceeding. AIR 1958 All 766 (769) (FB). (AIR 1937 All 284, **OVERRULED.**) ** AIR 1958 Punj 38 (42): ILR (1958) Punj 104 (FB).

(12) Where in pursuance of a valid decree a sale is gone through and the sale is only voidable and not void and such a sale is set aside under Order 21, Rule 90, there is no provision in law for a certificate of refund of the poundage. (1965) 2 Mad LJ 554: 78 Mad LW 741.

(13) Court will prevent substance of a compromise from being wrecked by an obstinate party. AIR 1923 All 460 (462) (DB) ** 1958-1 Mad L Jour 183 (184).

(14) Court will prevent counsel from unduly harassing and browbeating witness. AIR 1917 Pat 437 (440) (DB).

(15) Court will order counsel to withdraw from suit when it comes to conclusion that his appearance as lawyer will embarrass trial because his evidence as witness is material to case. AIR 1950 Nag 110 (114).

(16) Court will vacate under section manifestly unjust orders. AIR 1953 SC 23 (27): 1953 SCR 136 ** AIR 1922 Bom 385 (385): 47 Bom 104 (DB) ** AIR 1961 SC 272 (275): (1961) 1 SCR 591. (Order for

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delivery of possession of premise ignoring provisions of Rent Control Order prohibiting eviction of tenants.) ** ILR (1968) 1 All 209 ** (1965) All WR (HC) 604 ** (1964) 66 Pun LR 189 ** 1963 BLJR 906 (DB) ** AIR 1961 Andh Pra 102 (105): ILR (1961) 2 Andh Pra 480.

(17) Court will not refuse relief merely because application, therefore, is made under wrong section. AIR 1958 Mad 366 (367) ** 1957 BLJR 534 (536) ** AIR 1968 Orissa 140 (142): 34 Cut LT 560. (Application purported to be under Section 47, though in fact claiming relief under Order 9, Rule 13.) ** AIR 1966 Andh Pra 246 (249): (1964) 1 Andh WR 352 ** ILR (1965) Andh Pra 442 (DB).

[See also AIR 1967 All 520 (523): 1967 All LJ 139.]

(18) Relief will not be refused because there is some technical defect. AIR 1950 Mad 119 (122): ILR (1950) Mad 555 ** ('51) 55 Cal WN 402 (404) ** AIR 1927 PC 264 (265) ** AIR 1959 Mys 157 (157, 158): 36 Mys LJ 474.

[But see (1911) 5 Sind LR 68 (70) (DB).]

(19) Appeal dismissed for want of subsisting decree (decree having been set aside by first Court) can be revived when decree is subsequently restored. AIR 1930 All 100 (100) (DB) ** AIR 1920 Cal 399 (400).

(20) Appeal dismissed on application of appellant to withdraw it cannot be restored though appellant might have acted under mistake of law. AIR 1942 All 253 (253) (DB).

(21) Court can restore suit, when decree therein has been set aside in separate suit on ground that minor or lunatic defendant was not properly represented. AIR 1917 All 477 (479): 39 All 8 (DB) ** AIR 1930 All 644 (645, 646): 52 All 924 (DB) ** AIR 1931 Cal 168 (169) (DB) ** AIR 1959 Mys 28 (29): 36 Mys LJ 179. (Lunatic not properly represented.)

(22) The Court has power to set aside the proceedings taken by it subsequent to the passing of a stay order by the Superior Court and before such order had been communicated to it if the interests of justice require it. (1968) 1 Andh LT 321.

(23) Minor defendant effectively represented by father who was also one of the defendants — No formal order appointing father as guardian-ad-litem due to inadvertence — Decree cannot be set aside under Section 151. AIR 1960 Raj 189 (192): ILR (1960) 10 Raj 470.

(24) Court can rehear matter before passing final order to avoid multiplicity of proceedings and needless expenses and inconvenience. (1910) 37 Cal 259 (262) (DB) ** AIR 1918 Cal 173 (175) (DB) ** (1837-41) 2 Moo Ind App 181 (216) (PC).

[See also AIR 1961 Mys 101 (102): 39 Mys LJ 26. (Court has discretion under Section 151 read with Order 13, Rule 2 to review previous order and allow plaintiff to produce document.)]

(25) Court has power to consolidate suits, appeals or other proceedings. AIR 1957 Pat 124 (125) ** (1957) 61 Cal WN 793 (794) ** AIR 1915 Bom 146 (148): 39 Bom 604 (FB) ** AIR 1923 All 490 (491): 45 All 506 (FB) ** AIR 1946 Oudh 33 (35): 20 Luck 339 (FB) ** 1968 Ker LJ 123 (DB). (But if there is nothing in common in the two proceedings and the nature of the evidence required is also different no consolidation can be ordered.) ** ILR (1961) 11 Raj 1173 (1176) ** AIR 1960 All 184 (189). (Section 10, Civil P. C. is no bar.) ** AIR 1960 Andh Pra 75 (75, 76): (1959) 2 Andh WR 308.

[See AIR 1930 Mad 376 (379, 381): 53 Mad 248 (FB) ** AIR 1930 Mad 381 (382): 53 Mad 262 (FB).]

[See however (1894) 22 Cal 511 (517).]

(26) Two suits disposed of by lower Court by common judgment — Appeal filed only in one such suit — Appellate Court cannot claim jurisdiction under inherent powers to pass order in connection with the other suit in which there is no appeal before it — AIR 1965 Manipur 24 (26).

(27) Courts can take notice of subsequent events. AIR 1958 Andh Pra 779 (783) ** AIR 1958 Cal 453 (455) ** AIR 1958 Pat 613 (617) ** AIR 1958 Pat 279 (282): 36 Pat 1231 ** AIR 1958 Pat 227 (228) ** 1958-1 Mad L Jour 183 (184) ** 1958 Raj LW 90 (92) ** ILR (1955) Hyd 253 (255) ** AIR 1963 Mad 217 (220): (1963) 1 Mad LJ 113 (FB) ** AIR 1968 Madh Pra 175 (177): 1968 MPLJ 180 ** AIR 1967 Cal 603 (607). (Provided such action causes no prejudice to either party.) ** (1967) 2 Mad LJ 468: 80 Mad LW 414 ** AIR 1966 All 216 (217): 1964 All LJ 1008 ** AIR 1966 Orissa 1 (2, 3): 31 Cut LT 996 (DB) ** AIR 1965 Andh Pra 98 (101): ILR (1963) Andh Pra 931 (DB) ** AIR 1964 Cal 335 (339) ** AIR 1964 Manipur 1 (2). (Subsequent events during pendency of suit — Power of Court to mould decree accordingly — Amendment of pleadings, issues on them and evidence of parties are necessary.) ** (1964) 66 Punj LR 865 ** AIR 1963 Ker 348 (349): 1963 Ker LT 656 (DB). (Fiction created by deeming provisions.) ** AIR 1963 Mad 456 (460): (1963) 2 Mad LJ 433 (DB) ** AIR 1963 Raj 198 (201): 1963 Raj LW 304 ** AIR 1962 Pat 168 (177) (DB) ** (1962) 64 Pun LR 834 (836) ** AIR 1961 Manipur 54 (56) ** AIR 1960 All 601: 1960 All LJ 246 ** AIR 1960 Cal 278 (282) ** AIR 1960 J & K 132 (135) ** AIR 1960 Mad 177: 73 Mad LW 16. (Order directing issue of mandamus to stay proceedings — Subsequent change in law — Review — Order can be recalled in exercise of inherent power.)

[See also 1960 Raj LW 385: ILR (1960) 10 Raj 952. (Suit for salary by dismissed servant — Salary for period subsequent to institution of suit — Cause of action with regard to subsequent period not being in existence at the date of the suit Court

Section 151 — Note 4 (contd.)
would not be justified in exercising a discretion in favour of taking note of such event, subsequent to the suit and decide it.)]

[See however AIR 1924 Pat 438 (438): 3 Pat 224 (DB) ** (1918) 46 Ind Cas 794 (796) (Nag) ** (1910) 8 Ind Cas 576 (577) (DB) (Lah) ** AIR 1922 Lah 437 (439) (DB) ** AIR 1926 Mad 594 (597) ** AIR 1922 All 526 (526) (DB).]

(28) If circumstances changed they can form the subject of some other proceedings but need not ordinarily be considered in the appeal. To this proposition there are a few. exceptions. Sometimes it happens that the original relief claimed becomes inappropriate, or the law changes affecting the rights of the parties. In such cases Courts may allow an amendment pleading the changed circumstances. Sometimes also the changed circumstances shorten litigation and then to avoid circuity of action the Courts allow an amendment. **AIR 1968 SC 1165 (1178):** 1968 Ker LT 182. (AIR 1966 Ker 286, **REVERSED.**)

(29) The suit involving trust relating to the debts of the author executed in the year 1932 was instituted on 31-5-1947. The U. P. Zamindari Abolition and Land Reforms Act (1 of 1951) and the U. P. Zamindari Debt Reduction Act, 1952 (U. P. Act No. XV of 1953), came into force several years after the institution of suit. The judgment and decree of the trial Court in the suit was dated the 7th July, 1950, and the appeal was filed on the 5th December, 1950. These Acts were passed during the pendency of the appeal.

Held, that any argument based on these two Acts could not be entertained. It would not be permissible to entertain arguments relating to matters which had arisen after the decision of the suit, and which raised issues that require elucidation on questions of fact. ILR (1964) 2 All 191.

(30) Courts can take notice of questions which cut at root of subject-matter in controversy. (1912) 35 Mad 607 (612): 39 Ind App 218 (PC) ** AIR 1932 Oudh 244 (246): 8 Luck 87 (DB).

(31) Where, owing to accident or other cause, records of Court are lost or are destroyed, it can reconstruct the records. ILR (1957) Andh Pra 739 (741) ** AIR 1923 Mad 647 (648): 46 Mad 679 (FB) ** 1968 Kash LJ 101. (Article 181 of Limitation Act (1908) is not attracted.) ** 1967 Cur LJ 781: ILR (1968) 1 Punj 314.

(32) Court may order party to refund money withdrawn by mistake. AIR 1935 Mad 212 (212, 213) (DB) ** AIR 1933 Lah 850 (851) ** AIR 1934 Lah 142 (143).

(33) Where execution sale is nullity Court has inherent power to order refund of purchase money to auction purchaser. (1947) 5 Cal WN 255 (257).

(34) Execution sale taking place in spite of tender of deposit of decretal debt and costs — Sale being nullity held fit for setting aside in exercise of discretion under Section 151. AIR 1960 Pat 311 (313): 1960 Pat LR 38.

(35) Where auction-sale is set aside on ground of its being fraud on Court auction-purchaser cannot get refund of purchase money. AIR 1957 Raj 154 (159): ILR (1957) 7 Raj 520 (DB).

(36) Petitioner in possession of Judgment-debtor's property as Supratdar — Warrant under Order 21, Rule 43 — Petitioner paying decretal amount to guard his interests, against judgment-debtor — Property subsequently deposited in Court — Application under Section 151 for refund of amount paid not entertained. 1961 Jab LJ 272.

(37) There may be cases, such as where a sale is set aside under Section 23, Madras Agriculturists' Relief Act, in which it may become necessary, inasmuch as they do not come under Section 144, to remedy the injury consequent upon the variation or reversals by other means. In such cases Court can give relief under Sec. 151. AIR 1958 Ker 84 (85).

(38) Attachment before judgment of decree — Execution of attached decree and collection of proceeds by attaching creditor without obtaining any decree in suit in which attachment before judgment made — Refund of amount realised can be ordered under Section 151 — Section 144 does not apply. AIR 1963 Ker 195 (196, 197): 1963 Ker LT 1179.

(39) Under Section 151 Court can pass interlocutory order to preserve position of parties in relation to suit property till the respective rights are finally determined. AIR 1949 Lah 131 (141): Pak LR (1949) Lah 215 (FB) ** AIR 1957 Trav-Co 286 (286).

(40) Court has complete jurisdiction to make consequential orders in order to give effect to terms of compromise and record same. AIR 1951 Pat 299 (304): 29 Pat 610 (DB).

(41) Execution Court has inherent jurisdiction to decide upon validity of decree on application of third party. AIR 1950 Bom 155 (157): ILR (1950) Bom 185 (DB).

(42) The Court has inherent power to alter scheme framed under Section 92 AIR 1948 Bom 146 (148): ILR (1947) Bom 466 (DB).

(43) Court has power to order payment of money realised by execution sale of attached property to Crown on an application by it towards income-tax due from judgment-debtor. AIR 1938 Mad 360 (363): ILR (1938) Mad 744 (FB).

[But see AIR 1959 Cal 179 (180, 181): 63 Cal WN 79. ((1938) 1 Mad LJ 351 (FB), **DISSENTED FROM.**)]

(44) Arrears of income-tax dues — Application by Income-tax Officer to Execut-

Section 151 — Note 4 (contd.)

ing Court for payment of dues from amount of sale proceeds — State dues must receive priority over dues of private individuals and application can be granted under inherent powers — Remedy under Sec. 46 (2) of Income-tax Act (1922) does not impose bar to such application. AIR 1966 Raj 152 (154): 1965 Raj LW 455 (DB). (AIR 1959 Cal 179, Not foll.)

(45) Money deposited into Court for payment to decree-holder — Government filing application in Court for payment of Government debt due from decree-holder — There is no bar on the Government to make any application to the Court for making payment from the amount already deposited into Court — Court had ample powers under Section 151, C. P. Code to make suitable orders on such an application. (1968) 2 An WR 394.

(46) Court may in suitable cases allow a party to give additional evidence after it has closed its case and the opposite party has summoned its witnesses. 1957 Jab LJ 136 (138).

(47) Court can act under Section 151 after evidence of parties is closed — Suit posted for argument — It cannot be said that hearing of suit is completed — Parties are not precluded from advancing further evidence, before the case is posted for judgment — Court has inherent powers to grant such request of parties. AIR 1966 Andh Pra 295 : (1965) 2 Andh LT 347.

(48) Tribunal has no inherent power to direct matter to be heard afresh after order was recorded that evidence was closed. (1967) 71 Cal WN 14: (1967) 2 Lab LJ 325.

(49) Party who will not adopt or who negligently fails to pursue another remedy open to him will not be granted relief under Court's inherent powers. AIR 1950 Trav-Co 100 (102) (FB) ** AIR 1958 Andh Pra 156 (159) ** AIR 1958 Cal 681 (682): ILR (1956) 1 Cal 276 ** AIR 1958 Madh Pra 391 (393) ** AIR 1957 All 820 (822) ** AIR 1957 Raj 154 (157): ILR (1957) 7 Raj 520 ** 1957 All WR (HC) 85 (86) ** 1957 Pat LR 307 (307) ** ILR (1955) 1 Cal 25 (27) ** AIR 1956 Assam 65 (66): ILR (1955) 7 Assam 470 (DB) ** AIR 1956 Raj 164 (165) ** AIR 1929 Mad 757 (763): 52 Mad 899 (FB).

[Contra AIR 1927 Mad 355 (356, 357) (DB) ** 1966 Cur LJ 554 (Punj) ** AIR 1966 Madh Pra 186 (189): 1965 Jab LJ 1012 ** ('64) 68 Cal WN 1064 ** AIR 1964 Pat 142 (143) ** AIR 1962 All 590 (602): 1962 All LJ 501 (DB). (Compensation Officer is Court and has inherent powers under Section 151 — Restoration application under Order 9, Rule 13 barred — Inherent jurisdiction cannot be invoked.) ** AIR 1962 Andh Pra 506 (510): (1962) 1 Andh WR 405 (DB) ** AIR 1962 Tripura 20 (21, 22). (Dismissal of appeal for default — Application for restoration filed beyond limitation — Section 5, Limitation Act does not apply — Appeal cannot be restored under Section 151, Civil P. C.) ** AIR 1960 Orissa 176 (177): ILR 1960 Cut 41. (Application under Order 9, Rule 13, dismissed for default — Restoration — Remedy is by way of appeal — Inherent powers cannot be used.) ** ('61) 27 Cut LT 326.]

(50) Consent decree cannot be set aside under Order 9, Rule 13 read with Sec. 151 on ground that counsel who represented defendant in the compromise was not engaged by the defendant and therefore there was fraud practised upon Court. Remedy of defendant is to file regular suit. AIR 1961 Raj 29 (30): ILR (1960) 10 Raj 169.

(51) In exceptional and peculiar circumstances party may be given relief under inherent power although he has failed to pursue another remedy which was open to him. AIR 1958 Orissa 200 (201): ILR (1958) Cut 351 ** AIR 1957 Raj 154 (159): ILR (1957) 7 Raj 520 (DB) ** ILR (1955) 1 Cal 25 (27) ** AIR 1929 Mad 757 (763): 52 Mad 899 (FB) ** AIR 1967 Pat 296 (298) ** AIR 1964 Orissa 98 (100) ** AIR 1964 Orissa 134 (135, 136): ILR (1964) Cut 18. (Order rejecting plaint for non-payment of deficit Court-fee within time granted by Court — Non-compliance due to mistake of pleader in entering wrong date in his diary — Application under Section 151 for restoration of suit — Application held maintainable — Failure to file appeal or review held no bar.) ** AIR 1964 Pat 142 (143) ** ('63) 67 Cal WN 935. (Ex parte order under Sec. 5 of Calcutta Thika Tenancy Act (2 of 1949), can be set aside under inherent powers — Existence of remedy by way of appeal or review does not bar exercise of inherent powers.)

(52) Where a party has in fact availed of another remedy open to him, powers under this section cannot be invoked. AIR 1948 Oudh 42 (44): 22 Luck 368 ** AIR 1964 Orissa 98 (100).

(53) Inherent powers should not be exercised so as to interfere with rights of third parties or to cause mischief or injustice. AIR 1940 Rang 201 (202): 1940 Rang LR 421 (SB) ** AIR 1926 Bom 377 (378): 50 Bom 457 (DB) ** AIR 1922 Mad 228 (229) (DB) ** AIR 1925 Mad 443 (443): (DB) ** AIR 1936 Oudh 50 (51): 11 Luck 519 (DB).

(54) Court's power to allow amendment of plaint in interests of justice will not be affected by consideration that fresh suit on amended claim is barred by limitation on the date of application for amendment. **AIR 1957 SC 357 (362): 1957 SCR 438 **** AIR 1965 Madh Pra 85 (88): 1965 Jab LJ 532.

(55) Inherent powers should not be exercised if it would assist party against whom new rights have sprung up as a result of his own laches. AIR 1950 All 580 (582):

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ILR (1951) 2 All 375 (FB) ** AIR 1955 Pat 237 (239, 240): 32 Pat 1138 (DB) ** AIR 1967 Orissa 172 (175): ILR (1967) Cut 321. (Tenant in arrears cannot invoke inherent powers to stay rent-suit pending his application for fixation of fair rent.) ** AIR 1966 Orissa 24 (27): 31 Cut LJ 769 ** 1959 Ker LR 861: 1959 Ker LJ 943.

(56) Court has inherent power to correct an error in passing decree against Government against which no relief was claimed by plaintiff. AIR 1966 Andh Pra 329 (331): (1966) 2 Andh WR 40.

(57) Assuming that apart from Order 20, Rule 11 (1) the Court had the inherent power under Section 151 to direct postponement of execution of the decree the Court will not exercise that power to restrain the creditor from executing the decree against the surety until he has exhausted his remedies against the principal debtor as the ends of justice did not require such postponement. **AIR 1969 SC 297 (299): (1969) 1 SCJ 380.**

(58) It is a rule of equity to deny relief to a party where it appears that the right he relies upon has grown out of his wrong or breach of duty. AIR 1963 Mys 120 (121): 40 Mys LJ 1057.

(59) The Court has inherent power to direct a party to go with the process server to identify his witnesses in a proper case. In the absence of any rule framed by the Rajasthan High Court on the point as to when it would be proper for the Court to specially direct a party to identify his witnesses, the inherent power should be exercised in the light of the principle contained in the rules framed by other High Courts. (1965) 1965 Raj LW 148: ILR (1965) 15 Raj 448.

(60) State priority in regard to payment of income-tax — Liability of assessee — Enforcement — Inherent powers of Court under Section 151 can be invoked for realisation of the tax and it is not necessary that a decree should be obtained in order to claim prior payment — Section 46, Income-tax Act which only gives an optional remedy to State cannot preclude the State from invoking inherent powers for realisation of its dues. AIR 1959 Andh Pra 631 (632): (1959) 36 ITR 47. (AIR 1938 Mad 360, Foll.) ** AIR 1961 Ker 18 (20, 21): 1960 Ker LT 716 (DB). (Rateable distribution — Order without decree — State claiming prior payment of sales tax due from debtor can be allowed to do so without any decree.)

(61) A Court has jurisdiction to cancel suo motu its earlier order for the issue of commission for the examination of witnesses, and issue a fresh commission, if sufficient reasons exist. Even otherwise, the Court has inferent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. AIR 1968 Delhi 226 (228).

(62) An application under Section 151 for directions from the Court to the commissioner appointed to examine witnesses as to whether he had the power or not to disallow questions put to the witness which he considers irrelevant does not lie. AIR 1960 Punj 430 (431): 62 Pun LR 697.

(63) Court will not pass an order which would lead to the anomalous result of requiring the party to go to the same Court for the same relief which he has already got. Courts are meant to do substantial justice and not to put complications in the way of a suitor. AIR 1966 All 234 (236): 1966 All LJ 1142.

(64) In proceedings like the winding up of a company, where proceedings are initiated by the official liquidator, who is an officer of the Court, and the Directors and other officers of the company, who are the best persons to explain their conduct in regard to the affairs of the company, stay away from the witness box, it may become necessary for the Court in the exercise of its inherent power to summon even a party against his will to give evidence on oath. AIR 1964 Mys 75 (80): (1963) 33 Com Cas 839 (DB).

5. "Prevent abuse of the process of the Court."— (1) Inherent powers under section can be invoked to prevent abuse of process of Court. AIR 1942 Oudh 189 (193): 17 Luck 297 (DB) ** AIR 1968 Delhi 226 (228). (Cancellation of earlier order for issue of commission for examination of witnesses and issue of fresh commission.) ** AIR 1967 Mys 37 (39): (1965) 2 Mys LJ 788. (If Court comes to conclusion that prayer of party to summon and examine other party to suit as his witness is abuse of process of Court it can disallow the prayer under Section 151.) ** AIR 1965 Manipur 14 (16). (Amendment of pleadings seeking to re-agitate same question.) ** AIR 1962 Andh Pra 137 (139, 140): (1961) 2 Andh WR 168 (DB). (Moveables in possession of third party garnishee attached — Garnishee not producing moveables or their value — Abuse of process of Court — Court can compel garnishee to do so under Section 151.)

[See also AIR 1969 Punj 197 (200). (Court can refuse to summons witnesses only if issue of summons would amount to abuse of process of Court.)]

(2) A defendant seeking to examine himself on commission cannot claim any right under the clear terms of the provision in Order 26. The matter is exclusively within the province of Order 26 which leaves it to the discretion of the Court. As such, if the application is not bona fide or is likely to result in an abuse of process of the Court, such an application can be rejected. AIR 1962 Andh Pra 435 (437, 438): (1962) 1 Andh WR 218 (DB).

(3) Where Court employs procedure in doing something which it never intended to do and there is miscarriage of justice, there is abuse of process of Court. (1950)

Section 151 — Note 5 (contd.)

54 Cal WN (2 DR) 289 (290) ** (1950) 8 J and K LR 180 (185) ** AIR 1963 All 186 (187): 1962 All LJ 817 (DB). (Decision by appellate Court in ignorance of notification under Section 4. U. P. Consolidation or Holdings Act.)

(4) Injustice done as a result of employment of procedure which it was not intended by Court to employ must be remedied on the principle that an act of Court shall prejudice no person. AIR 1956 Pepsu 74 (75) (DB) ** AIR 1958 Orissa 159 (160) ** AIR 1958 Pat 410 (411) ** 1957 Raj LW 598 (600, 601) ** AIR 1956 Punj 253 (254): ILR (1956) Punj 285 ** AIR 1955 All 251 (252) (DB) ** 1955 BLJR 1 (4) (DB) ** **AIR 1961 SC 832 (836): (1961) 2 SCR 918** ** AIR 1966 Andh Pra 73 (75): (1965) 1 Andh LT 276 ** 1965 Raj LW 5: ILR (1965) 15 Raj 170 ** ILR (1963) Andh 1022. (Appeal wrongly dismissed for default on a date of which appellant had no notice.) ** AIR 1961 Ker 200 (200): 1960 Ker LJ 421 ** AIR 1960 All 612 (614): 1960 All LJ 380 (DB).

[See also 1962 Raj LW 406: ILR (1962) 12 Raj 498.]

(5) In affording protection against any negligent act of Court or its officers the only legal provision available is under Section 151 and the inherent powers embodied therein. Hence where the Court passes a decree without notice to one of defendants, it is open to Court to adopt any procedure which is not prohibited by law to do justice. Therefore, the Court can, in exercise of its powers under Section 151, convert an application under Section 47 to one under O. 9, R. 13 to afford protection to the ex parte defendant. AIR 1968 Orissa 140 (142): 34 Cut LT 560.

(6) Remedy under section on ground of injury caused by order of Court itself or on the ground of abuse of process will not be given to party who has been guilty of laches, delay or dilatory conduct. 1958 BLJR 411 (413).

(7) Defects in decree arising as a result of omission on part of Court officials to draw it up as required by law can be removed by Court under its inherent powers. AIR 1957 Tripura 50 (51).

[See AIR 1967 Pat 360 (361): 1967 BLJR 275 (FB). (Accidental omission by Courts office to include one of plaintiff's name in certified copy of decree — Defendant appellant failing to include him as respondent in appeal —Delay in impleading respondent condoned.)]

(8) Inadvertent error in decretal order of High Court introducing the words 'mesne profits' instead of 'net profits' — High Court has jurisdiction under Sections 151 and 152 to make correction after appeals to Supreme Court had been admitted. **AIR 1962 SC 633 (643): 1962 Supp (1) SCR 266.**

(9) Abuse of process of Court may arise by

(a) default or mistake of Court itself. AIR 1956 Assam 65 (66): ILR (1955) 7 Assam 470 (DB) ** AIR 1955 Cal 526 (527): ILR (1956) 1 Cal 279 ** AIR 1955 Mad 173 (175, 176) ** (1953) 55 Pun LR 336 (338) ** AIR 1916 PC 85 (85) ** (1913) 35 All 331 (337): 40 Ind App 151: 16 Oudh Cas 194 (PC) ** AIR 1920 Cal 434 (435) (SB) ** AIR 1929 Oudh 385 (387): 4 Luck 562 (FB) ** AIR 1926 Pat 218 (226, 231): 5 Pat 361 (FB) ** AIR 1967 Pat 360 (361): 1967 BLJR 275 (FB) ** 1966 All LJ 376 ** (1966) All WR (HC) 777 (DB). (Mistake committed by Court or Tribunal — No provision for statutory review — Review lies under inherent powers.) ** AIR 1965 Punj 138 (140): 66 Pun LR 1220. (Annexure of schedule of testator's properties to probate — Annexure of Schedule in petition for probate is enjoined for Court-fee purpose — In granting probate, Court commits mistake if it makes the schedule part of probate — Mistake can be amended by High Court under inherent powers.) ** AIR 1964 Orissa 185 (186, 187): 30 Cut LT 22 ** 1962 All LJ 759 ** AIR 1961 Bom 254 (258): 63 Bom LR 48. (In revision, the High Court can, in the exercise of its inherent jurisdiction, interfere and reverse an order of the Lower Court, where the lower Court having jurisdiction to deal with the matter had exercised that jurisdiction in a manner which had caused injustice to one party or the other.) ** AIR 1960 Pat 179 (180): 1959 BLJR 653 (DB) ** AIR 1959 Ker 401 (402): 1958 Ker LT 331. (Decree for recovery of undivided share — Executing Court directing delivery of specific share — Petition for declaration that execution proceedings were without jurisdiction is maintainable.)

[See also AIR 1968 Assam 66 (67). (Omission to decide if mesne profits to be granted or not, while passing decree — Mistake not of accidental or clerical nature cannot be corrected — Remedy is by way of revision or appeal.)]

[See however AIR 1919 Cal 673 (674) (DB).]

(b) default or mistakes of officers of Court. AIR 1956 Andhra 108 (108, 109) ** AIR 1955 Cal 526 (527): ILR (1956) 1 Cal 279 ** AIR 1969 J and K 8 (9) ** AIR 1968 Manipur 22 (23). (A clerical mistake, in description of suit land can be rectified at any time by the Court, even under its inherent power under Section 151, C. P. Code or under Sections 152 and 153, C. P. Code.) ** (1967) 69 Pun LR

Section 151 — Note 5 (contd.)

950 ** 1966 All LJ 376 ** AIR 1956 Andhra 108 (108, 109): 1955 Andh WR 953.

[But see AIR 1927 Lah 372 (372).]

(c) misrepresentation or fraud of parties. AIR 1956 Assam 65 (66): ILR (1955) 7 Assam 470 (DB) ** (1964) 1 Andh LT 232 ** AIR 1963 Punj 230 (235): 65 Pun LR 67 ** 1962 Ker LT 10: (1962) 1 Ker LR 227 ** AIR 1962 Orissa 46 (47): 27 Cut LT 107 ** 1960 Jab LJ 209: 1960 MPLJ 33 ** AIR 1960 Mad 499 (501): (1960) 2 Mad LJ 93. (Confirmation of execution sale in ignorance of scaliug down due to the failure on the part of the decree-holder to inform Court about it.)

[See also (1967) 8 Guj LR 429: ILR (1967) Guj 420. (Bombay Tenancy and Agricultural Lands Act (67 of 1948), Sections 32-G, 67 to 69 — Agricultural Lands Tribunal can call back its decision if it finds that a fraud has been practised upon it.)]

(10) Decree cannot be set aside under section where fraud alleged is fraud on party and not on Court. AIR 1954 Madh B 81 (82): ILR (1954) Madh B 266 ** 1960 MPLJ 33.

[See also AIR 1962 Orissa 110 (111): 27 Cut LT 474. (Compromise petition by one party — Petition by other party for setting aside of compromise on ground of fraud — Not maintainable.)]

(11) By an application under Section 151, C. P. Code the petitioner sought to have the judgment and decree of the trial Court and also the judgment and decree of the appellate Court vacated on the ground that fraud had been practised by the opposite party by suppressing certain documents.

Held, there was no justifiable ground for the petitioner to invoke the inherent powers of the High Court under Section 151, C. P. Code to vacate the judgments. AIR 1966 Andh Pra 91 (92): (1965) 2 Andh WR 487 (DB).

(12) If act of officer of Court does not injuriously affect party, and no grievance has been made out about the act Court will not recall order already passed, or pass fresh order. AIR 1953 Pat 171 (172).

(13) Party to litigation becomes guilty of abuse of process by

(a) Gaining unfair advantage by use of rule of procedure. AIR 1957 Mys 71 (72): ILR (1957) Mys 14 ** 1957 Raj LW 598 (600) ** AIR 1924 Oudh 230 (231) (DB) ** (1913) 18 Ind Cas 994 (996) (DB) (Lah).

(b) Contempt of authority of Court by party or stranger. (1884) 10 Cal 109 (131, 132) (PC) ** AIR 1958 Pat 618 (619) ** AIR 1918 Pat 100 (103): 4 Pat L Jour 20 (DB).

[But see AIR 1919 Cal 44 (45) (DB).]

(c) Fraud or collusion in Court proceedings between parties. AIR 1943 Pat 13 (14) (DB) ** (1879) 2 Mad 264 (267, 268) (DB) ** (1882) 6 Bom 148 (150) (DB) ** AIR 1915 Mad 281 (282) (DB) ** (1910) 34 Bom 408 (410) (DB) ** AIR 1927 Pat 354 (363): 6 Pat 108 (DB) ** AIR 1915 Cal 622 (623) (DB).

[See also AIR 1961 Andh Pra 305 (309): (1961) 1 Andh WR 202 (DB). (There is an inherent power in the Court to prevent the abuse of a remedy actuated by mala fides and collusion.)]

[But see AIR 1923 Pat 483 (486): 2 Pat 731 (DB).]

(d) Retention of benefit wrongly received. AIR 1924 Rang 181 (181): 1 Rang 770 (DB) ** AIR 1916 Cal 241 (244): 43 Cal 269 (DB) ** AIR 1918 Pat 418 (419) (DB) ** AIR 1917 Pat 495 (497): 2 Pat L Jour 361 (DB).

(e) Resorting to and encouraging multiplicity of proceedings. ILR (1953) 3 Raj 146 (149) (DB) ** AIR 1926 All 212 (214): 48 All 356 (DB). (Note :— This case is **OVERRULED** on another point in AIR 1935 All 599: 57 All 977 (FB)) ** AIR 1965 All 498: 1965 All LJ 58 (FB).

(f) Circumventing law by indirect means. **AIR 1954 SC 349 (352): 1955 SCR 108 **** (1909) 32 Mad 242 (245, 252) (DB) ** AIR 1918 Cal 598 (599) (DB).

(g) Presence of witness during examination of previous witness. AIR 1934 All 840 (841).

(h) Instituting vexatious, obstructive or dilatory actions. Madh BLJ 1954 HCR 1709 (1711) ** (1898) 25 Cal 203 (206) (DB). (Vexatious delay or default.) ** AIR 1932 Mad 263 (264). (Repeated disobedience of Court orders — Defence struck off.) ** AIR 1965 Manipur 14 (16). (Amendment of pleadings which seeks to reagitate the same questions and lead further evidence is an abuse of the process of the Court.) ** AIR 1963 All 117 (118).

[See also (1948) 1948-1 All ER 227 (229) ** (1895) 15 All 84 (90) (FB) ** AIR 1964 All 136 (138). (Refusal to allow point of law or jurisdiction to be raised for first time in second appeal in exercise of inherent power to prevent abuse of right of appeal — AIR 1960 All 573, Foll.) ** AIR 1960 All 573 (575): 1960 All LJ 314.]

[See however (1913) 21 Ind Cas 781 (781) (Mad) ** AIR 1924 Bom 90 (93).]

(i) Introduction of scandalous or objectionable matter in proceeding. AIR 1951 Kutch 23 (25) ** (1880) 5 Cal 707 (710) ** (1899) 22 Mad 155 (158) (DB).

Section 151 — Note 5 (contd.)

(j) Executing decree manifestly at variance with its purpose and intent. AIR 1918 Pat 352 (354): 3 Pat L Jour 435 (DB).

(k) Institution of suit by puppet plaintiff. AIR 1951 Cal 563 (567).

(l) Institution of suit in name of firm in defiance of majority by one partner. AIR 1954 Cal 409 (412).

(14) Agreement to litigate in particular Court — Contract binding on parties — Previously instituted suit at a place not agreed with amount to abuse of process of Court. 1962 All LJ 464.

(15) Act done or proceeding taken as of right and in due course of law, is not an abuse of process of Court simply because it is likely to embarrass another. AIR 1952 Orissa 120 (125): ILR (1951) Cut 543 (FB) ** AIR 1949 Pat 68 (68) ** AIR 1942 Lah 119 (120) ** (1910) 8 Ind Cas 474 (475) (Upp Bur) ** AIR 1915 Mad 608 (612) (DB).

[See AIR 1957 Madh B 95 (95) ** AIR 1957 Raj 248 (250).]

(16) Abuse of process of Court is not ground on which person who is within terms of statute can be deprived of right conferred by statute. AIR 1916 PC 64 (65): 44 Cal 535: 44 Ind App 11 ** (1951) 4 Sau LR 90 (94) ** AIR 1915 Mad 461 (463).

(17) Failure to conform to mere rule of practice is not an abuse of process in every case. AIR 1928 Mad 522 (523) (DB).

[See also AIR 1929 Nag 251 (254): 27 Nag LR 102 (FB).]

(18) Expression "abuse of the process" refers only to some process of Court such as a writ of attachment, taken maliciously to the injury of another. (1909) 32 Mad 242 (250) (DB).

(19) If the suit can possibly proceed to trial on such allegations as have been made in the plaint then the Court should proceed to try it, raise appropriate issues therein and allow evidence to be led and pass a decree in the suit on the merits such as may be called for. Dismissal of a suit under the provisions of Section 151, C. P. Code, or under any other provision under such circumstances would be justified in an extreme case where the plaint discloses no cause of action or where the conduct of a party amounts to a clear abuse of the process of the Court. AIR 1963 Raj 106 (109, 110): 1962 Raj LW 696.

(20) Suit for possession of land — Construction during pendency of suit — Defendant giving undertaking to demolish construction — Decree directing removal of building can be passed under inherent powers — Not to grant relief would be to permit an abuse of the process of the Court. 1959 All LJ 221.

5-A. Expunging of objectionable matter.— (1) Power to expunge remarks is extraordinary power and can be exercised only when clear case is made out — Question to be considered is not whether another Judge would have made those particular remarks but whether Judge in making those remarks has acted with impropriety. **AIR 1967 SC 903 (907): (1967) 1 SCR 454.**

(2) The High Court has power to expunge a part of a judgment of a Court subordinate to it. But a Division Bench or a Fuller Bench of the High Court has no power to delete passages from the judgment of High Court delivered by a single Judge.

But a finding can be given that the adverse comments made by the Judge were not warranted. AIR 1960 Mad 73 (76): (1960) 1 Mad LJ 21 (DB).

(3) Every Court has an inherent power quite independently of Order 6, Rule 16, C. P. Code; to strike out scandalous matter in any record or proceeding. Under Section 151, the Court has power to expunge scandalous allegations which are irrelevant to the proceedings, even though they are contained in an affidavit. But the allegations cannot be scandalous, when they are relevant. AIR 1966 Mad 161 (162): (1965) 2 Mad LJ 477 ** AIR 1951 Kutch 23 (25) ** (1880) 5 Cal 707 (710) ** (1899) 22 Mad 155 (158) (DB).

6. Criminal cases.— (1) Where question of forgery is before High Court on appeal from proceeding wherein document was held to be forgery, the High Court has inherent power to stay proceedings under Section 476, Cri. P. C. against party who had produced the document pending disposal of appeal. AIR 1925 Lah 323 (323).

(2) The subordinate criminal Courts have got inherent powers even though there is no express provision in the code of Criminal Procedure, and this power would be exercised sparingly, with caution and having due regard for the rigorous tests laid down in Section 561-A of that Code. 1969 Cri LJ 575 (577): 34 Cut LT 460 ** AIR 1967 Orissa 182 (184): 1967 Cri LJ 1549: 32 Cut LT 1194.

(3) Like all procedural laws the provisions of the Criminal Procedure Code are designed to subserve the ends of justice and not to frustrate them. AIR 1968 Mad 117 (131, 132): (1968) 1 Mad LJ 480 (DB).

(4) Appellate Judgments — High Court has no power to review on the ground of discovery of fresh evidence — Section 561-A, Criminal P. C. merely preserves the inherent powers of High Court in Criminal matters just as Section 151 does in civil matters. AIR 1962 All 193 (196): 1962 (1) Cri LJ 390: 1961 All LJ 509 (DB).

7. Contempt of Court, proceedings for.— (1) High Court has inherent power to punish for contempt of Court and that power is not affected by Codes of Civil or Criminal Procedure. (1936) 40 Cal WN

Section 151 — Note 7 (contd.)
1285 (1289, 1292) ** AIR 1969 Pat 72 (79).

(2) High Court can enforce its orders but cannot arrest for contempt person outside its general jurisdiction. (1936) 40 Cal WN 1285 (1289, 1292).

(3) High Court has jurisdiction to award costs in criminal prosecution for contempt and has inherent jurisdiction to order its recovery on lines on which decrees are executed by Civil Court. AIR 1956 All 79 (80) ** AIR 1935 All 1013 (1014): 58 All 374 (DB).

(4) High Court has power to punish contempt of itself by summary proceedings. AIR 1940 Sind 239 (241): ILR (1941) Kar 3 (FB).

(5) Ordinarily the High Court would be disinclined to allow its inherent power to punish for contempt of Court to be invoked at the instance of a party on the mere ground that his opponent has raised incorrect or even false pleas. AIR 1969 Delhi 6 (7).

8. Proceedings under Press (Emergency Powers) Act (since repealed).— (1) Inherent powers of High Court under Section 151 cannot be invoked to relieve a person of consequences of his default in depositing security ensuing under Sec. 12 of Press Emergency Powers Act. (1951) 52 Cri L Jour 880 (882) (Lah) (FB).

9. Insolvency Court.— (1) Insolvency Court has inherent powers to pass just and necessary orders in cases not provided for by Insolvency Act. AIR 1940 Rang 156 (156): 1940 Rang LR 392 ** AIR 1933 Pat 84 (87): 12 Pat 163 (DB).

(2) Insolvency Court has power to grant ad interim protection before adjudication. (1910) 6 Ind Cas 95 (97) (DB) (Cal).

(3) Insolvency Court has power to rectify mistakes in its proceedings. AIR 1934 Lah 177 (178) ** AIR 1934 Mad 31 (31) (DB).

(4) Insolvency Court has power to set aside ex parte order obtained by fraud or misrepresetation. AIR 1937 Lah 631 (631, 632).

(5) Insolvency Court cannot stay execution sale going on in another Court. AIR 1917 Mad 945 (946) (DB).

(6) Executing Court may, on claim by the official Receiver under Section 51 or Section 52 of Insolvency Act, stay execution under its inherent powers. AIR 1924 Sind 69 (71).

(7) Applicant entitled to order of adjudication as of right under Insolvency Act cannot be refused adjudication under inherent power on the ground of an abuse of process. AIR 1916 PC 64 (65): 44 Ind App 11: 44 Cal 535.

(8) Insolvency Court cannot invoke Section 151 and take action under Section 4, Provincial Insolvency Act when that jurisdiction is lost as a result of order of annulment. AIR 1949 Nag 39 (41): ILR (1948) Nag 284.

(9) Court can under this section restore petition dismissed upon compromise between petitioning creditor and debtor and substitute another creditor as petitioner where dismissal has resulted in injustice to other creditors. AIR 1953 Mad 993 (995) ** AIR 1963 Mad 367 (368, 369): (1963) 1 Mad LJ 333.

(10) Application falling under Section 4, Provincial Insolvency Act, made to Court — Application dismissed for default of appearance of applicant — Applicant not aware of date of hearing — Neither O. 9, R.9 Civil P. C., nor Art. 163, Limitation Act (1908) is attracted — Application can be restored under Section 151, Civil P. C. AIR 1964 Bom 40 (41) : 65 Bom LR 432.

(11) Section 75 (2) of the Presidency Towns Insolvency Act can be extended so as to vest jurisdiction in the High Court to grant further sums to the insolvent and his family for their support or in consideration of the insolvent's services. Section 151 will also come into play. AIR 1967 Mad 399 (399): (1967) 2 Mad LJ 305.

10. Legal Practitioners Act, cases under.— (1) Although there is no express provision for review of order made under Legal Practitioners Act, High Court has inherent power to restore pleader whose name has been struck off rolls. AIR 1935 All 321 (322) (FB) ** AIR 1934 Oudh 140 (142) (SB) ** AIR 1968 Punj 328 (331): 1967 Cur LJ 954 (DB).

(2) Court which under Section 41, Legal Practitioners Act has power to remove person from practice has also power to rescind order so removing him from practice by reason of provisions of Section 21, General Clauses Act. AIR 1934 Oudh 140 (142) (SB).

(3) Irrespective of any enactment, High Court as Court of record has inherent power to grant permission to advocates to appear in particular civil cases. AIR 1951 Hyd 140 (143, 148, 150, 153, 158, 160, 161, 162): ILR (1951) Hyd 689 (FB).

11. Appeal.— (1) No appeal lies as an appeal from an order under Section 151. AIR 1953 SC 23 (27): 1953 SCR 136 ** AIR 1958 Madh Pra 391 (393) ** AIR 1958 Pat 618 (619) ** AIR 1958 Pat 547 (548) ** AIR 1957 Him Pra 61 (64) ** 1957 BLJR 740 (742) ** AIR 1955 Orissa 16 (16) (DB) ** AIR 1948 All 19 (20): ILR (1947) All 582 (FB) ** AIR 1968 Pat 48 (49) ** (1968) 70 Punj LR 354: 1968 Cur LJ 265 ** AIR 1966 Cal 310 (311). (Remand order under Section 151.) ** ILR (1966) 2 Cal 91. (Order of remand under Section 151.) ** AIR 1965 Cal 547 (549, 550, 551) ** AIR 1965 Mys 34 (35): (1964) 1 Mys LJ 242 ** AIR 1964 Pat 542 (543) (DB) ** AIR 1961 Pat 483 (484): 1964 BLJR 727 (DB) ** AIR 1963 Madh Pra 9 (10): 1963 Jab LJ 104 ** AIR 1962 Orissa 46 (46): 27 Cut LT 107 ** ILR (1960) Cut 118.

Section 151 — Note 11 (contd.)

(2) If order under Section 151 amounts to decree within definition of Section 2, sub-section (2), appeal will lie under Section 96. AIR 1948 Mad 452 (453) (DB) ** AIR 1940 Nag 349 (354): ILR (1940) Nag 538 (DB) ** AIR 1923 Cal 606 (607) (DB) ** AIR 1928 Cal 218 (219) (DB) ** AIR 1935 Pat 49 (51) (DB).

(3) If order made in execution under Section 151 falls within Section 47, appeal and second appeal will lie therefrom. AIR 1950 Mad 640 (641) (DB) ** AIR 1943 Nag 335 (339): ILR (1944) Nag 370 (DB) ** AIR 1937 Cal 152 (156): ILR (1937) 1 Cal 637 (DB).

[See **AIR 1953 SC 23 (27):** 1953 SCR 136.]

[See also AIR 1950 All 580 (581): ILR (1951) 2 All 375 (FB).]

(4) Order under Section 151 can be challenged under Section 105 if it affects decision of case on merits but not otherwise. AIR 1934 Lah 312 (312).

(5) Order of remand can always be challenged in appeal from final decree under Section 105 and hence no revision against order will lie. AIR 1957 Raj 71 (73): ILR (1957) 7 Raj 496.

[See however AIR 1966 Pat 209 (213, 214): 1966 BLJR 270 (FB). (Second appeal — Remand by Single Judge of High Court —Decree passed by first appellate Court after remand — Appeal to High Court from such decree — In this appeal remand order challenged as being erroneous.

Held, that Bench, hearing this appeal being of co-ordinate jurisdiction, could not set aside remand order.)]

(6) It is for the respondent, who raises the preliminary objection, that the appeal against the order of remand is incompetent on the assumption that it was passed under Section 151, to prove that such order was passed only under Section 151, but not under Order 41, Rule 23 as when the order is silent about the provision under which it was passed it must be presumed to be referable to the specific provision of the Code, viz., Order 41, Rule 23. AIR 1969 Andh Pra 216 (220).

(7) If order appealed from is silent Court must decide whether it was passed under Section 151 or under any other provision of Code, in order to ascertain whether appeal lies therefrom. AIR 1956 Raj 43 (44, 45): ILR (1955) 5 Raj 143 ** AIR 1951 Pepsu 130 (132): 2 Pepsu LR 649 (DB) ** AIR 1930 Mad 158 (159): 53 Mad 395 (DB) ** AIR 1926 Pat 516 (516) (DB) ** (1967) ILR 46 Pat 1171. (Order recalling dismissal of execution case for default held was one under Section 151.)

(8) If order purports to be under appealable provision, though wrongly, appeal will lie therefrom. AIR 1928 Lah 341 (341) ** AIR 1932 Pat 317 (319): 11 Pat 553 (DB).

[But see AIR 1957 Him Pra 61 (64) ** AIR 1940 Nag 349 (351, 352): ILR (1940) Nag 538 (DB). (AIR 1936 Nag 8: 31 Nag LR Sup 72, **OVERRULED.**)]

(9) Where order is made under Section 151 fact that jurisdiction analogous to that conferred by appealable provision is exercised, will not render it appealable. AIR 1917 Pat 495 (496, 497): 2 Pat L Jour 361 (DB) ** AIR 1950 Mad 463 (468, 471, 474) (FB). (AIR 1941 Mad 564, **OVERRULED.**) ** AIR 1939 Oudh 273 (275): 183 Ind Cas 709 (710) (DB).

[But see AIR 1948 Cal 37 (38) ** AIR 1943 Nag 172 (174): ILR (1943) Nag 699 ** AIR 1931 Cal 779 (781) (DB). (AIR 1927 Cal 285, Followed.) ** AIR 1938 Nag 326 (328): ILR (1939) Nag 350 (DB).]

(10) Nature of an order is not to be determined by provision of law to which it may wrongly have been assigned and true test is what is the order itself. Thus, although Court may purport to act under Section 151 in making amendment, Appellate Court should deal with matter as appeal from amended decree. AIR 1939 Sind 303 (304): ILR (1939) Kar 428 (DB).

[See also AIR 1957 Him Pra 61 (64).]

(11) Order refusing to exercise jurisdiction under this section is not a "judgment" within Clause 10 of Letters Patent (Patna) AIR 1933 Pat 139 (141, 142): 12 Pat 202 (DB).

(12) No appeal lies against order made under Section 151 refusing to issue injunction against party restraining him from proceeding with earlier suit as it does not constitute a judgment within Clause 15 of Letters Patent (Bombay). AIR 1953 Bom 117 (119): ILR (1953) Bom 416 (DB).

(13) Application for stay of proceedings under Hindu Marriage Act made under Sections 10 and 151, Civil P. C. — Order refusing stay is not appealable under Civil P. C., or under Section 28 of the Hindu Marriage Act. AIR 1967 Punj 148 (152). ILR (1967) 1 Punj 695 (DB) ** 1962 Jab LJ 371.

(14) Where a preliminary decree was passed and an application was made for rehearing and modification or variation of the preliminary decree invoking the inherent jurisdiction of the trial Judge under Section 151, the order passed on such application would not be appealable. An appeal from this preliminary decree however would lie. (1968) 72 Cal WN 318 (DB).

12. Revision. — (1) Revision lies from order under inherent jurisdiction of Court AIR 1955 Raj 127 (128): ILR (1955) 5 Raj 398 ** AIR 1957 Him Pra 61 (64) ** ILR (1955) 5 Raj 492 (494) ** AIR 1965 Mys 34 (35): (1964) 1 Mys LJ 242 ** AIR 1964 Orissa 156 (157): 32 Cut LT 76. (Trial Court disposing of suit on merits — Remand is under Section 151 — Revision lies and not appeal.) ** AIR 1963 Madh Pra 9 (10): 1963 Jab LJ 104 ** AIR 1963 Orissa 186 (187): ILR (1963) Cut 841 ** AIR 1962 Raj 107 (108): 1961 Raj LW 218 ** ILR (1960) Cut 118.

152. Amendment of judgments, decrees or orders.—Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

[1882, cf. S. 206, para. 3; 1877, Ss. 204 to 206; 1859, S. 189; R.S.C., O. 28, R. 11; See also S. 153 and O. 6, R. 17.]

Section 151 — Note 12 (contd.)

(2) Where, Court exercises inherent jurisdiction it will not be ordinarily interfered with in revision. ('56) AIR 1956 Bom 598 (599) ** AIR 1954 All 43 (44) (DB) ** AIR 1953 Hyd 130 (131): ILR (1952) Hyd 1001 (DB) ** AIR 1952 Pat 437 (438) ** 1940 All WR (HC) 62 (63) (DB) ** AIR 1934 Cal 780 (781) (DB) ** (1967) ILR 46 Pat 1171. (Court below wrongly thinking that execution case could not be dismissed for default — Order recalling dismissal under Section 151 — Error not one of jurisdiction.) ** AIR 1961 Assam 79 (80) ILR (1962) 14 Assam 166.

[See also 1961 Ker LJ 1272. (Interim protection from arrest in execution of decree against debtor pending his application for adjudication — Inherent power — Refusal to grant protection — Not revisable either under Section 115, Civil P. C., or Article 227 of the Constitution.)]

(3) When lower Court exercises its inherent powers under Section 151, the Court of revision is to see whether inherent powers were exercised in any of the manners prescribed under Section 115 — High Court cannot independently invoke its powers under Section 151 as if there was no original order. AIR 1966 Orissa 58 (59) 32 Cut LT 1011.

(4) Where executing Court in exercise of its proper discretion under this section restored execution dismissed by it erroneously High Court acts in excess of its powers of revision in reversing that order and remanding case for further inquiry. AIR 1953 SC 23 (28): 1953 SCR 136.

(5) Revision will lie where Court

(a) Refuses to exercise inherent jurisdiction when it ought to. AIR 1952 Pat 260 (260) (DB) ** ILR (1951) 1 Cal 642 (644) ** AIR 1925 Cal 420 (421) (DB) ** AIR 1919 Mad 14 (15). [See AIR 1939 Sind 137 (142): ILR (1939) Kar 330 (DB).]

(b) Exercises inherent jurisdiction when it has no power to do so. AIR 1956 Him Pra 37 (38) ** 1956 Raj LW 11 (12) ** AIR 1952 Cal 560 (562): ILR (1953) 2 Cal 11 (DB) ** AIR 1952 Pat 478 (480): 31 Pat 737 (DB) ** AIR 1952 Raj 157 (158) ** AIR 1939 All 668 (669, 670) (DB) ** AIR 1929 Cal 158 (159) (DB) ** AIR 1918 Pat 100 (103): 4 Pat L Jour 20 (DB) ** AIR 1935 Cal 336 (338): 62 Cal 61 (DB) ** 1961 Ker LT 431. (Sale in execution — Petition to set aside made beyond limitation — Sale set aside under Section 151 — Order is without jurisdiction — Revision lies.)

(6) Where in remanding a case under Section 151 there has been no material irregularity no revision will lie. AIR 1954 Him Pra 73 (75).

(7) No revision will lie against order of remand as the order can be challenged in appeal against final decree. AIR 1957 Raj 71 (73): ILR (1957) 7 Raj 496.

(8) No revision lies against refusal to exercise discretion under Section 151 when such refusal was made after judicial consideration of matter so that there is no question of jurisdiction involved. AIR 1935 All 49 (49).

(9) An appeal filed against an order under section may be treated as civil revision application. 1957 BLJR 740 (742).

SECTION 152 — SYNOPSIS

1. Amendment of judgments, decrees or orders.
2. Clerical or arithmetical mistakes, etc.
3. Mistakes originating in pleadings.
4. Mistakes originating anterior to the suit.
5. Inherent power.
6. "May . . . . . be corrected".
7. "At any time".
8. Court by which amendment can be made.
9. "Of its own motion".
10. Who can apply for amendment.
11. Notice of amendment.
12. Effect of amendment.
13. Consent decree.
14. Award.
15. Suit to rectify mistake, if lies.
16. Appeal.
17. Revision.
18. Review.

1. Amendment of judgments, decrees or orders. — (1) As a general rule a judgment, decree or final order, once drawn up and signed, cannot subsequently be altered, varied or amended in any manner even with the consent of the parties except on review or under Section 152. See O. 20, Rules 3 and 6.

[See also AIR 1956 Raj 164 (165): ILR (1956) 6 Raj 736.]

(2) Under Section 152 a clerical or arithmetical mistake or an error arising from an accidental slip or omission may be corrected by the Court. AIR 1955 Andhra 215 (216) ** AIR 1957 Madh B 50 (52)

Section 152 — Note 1 (contd.)

(DB). (Accidental omission to award future interest and to specify time for satisfying decree.) ** AIR 1953 All 485 (486) ** AIR 1948 Bom 47 (49) (DB) ** AIR 1926 PC 29 (30): 4 Rang 513.

(3) Even though the decree is in conformity with the judgment power under Section 152 can be exercised where a mistake has crept in the judgment due to a mistake in pleadings. AIR 1927 Mad 435 (436).

(4) Civil Judge as directed by superior Courts hearing fresh argument and passing considered judgment — Plaintiff appeliant filing application for amendment and not appeal — There was no scope for amendment when the decree was in comformity with judgment of Civil Judge. **(1965) AIR 1965 SC 1935 (1936).**

(5) A decree or order may be varied or amended in cases not falling under this section by a review of judgment or by an appeal from the decree. (1950) 54 Cal WN 568 (572) (PC) ** (1956) 58 Pun LR 101 (104) ** AIR 1952 Cal 577 (578, 579) (DB).

(6) Where Court can amend a decree passed by it, proper course is to apply for amendment and not to appeal. ILR (1953) 3 Raj 187 (188) ** AIR 1935 Cal 619 (620): 63 Cal 181 (DB). (Omission to appeal does not bar an application for amendment.)

[See also AIR 1954 Mys 65 (70): ILR (1953) Mys 521 (FB).]

(7) Neglect to apply for amendment does not preclude a party from obtaining same result in appeal. (1885) 7 All 606 (611) (FB).

[See also (1950) 54 Cal WN 568 (572) (PC).]

(8) An amendment should not be made if it will have effect making decree differ from judgment. If same mistakes are made in both the judgment and decree, both should be amended and not the decree alone. AIR 1915 Mad 939 (940) ** (1911) 11 Ind Cas 896 (897) (DB) (All) ** (1907) 31 Bom 447 (449) (DB) ** (1939) 41 Pun LR 119 (120).

(9) Principle of 'res judicata' has no application to correction of accidental errors or mistakes in decree. AIR 1953 All 485 (487).

(10) A decree may be amended though applicant's pleader may have signed the decree. AIR 1925 Oudh 373 (373) (DB).

(11) Court has no power to annul decree or order itself under Section 152. AIR 1919 Low Bur 151 (153): 9 Low Bur Rul 263.

(12) Proceedings before Special Judge under the U. P. Encumbered Estates Act (25 of 1934) — Section 152 will apply. AIR 1950 All 229 (230) (DB).

(13) An amendment petition being an independent proceeding will be governed by the law prevailing on date of petition and not on date on which order sought to be amended was passed. **AIR 1952 SC 409 (410):** 1953 SCR 752: ILR (1953) Patiala 9.

(14) An application under this section to amend a decree after sale is not affected by provisions of Order 21, Rule 92. AIR 1953 All 485 (487).

(15) Though Section 29 (5) of the W. B. Tenancy Act gives power under Sections 151 and 152, to Rent Controller an order cannot be justified under Section 29 (5) if the conditions necessary to exercise power under Sections 151 and 152 are absent. **(1966) AIR 1966 SC 935 (939):** (1966) 1 SCR 235.

(16) Though a date was not originally fixed before which the vendee was to pay the sale amount to the vendor and get a conveyance from the latter in a decree for specific performance of an agreement to sell, it is only an accidental omission and, therefore, the Court has jurisdiction under Section 152, Civil Procedure Code, to fix a date subsequently for the performance of the contract by the plaintiff though the application was filed under Section 151, Civil Procedure Code. (1961) 2 Andh WR 54 (54).

(17) Where a personal decree under Order 34, Rule 6 provides for contractual rate of interest which is in excess of that allowable under the statute, relief can be given by allowing amendment of the decree and judgment even if an appeal has not been filed. AIR 1959 Andh Pra 619 (622).

(18) A plain and inexcusable error in a decree must be corrected unless law forbids it. An error of passing a decree against a Government when no relief was claimed by the plaintiff against the Government can well be brought within the purview of Sections 152 and 153. AIR 1966 Andh Pra 329 (331): (1966) 2 Andh WR 136 (DB).

(19) Execution proceedings — Defendant company going into liquidation before passing of decree against it — Amendment of description of defendant in execution proceedings is permissible. AIR 1964 Cal 42 (43): 67 Cal WN 601 (DB).

(20) A decree in a maintenance suit is not final in the sense, that the rate once fixed by it, cannot be altered under any circumstance. Section 25 of the Hindu Adoptions and Maintenance Act, 1956, which specifically empowers Courts to effect alterations in such decrees according to changed circumstances, is a statutory recognition of such power to be exercised in proper cases. 1961 Ker LJ 465 (466): 1961 Ker LT 455.

(21) Death of plaintiff pending suit — Application for substitution made — Orders thereon not passed — Suit compromised and decree passed — Decree stood in name of deceased — Decree is nullity — Subsequent amendment cannot validate it — Suit must be treated as pending. (1962) AIR 1962 All 541 (542): ILR (1961) 2 All 663 ** AIR 1963 Ker 263 (264): 1962 Ker LT 673 (DB).

Section 152 — Note 1 (contd.)

(22) Section 152 does not use the word "inaccuracy" occurring in Madras High Court Original Side Rules, Order 17, Rule 15. Even the inaccuracy must be manifest on the face of the record just like a clerical or arithmetical error. So a decree for cost when the 'inaccuracy' was not manifest cannot be amended. AIR 1960 Mad 564 (566, 567): (1960) 2 Mad LJ 550 (DB).

(23) The object of allowing amendments under Section 152, Civil Procedure Code is to provide a remedy for casual omission or negligence of ministerial officers of the Court in preparing decrees of Courts even though they bear the signatures of the presiding officers concerned. The object is to harmonise the decree with the judgment sought to be enforced by it; the test for deciding whether an amendment should be allowed is whether the decree represents the intention of the Judge who made it. AIR 1959 Punj 88 (89): 60 Pun LR 185.

(24) Where an order of remand finally disposes of an appeal, the appellate Court becomes functus officio and cannot thereafter make any further order in it or interpret its earlier order except on review of under Section 151 or 152. (1966) 1966 All LJ 1108 (1109).

(25) Amendment of decree under Section 151 or 152 does not bring about any change in the date of decree and time for filing an appeal against the decree runs from the date of the decree and not from the date of amendment. AIR 1969 Ker 183 (185): 1968 Ker LT 969.

(26) Decree strictly in conformity with judgment — Amendment of decree to rectify judgment defective on merits — Not permissible. AIR 1962 Ker 6 (7): 1961 Ker LT 349.

2. Clerical or arithmetical mistakes, etc. — (1) Before exercising powers under Section 152, Court must satisfy itself that a clerical error, etc., has occurred, which is apparent on the face of the record or from the evidence adduced before it. AIR 1945 Mad 230 (230).

(2) Where a direction is inadvertently omitted, the decree may be amended by adding the direction or provision. ILR (1953) 3 Raj 187 (188). (Direction as to costs.) ** AIR 1958 Andh Pra 768 (773): ILR (1958) Andh Pra 553 ** AIR 1956 Nag 239 (240): ILR (1956) Nag 535 (DB). (Direction as to interest.) ** (1910) 37 Cal 623 (625): 37 Ind App 133 (PC). (Do.) ** AIR 1955 All 159 (161): ILR (1954) 2 All 617 (FB). (Omission to include relief claimed.)

(3) Inadvertently recording order of dismissal instead of order decreeing suit or appeal can be corrected under Section 152. AIR 1915 All 323 (324) ** (1957) 10 Cal L Jour 21 (25) ** AIR 1924 Oudh 144 (144).

(4) Inadvertently misdescribing property covered by decree or judgment can be corrected under Section 152. AIR 1954 Pat 108 (109) ** AIR 1953 Mys 43 (43) ** AIR 1950 Mad 751 (752) ** AIR 1915 Cal 586 (587) (DB) ** AIR 1918 All 78 (78) (DB) ** AIR 1968 Manipur 22 (23) ** (1966) 1 Mys LJ 153 (154): (1966) 5 Law Rep 662.

(5) Judgment accidentally including the property of a stranger — Error can be corrected. AIR 1929 All 147 (147): 50 All 859.

(6) Passing a personal decree against the legal representatives of a party is an accidental slip. AIR 1940 Cal 202 (203): ILR (1939) 1 Cal 305 ** AIR 1923 Bom 414 (415) (DB).

(7) Passing an erroneous order as to costs by oversight — Error can be corrected. AIR 1953 Mys 167 (168): ILR (1953) Mys 546 ** AIR 1935 Oudh 369 (371): 11 Luck 150 (DB) ** AIR 1966 Orissa 225 (226): (1965) 7 OJD 275.

[But see AIR 1961 Orissa 18 (19): 26 Cut LT 153. (Order passed without notice is one without jurisdiction.)]

(8) Final judgment affirming preliminary decree — Affirmation not referred to in final decree drawn up — Defect can be corrected under Section 152. AIR 1953 Trav-Co 220 (222): ILR (1953) Trav-Co 89 (FB).

(9) Failure to pass a decree consistent with the statutory provisions amounts to an accidental slip which could be corrected under Section 152. ILR (1953) Punj 333 (336).

(10) Appellate Court dismissing suit in toto instead of dismissing it only against appealing defendant — Mistake can be corrected. AIR 1938 Mad 573 (575) (DB).

(11) Where by oversight name of a wrong person is inserted in decree as guardian of a minor party, the mistake may be corrected under this section. AIR 1926 Pat 564 (565).

(12) Case of real non-representation of minors by proper guardian — It is a defect of substance and hence cannot be cured by substituting name of the proper guardian under this section. AIR 1928 Mad 1057 (1059).

(13) Section 152 does not apply where there is no question of clerical or arithmetical mistakes or errors arising from accidental slips and omissions. (1950) 54 Cal WN 568 (572) (PC) ** AIR 1956 Pepsu 74 (75): ILR (1956) Patiala 191 (DB) ** AIR 1955 Mys 2 (3) ** AIR 1954 Madh B 14 (15): ILR (1954) Madh B 227 ** AIR 1952 Cal 577 (578, 579) (DB). (Intentional omission does not give power to correct under section.)

(14) Order passed under an erroneous impression as to facts of case — Error does not come under Section 152. AIR 1956 Orissa 165 (167) (DB) ** (1956) 58 Pun LR 101 (104) ** AIR 1920 Pat 743 (744): 5 Pat L Jour 253 (DB).

(15) The test to determine whether the slip or omission is accidental or not is to

Section 152 — Note 2 (contd.)
see whether the order as it stands represents the intention of the Judge at the time he made it, and if it does, then, a mistake in it cannot be treated as an accidental slip or omission. AIR 1942 Oudh 226 (229): 17 Luck 739 (DB).

(16) An amendment allowing a correct description of property which completely alters the plaint and the decree and the deed on which the plaint is based, cannot be said to be the correction of a clerical mistake in the judgment. AIR 1934 All 100 (101) (DB).

(17) Decree correct when passed — Decree cannot be corrected on ground of subsequent event entitling party to larger relief. 1951 Ker L Tim 207 (209).

(18) The omission to consider the effect of the Constitution (Fourth Amendment) Act cannot be said to be a "clerical mistake or error arising from any accidental slip or omission". AIR 1958 All 154 (157): ILR (1957) 2 All 88 (DB).

(19) Arithmetical mistake is mistake of calculation, clerical mistake is of writing or typing. An accidental slip or error is an error due to careless mistake or omission unintentionally made. Such mistake should be apparent on the face of the record, it should not depend on its discovery on elaborate arguments on questions of law and fact. **AIR 1966 SC 1047 (1049): (1966) 3 SCR 99.**

(20) Application under Section 37-A (8), Bengal Agricultural Debtors Act (7 of 1936) — Order for restoration of possession passed before passing order setting aside auction sale — Omission to pass order setting aside sale due to accidental slip cannot be rectified by amendment as it will amount to passing a new order. (1956) 60 Cal WN 367 (375) (DB).

(21) Omission to dispose of an issue as to mesne profits — Mistake not of an accidental or clerical nature — Cannot be corrected by invoking this section; the only remedy is by way of appeal or review. AIR 1968 Assam 66 (67) (DB).

(22) Where a District and Sessions Judge, duly empowered to hear an appeal under the provisions of law, described himself in his order as "District Judge," omitting the words "and Sessions," the omission is a mere irregularity, which cannot affect the merits of his decision, or vitiate the order. AIR 1968 Delhi 299 (304): (1968) 70 Pun LR (D) 195.

(23) Where direction as to interest is inadvertently omitted the decree or order can be amended by adding any appropriate direction under Section 152. AIR 1966 Madh Pra 270 (273): 1967 MPLJ 733 (DB).

(24) Omission to pass order under Section 39, Companies Act, while delivering judgment under Section 38 — Omission subsequently corrected by second order — Second order held legal—Such an accidental slip comes within Section 152. AIR 1961 Orissa 188 (195): (1962) 32 Comp Cas 908.

(25) An accidental omission made in the judgment falls within the purview of Section 152 and it is the duty of the Court to correct the mistake made by it. The omission to make an order contemplated by Order 20, Rule 12 (1) (c) is an accidental slip and it ought to be corrected by the Court. AIR 1963 Pat 158 (159): 1962 BLJR 512 (DB).

(26) Suit for possession of land — Erroneous arithmetical calculation of area of land in decree — Claim for amendment of decree by application under Sections 151/152 — Claim can be granted though grievance also redressable by appeal against the decree. AIR 1966 Punj 212 (213): 67 Pun LR 172 (DB).

3. Mistakes originating in pleadings.— (1) A Court can, under Section 152, amend clerical error in a decree although the error may have first occurred in the parties' pleadings and may have been merely copied from them in the decree: it is not necessary to first amend the pleadings in such a case. AIR 1954 Pat 108 (109) ** AIR 1957 All 133 (134).

[But see AIR 1919 All 264 (265) (DB) ** AIR 1927 All 585 (585) (DB) ** AIR 1946 Cal 336 (336, 337).]

(2) Court has power to correct a mistake which has crept into the decree from the plaint when rights of third parties have not intervened and no prejudice has been alleged as a result of the mistake in the plaint. ILR (1951) 2 Cal 407 (409) (DB) ** AIR 1961 Andh Pra 508 (510): (1961) 1 Andh WR 313.

4. Mistakes originating anterior to the suit.— (1) Under Section 152 accidental mistakes may be amended even though they may have an origin anterior to the suit and may have been merely repeated in the decree. AIR 1941 Mad 940 (940). (Extent mentioned in mortgage deed mistaken.)

[But see AIR 1948 Mad 13 (15): ILR (1948) Mad 263 (DB).]

(2) Insertion of wrong survey number in mortgage deed and error repeated in plaint and decree — Court has ample power to rectify the error. AIR 1950 Mad 751 (752) ** AIR 1931 Mad 260 (266) ** AIR 1932 Mad 275 (278, 279) (DB) ** AIR 1960 J and K 37 (38). (Obiter :— Remedy to correct the error by way of a separate suit is not available to the plaintiff.)

[But see AIR 1948 Mad 13 (15): ILR (1948) Mad 263 (DB).]

(3) Section 152 does not apply to mistakes originating anterior to suit and a suit for rectification would be appropriate remedy. ILR (1953) 3 Raj 914 (921) (DB) ** AIR 1958 Raj 276 (279): ILR (1958) 8 Raj 885 (DB) ** (1912) 8 Nag LR 13 (16).

(4) There is no reason for restricting the scope of Section 152 to correction of errors made by the Court itself. Indeed mistakes

Section 152 — Note 4 (contd.)
having their origin anterior to the suit and repeated in the decree have themselves been corrected by exercise of jurisdiction under this section. AIR 1959 Ker 386 (386): 1959 Ker LT 165. (AIR 1944 Oudh 5 and 61 Mad LJ 805 and (1950) 1 Mad LJ 120, Relied on.)

5. Inherent power.— (1) Even in cases not falling within Section 152, a Court has inherent power to amend its decree when it is at variance with the judgment. AIR 1953 Vind Pra 2 (3) ** (1910) 37 Cal 649 (657) ** AIR 1932 All 587 (589): 54 All 800 (DB) ** AIR 1924 Cal 895 (898) (DB) ** (1966) 2 Mys LJ 735 (738): 10 Law Rep 491.

(2) When the decree does not correctly express what was really decided and intended by the Court, the Court has an inherent power to amend the decree so as to carry out its own meaning. AIR 1944 PC 46 (50): 76 Ind App 65: ILR (1944) Nag 597: ILR (1944) Kar (PC) 185 ** AIR 1950 Trav-Co 56 (56) (FB) ** AIR 1931 PC 104 (106): 58 Ind App 141: 58 Cal 1281 ** (1966) 32 Cut LT 733 (740): ILR (1966) Cut 556.

(3) Suit for a certain sum against two defendants — Judgment in favour of plaintiff as prayed — Decree making one of defendants alone liable — Decree can be brought in conformity with judgment. (1892) 15 Mad 403 (404) (DB).

(4) Where the judgment gives a mortgage decree but the decree is wrongly drafted so as to give the decree-holder only a charge on property, the decree may be amended so as to agree with the judgment. AIR 1916 Mad 520 (521) (DB).

(5) Where identity of judgment-debtor is definite but the Court has misdescribed his name in decree the mistake can be corrected under inherent powers. 1956 Madh BLJ 131 (132). (AIR 1954 Madh B 14: ILR (1954) Madh B 227; AIR 1933 Bom 200 and AIR 1935 All 914, Foll.)

(6) An order dictated though intended to be reconsidered was signed inadvertently — Order set aside under its inherent powers. AIR 1933 All 49 (49).

(7) Where decree is in accordance with judgment and there is no clerical or arithmetical mistake or accidental slip or omission, Court has no power, either under Section 152 or under its inherent jurisdiction, to amend it. AIR 1956 Orissa 165 (167, 168) (DB).

(8) Where a judgment is passed against G and the decree agrees with the judgment, it cannot be amended so as to convert it into a decree against G and another person. AIR 1917 All 166 (167) (DB) ** AIR 1916 Pat 45 (46) (DB).

(9) The High Court or Federal Court has no power under Section 151 or Sec. 152 to vacate the certificate granted under Section 205 of the Government of India Act which was correct at the time it was given, because of some subsequent event. AIR 1940 FC 7 (8): ILR (1940) Kar FC 45: 1940 FCR 31.

(10) An Appellate Authority under the Industrial Employment (Standing Orders) Act has no power under Section 151 or 152, Civil P. C., to correct mistakes in standing orders finally certified by it under Section 6 (1) of the Act. AIR 1958 Pat 427 (430): 36 Pat 1162 (DB).

(11) Where there is a right of appeal and the party can obtain relief in the Court of appeal ordinarily it is not open to trial Court to set aside its own order unless it is permissible, inter alia under Section 152 — Inherent powers of Court cannot be invoked in such cases. AIR 1962 Andh Pra 506 (510): (1962) 1 Andh WR 405 (DB).

(12) Appeal filed in forma pauperis — Court issuing notice to respondent without complying with Rule 1 (2) — Question under Rule 1 (2) considered in presence of respondent — Court held had jurisdiction to correct its error — In the absence of any vested interest accruing to the other party a Court has inherent jurisdiction always to correct its own error. (1962) 1 Mad LJ 420 (421).

(13) Inherent power — Every authority, judicial or administrative, has inherent power to correct clerical or arithmetical error. (1967) ILR 46 Pat 242 (244) (DB).

(14) A District Judge has no jurisdiction in the exercise of his powers under Sections 152 and 151, to modify original orders passed by a subordinate Court when an aggrieved party can seek proper relief, by way of review, revision or appeal. A Civil Court is not entitled to use its inherent powers in such cases even for the ends of justice or for preventing abuse of the process of the Court. (1966) 1966 Cur LJ 554 (556) (Punj).

(15) Statement not made by Girdawar attributed to him inadvertently by Court in its order — Plaintiff seeking amendment — Amendment can be allowed in exercise of power under Section 151. 1968 Kash LJ 308.

6. "May . . . . . be corrected."— (1) The power of correction under this section is left to the discretion of the Court to be exercised in view of the peculiar facts of each case. AIR 1951 Mad 877 (878, 879) ** AIR 1925 All 187 (188): 47 All 44 (DB) ** AIR 1932 Cal 563 (564, 566, 567).
[But see AIR 1924 Cal 895 (897) (DB).]

(2) A decree could be brought into comformity with the judgment even after the lapse of years and the only limitation is that the Court may deem it inexpedient or inequitable to exercise its power where third parties have acquired rights bona fide under the erroneous decree. (1940) 44 Cal WN 708 (708) (DB) ** AIR 1933 Cal 627 (629): 60 Cal 753 (DB).

(3) It would not ordinarily be a proper use of discretion by the Court to amend

Section 152 — Note 6 (contd.)

a decree after its execution has become barred by limitation. (1954) ILR (1954) Mys 340 (341).

(4) Unless it will be inequitable to do so, mistakes in judgments due to accidental slips or omissions should be corrected. AIR 1942 Oudh 226 (230): 17 Luck 739 (DB).

7. "At any time."— (1) There is no limitation for an application for amendment under this section. AIR 1953 All 485 (486) ** AIR 1929 Oudh 385 (388): 4 Luck 562 (FB) ** (1937) 41 Cal WN 1330 (1331) (DB) ** AIR 1962 Pat 116 (119): 1962 BLJR 622.

(2) Errors arising from accidental slip can be corrected subsequently not only in decree drawn up by ministerial officer but even in judgment pronounced and signed by Court. **(1967) AIR 1967 SC 1440 (1443): (1967) 2 SCR 18.**

(3) An amendment under Section 152 can be made at any time. AIR 1951 Mad 877 (878) ** AIR 1958 Madh Pra 307 (307) (DB).

(4) An order for amendment after satisfaction of decree is entered up is a mere nullity unless steps are taken to set aside the order recording satisfaction. ILR (1952) 2 Raj 487 (491) (DB) ** AIR 1950 Pepsu 52 (55) ** AIR 1925 All 556 (556) (DB) ** AIR 1926 Mad 516 (517) ** (1902) 12 Mad L Jour 96 (97) (DB).

[But see AIR 1953 All 485 (486) ** AIR 1950 Pat 183 (184) ** AIR 1941 Oudh 344 (348).]

(5) Where third parties have acquired rights under the erroneous decree, for valuable consideration and in ignorance of the error in the decree, no amendment should be allowed so as to prejudice their rights. AIR 1956 Orissa 165 (168) (DB) ** AIR 1960 All 385 (386) ** AIR 1960 Mad 564 (568): (1960) 2 Mad LJ 550 (DB).

(6) Laches may disentitle a party to relief by way of amendment of a decree. AIR 1952 Cal 86 (90).

[See however AIR 1942 Oudh 226 (230): 17 Luck 739 (DB).]

[But see AIR 1962 Pat 36 (38): 1961 BLJR 530. (As duty primarily rests with Court, plea of laches or plea of failure of applicant to object at time of preparation of decree is not available against his application.)]

(7) Application for amendment cannot be refused on ground that it has been made after a long lapse of time where the mistake was discovered only soon before the application. AIR 1953 All 485 (487).

(8) Where a decree is not in accordance either with the pleadings or with the judgment, the aggrieved party can ask for amendment of the decree. 1966 All WR (HC) 770 (771).

(9) Clerical mistake can be corrected even when decree is satisfied. AIR 1963 Madh Pra 158 (159): 1964 Jab LJ 668 ** (1959) 37 Mys LJ 993 (995) (DB).

(10) Where the judgment makes provision for future interest from date of judgment till realisation, omission to incorporate the provision in decree is purely a case of accidental slip which can be incorporated in the decree at any time under Section 152. AIR 1961 Orissa 18 (19): 26 Cut LT 153.

(11) One of plaintiffs dying during progress of suit — Substitution of name of heir allowed but order not implemented — Name of deceased containing in appeal and second appeal by defendants — Mistake held should be corrected even though it was brought to notice of High Court at second appellate stage. AIR 1962 Orissa 128 (129): ILR (1961) Cut 684 (DB) ** AIR 1968 Punj 68 (69): 69 Punj LR 906 (DB).

(12) Extent of power of amendment — Delay itself no bar to application for amendment — Trial Court can grant amendment of decree even when appeal against decree is decided by Appellate Court. AIR 1966 Orissa 225 (226): (1965) 7 OJD 275. (**AIR 1962 SC 633** and AIR 1948 Cal 126, Rel. on.)

8. Court by which amendment can be made.— (1) Unless and until a decree is superseded in appeal or revision Court which passed it is entitled to amend it. (1891) 13 All 124 (126) (DB) ** AIR 1922 Mad 186 (186) (DB).

(2) Where decree of lower Court to confirmed, reversed or varied in appeal only Court that can amend decree thereafter is Appellate Court. ILR (1955) Hyd 759 (760) (DB) ** (1958) 62 Cal WN 881 (883) ** (1910) 32 All 295 (300): 37 Ind App 70 (PC) ** (1895) 18 Mad 214 (216) (FB) (Overruling 9 Mad 354.) ** (1889) 11 All 267 (274) (FB) ** ILR (1967) Guj 795 (1967) 8 Guj LR 986 (996) ** (1967) 2 Mys LJ 317 (322). **(AIR 1958 SC 868; AIR 1963 SC 1124, Foll;** AIR 1934 All 971; AIR 1956 Aimer 38 and AIR 1933 Cal 335, **HELD NO LONGER GOOD LAW** in view of Supreme Court decision.) ** AIR 1965 All 226 (228) 1964 All LJ 817 (DB). (AIR 1932 Pat 238 and AIR 1953 Bom 122, **DISSENTED FROM.)** ** (1964) 1 Ker LR 155 (156) **(AIR 1963 SC 1124, Foll.)** ** 1962 All LJ 105 (108): 1962 All WR (HC) 142. (AIR 1934 All 971, **DISSENTED.)** ** AIR 1962 Pat 36 (39): 1961 BLJR 530 ** AIR 1959 Andh Pra 360 (364) (DB) ** AIR 1959 Cal 153 (156): 62 Cal WN 881. (AIR 1934 All 971, **DISSS FROM.)** ** AIR 1959 Pat 591 (592): 1959 BLJR 356 (DB).

(3) Where an appeal or revision is dismissed in limine, lower Court can amend decree. AIR 1956 Ajmer 38 (39) ** AIR 1932 Pat 238 (240): 11 Pat 409 (DB) ** 1966 Cur LJ 195 (196) (Punj).

(4) Appeal dismissed for default — Lower Court can amend decree. AIR 1925 All 556 (556) (DB) ** (1963) 67 Cal WN 256 (258).

(5) Where amendment relates to a portion of decree which is outside scope of

Section 152 — Note 8 (contd.)
appeal lower Court is entitled to amend the decree. AIR 1920 Cal 286 (286) (DB).

(6) Appeal withdrawn — Lower Court can amend decree. AIR 1928 All 679 (680): 50 All 608 (DB).

(7) Words "at any time" have a special significance and provide for amendment by lower Court even where its decree has merged in decree of Appellate Court. AIR 1934 All 971 (972).

Amendment pending appeal against decree.— (8) Amendment can be made by Court which passed decree even when an appeal against decree is pending in a superior Court. **AIR 1962 SC 633 (643): 1962 Supp (1) SCR 206** ** AIR 1924 Pat 528 (528) (DB) ** AIR 1931 All 766 (766) (DB) ** AIR 1969 Andh Pra 128 (128): (1969) 1 Andh WR 366 (DB).

[But see AIR 1954 Manipur 20 (21).]

(9) After satisfaction of the decree the Court may become functus officio as regards the execution of the decree but it retains the power to correct obvious errors in its own records. The Court will not make any correction if it leads to injustice and in any case, not without hearing the parties whose interests are likely to be affected. (1960) AIR 1960 All 385 (386).

(10) Appellate Court can amend lower Court's decree under Section 152 read with Section 107 (2). AIR 1941 All 277 (278): ILR (1941) All 360 (DB).

Power of executing Court to amend.— (11) An executing Court has no power, as such, to amend decree. AIR 1940 Bom 10 (11): ILR (1939) Bom 708. (Proper course is to apply for amendment to Court passing decree.) ** (1912) 15 Ind Cas 719 (720) (DB) (Cal) ** (1900) 27 Cal 951 (967): 27 Ind App 110 (PC) ** (1965) 67 Punj LR 569 (571). (Decree if amended is nullity and can be challenged in appeal in execution matter.)

(12) Where the executing Court and the Court which passed the decree are one and the same, the Court can amend the decree in the course of the execution. AIR 1935 Cal 619 (620): 63 Cal 181 (DB). (AIR 1933 Cal 627: 60 Cal 753, Foll.)

(13) Executing Court will have power to amend where Court which passed the decree has been abolished and there is no successor Court or a Court having power to entertain any proceeding arising from the decision of the Court which has been abolished. AIR 1955 All 622 (623) (DB).

Power of successor in office to amend.— (14) The successor in office of a Judge can correct a clerical mistake in the order passed by his predecessor. AIR 1921 Pat 306 (307) ** (1910) 5 Ind Cas 723 (724) (DB) (Cal) ** (1889) 11 All 267 (293) (FB).

(15) The power given by this section is wider than that conferred under Order 47, Rule 2 on successor of a Court passing an order. AIR 1932 Pat 321 (322).

Transfer of business.— (16) Transfer of business of one Court to another, latter can amend judgment, decrees and orders passed by former Court. AIR 1942 Oudh 226 (229): 17 Luck 739 (DB).

(17) Under Article 12 (2), Assam High Court Order, power to review orders made before the appointed day on which the Assam High Court came into existence was exclusively vested in Calcutta High Court. ILR (1951) 2 Cal 407 (410) (DB).

(18) Where an application for amendment of a decree should be made in the first instance to the High Court, High Court can treat an application for revision from the order on such application in lower Court as one for amendment. AIR 1932 All 337 (339): 54 All 490 (DB).

(19) Suit filed in Court of Subordinate Judge — Court having no presiding officer — Case dealt with by District Judge without any order of transfer to his file as District Judge in charge — Decree passed must be deemed to be one by Court of Subordinate Judge and latter has power to amend it. AIR 1957 Tripura 50 (52).

9. "Of its own motion." — (1) Court can amend a decree of its own motion. AIR 1953 Trav-Co 220 (222): ILR (1953) Trav-Co 89 (FB) ** AIR 1935 Cal 178 (179) (DB) ** AIR 1932 All 337 (340): 54 All 490 (DB).

(2) The power under Section 152, C. P. Code is not confined only to correct the mistakes in the drafting of the decree. It has been held to apply even to correct the mistakes or errors committed in the plaint, and even in a document on the foot of which the suit was filed. It is manifest from Section 152 that a clerical or arithmetical mistake creeping into a judgment or decree on account of an accidental slip or omission may be corrected at any time by the Court of its own motion even without an application. AIR 1966 Andh Pra 26 (27): (1965) 1 Andh WR 266.

10. Who can apply for amendment.— (1) A person not a party to suit has no right to apply for amendment of decree. AIR 1953 Hyd 3 (3): ILR (1952) Hyd 738 (DB).

[But see AIR 1942 Oudh 226 (229): 17 Luck 739 (DB).]

(2) Assignee of a decree may apply for amendment. AIR 1939 Lah 255 (256).

(3) Where an appeal abates so far as one of respondents is concerned, but is decided on merits as against the other, Appellate Court has power to carry out necessary amendment of decree at the instance of the legal representative of deceased respondent. AIR 1941 Mad 123 (125).

11. Notice of amendment.— (1) Though section does not require any notice to be given it would be unfair for a decree to be amended without an opportunity being given to the party against whom the amendment will operate, to show cause against it. AIR 1943 Pat 72 (73) ** AIR

Section 152 — Note 11 (contd.)
1940 Lah 182 (182) ** AIR 1935 Cal 619 (620) (DB). (32 Cal 253 (FB), Applied.)

(2) Amendment ordered without notice to opposite side. Aggrieved party may apply for a review of order or under Section 151 to set aside the amendment. AIR 1926 All 384 (386): 48 All 281 ** AIR 1943 Pat 72 (73).

(3) Plaintiff applying for amendment of decree on ground that name of wrong person was mentioned in plaint by accidental slip and which was copied in decree — Court can amend decree after giving notice to person concerned and giving him an opportunity to show that the mistake is not accidental or clerical. AIR 1935 All 914 (914, 915).

(4) Amendment of decree radically changing its texture allowed without notice to affected party — Amendment is invalid — Application for execution made more than 2 years from original decree but within 2 years from amendment — Notice under Order 21, Rule 22 (Madras) is essential — Sale in execution of such amended decree void — High Court can interfere under Article 227, Constitution of India to expunge the amendment. AIR 1962 Andh Pra 134 (136).

12. Effect of amendment.— (1) Where a decree is amended, the amended decree operates as res judicata from the date of the original decree and not from that of the amendment. (1891) 14 Mad 150 (152) (DB).

(2) Though the general rule is that an amendment of a decree dates back to the date of the decree, yet the amendment should not be allowed to take effect from date of decree so as to affect rights of a purchaser for value wtihout notice who has acquired the property after decree but befor making of amendment. AIR 1942 Oudh 226 (231): 17 Luck 739 (DB) ** AIR 1937 Oudh 217 (220): 13 Luck 101 (FB).

(3) If a decree is passed without jurisdiction a later order amending it cannot remove that lack of jurisdiction and what was a nullity before the amendment does not become a valid thing after the amendment. AIR 1958 Cal 691 (692) (DB).

(4) Where a Court allows an amendment of a decree the limitation commences from date of amendment. Executing Court has no power to consider the question whether the amendment was of substantial nature or whether it was of clerical or arithmetical nature. ILR (1967) Guj 795: (1967) 8 Guj LR 986 (994).

(5) When a decree is amended under powers of review under Order 47 a new judgment and decree comes into existence superseding the former one — This result does not follow when any correction or amendment is made or directed under Sec. 152. When an appeal was pending when the decree was amended under O. 47, the appeal becomes incompetent. AIR 1966 Punj 518 (523): 67 Pun LR 1223 (DB).

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((1881) ILR 6 Cal 22 and (1906) 3 Cal LJ 188 and AIR 1931 Cal 323, DISSENTED.)

(6) The party affected by the mistake in the decree should apply to the Court which passed the decree to correct the mistake under Section 151 or Section 152 — At best the executing Court can only be asked to stay the execution until the mistake is corrected — If after the mistake is corrected, the executing Court finds that the decree is different from the decree sought to be executed the only decree which can be executed thereafter will be the decree which had been corrected. AIR 1963 Tripura 55 (56).

13. Consent decree.— (1) A consent decree may be corrected by Court under Section 152. AIR 1953 Ajmer 1 (1) ** AIR 1957 Tripura 50 (51). (Compromise mortgage decree not specifying costs and omitting to describe mortgaged property.) ** 1958-2 Mad L Jour 514 (514).

(2) A consent decree not in accordance with agreement of parties can be corrected under Section 151. AIR 1934 Rang 108 (109) (DB).

(3) Where there is no mistake contemplated by Section 152 and there is no variance between decree and compromise petition, it cannot be amended either under Section 152 or Section 151, on ground that compromise itself is bad for mutual mistake or fraud of parties or on ground that it does not represent true intention of parties. AIR 1940 Mad 538 (540) ** AIR 1916 Cal 446 (446) (DB) ** AIR 1929 Nag 34 (36) (DB).

(4) A consent decree cannot be varied except by consent. AIR 1940 Mad 538 (540) ** AIR 1957 Tripura 50 (51) ** AIR 1914 Bom 127 (127) (DB).

(5) Where, owing to ambiguity in petition of compromise, the decree passed thereon is varied by consent so as to give expression to the true intention of parties, it cannot be amended and restored to its former form on ground of its variation from compromise petition. (1903) 7 Cal WN 880 (883) (SB).

(6) The form of a consent decree omitting to embody the compromise between the parties can be corrected under Section 152 if the decree indicates that the Court had the intention to embody such compromise therein. AIR 1962 Andh Pra 412 (414): (1962) 1 Andh WR 223 (DB).

14. Award.— (1) Section 152 is general in its terms and applies to clerical and accidental errors in judgments and decrees based on awards. AIR 1946 Nag 257 (258): ILR (1946) Nag 348 ** AIR 1942 Oudh 426 (426, 427).

(2) Where a decree is in accordance with award and there is no clerical mistake or accidental slip it cannot be amended or modified by Court in any manner. (1893) 17 Bom 657 (661).

Section 152 — Note 14 (contd.)

(3) Labour Court or an Industrial Tribunal becomes functus officio with regard to a particular dispute after its award becomes enforceable under Section 6-A of U. P. Act (28 of 1947). Section 6 (6) no doubt confers powers to correct arithmetical mistakes or accidental omissions etc. It neither provides a period within which the action is to be taken nor does it speak of "at any time" as in Section 152, Civil P. C. AIR 1967 All 430 (432): 1968-1 Lab LJ 420 (DB).

15. Suit to rectify mistake, if lies.— (1) Decree passed by a Court of competent jurisdiction. No suit by a party thereto will lie to set aside or rescind that decree. AIR 1915 PC 99 (101): 42 Ind App 171: 37 All 485. (Except on ground of fraud.)

(2) A suit lies to set aside or correct a decree on ground of mistake. ILR (1953) 3 Raj 914 (921) (DB) ** AIR 1958 Raj 276 (279): ILR (1958) 8 Raj 885 (DB). (Mutual mistake of parties extended to decree.) ** AIR 1918 Pat 185 (187) (DB).

[But see (1912) 14 Ind Cas 93 (95) (DB) (Cal) ** AIR 1920 Oudh 171 (172): 23 Oudh Cas 140.]

(3) Amendment sought on ground of a subsequent change of circumstances. A suit, and not an application, would be the most appropriate remedy. AIR 1915 Cal 696 (698) (DB).

(4) Final decree not carying out directions in preliminary decree — Fresh suit not maintainable — If the decree was defective of any accidental omission, the remedy ought to have been sought in that suit itself. ILR (1963) 1 Ker 76 (83).

(5) No error in decree passed in terms of compromise — Clerical error in agreement of compromise — Decree cannot be corrected under Sections 151, 152 and 153 — Separate suit for rectification on ground of mutual mistake would be proper remedy. AIR 1961 Ker 13 (13): 1960 Ker LT 890.

16. Appeal.— (1) An order granting or refusing an amendment under Section 152 is not appealable either as decree or order. AIR 1936 Oudh 81 (82) (DB) ** AIR 1939 Bom 389 (390): 41 Bom LR 800 (802) ** **AIR 1952 SC 409 (410): 1953 SCR 752: ILR (1953) Patiala 9.**

(2) Where there is no mistake contemplated by Section 152, but the whole method of calculation is altered by the amendment, the order, though purporting to be one under Section 152, must be deemed to be one passed on review under O. 47 and hence will be appealable. AIR 1921 Lah 250 (251).

(3) An order of High Court rejecting an application to amend a decree passed by it on appeal is not an order made "on appeal" within the meaning of Clause 39 of the Letters Patent (Calcutta), and is not appealable to the Privy Council. (1903) 30 Cal 679 (681) (DB).

(4) The amended decree is always appealable as a decree. **AIR 1952 SC 409 (410): 1953 SCR 752: ILR (1953) Patiala 9.**

(5) Where instead of amending the decree a fresh decree is passed there is a right of appeal from the fresh decree, but not from the original decree. AIR 1934 Lah 839 (839) ** AIR 1936 Sind 53 (55): 29 Sind LR 445 (DB).

(6) If the decree is amended or corrected in respect of unsubstantial matter a party may not get a right of appeal but if the decree is substantially amended, the right of appeal would be from the date of such substantial amendment. AIR 1968 MP 220 (223): 1968 Jab LJ 633.

(7) Decree for pre-emption — Correction of clerical and patent error in the decree — Appeal filed against the original decree and not against the corrected one, is not incompetent. (1964) ILR (1964) 1 Punj 858 (862).

(8) Appeal against amended decree — Appellant applying for amendment of decree after his appeal against it was dismissed as time-barred — Amendment allowed — Appellant then filing appeal against amended decree — **Held,** though appellant had right of appeal against amended decree, scope of that appeal was confined only to matters covered by amendment and he was not entitled to reopen all matters including those in respect of which he had filed earlier appeal which was dismissed — **Held** further, that the earlier appeal was dismissed as time-barred would make no difference. AIR 1966 Punj 531 (532): (1966) 68 Pun LR (D) 247.

(9) Where an appeal against a decree is pending before the High Court and a specific ground about amendment of decree is taken there, it will be better if the lower Court instead of amending the decree allows the parties to have the matter decided in the High Court. (1965) 67 Pun LR 499 (500).

17. Revision.— (1) An order granting or refusing an application for amendment under the section is open to revision by High Court. AIR 1941 Oudh 66 (66): 16 Luck 252 ** 1957 Andh LT 534 (536) ** 1951 Ker L Tim 207 (209) ** AIR 1934 All 100 (101) (DB) ** AIR 1936 Oudh 81 (82) (DB).

(2) If a Court erroneously thinks that it is bound to amend decree and amends a decree although it feels that the case is one in which amendment ought to be refused, the order can be revised, as it is vitiated by a material irregularity. AIR 1925 All 556 (556).

(3) Where a Court has jurisdiction to amend a decree but refuses to do so on the ground that it has no jurisdiction, its order can be revised. AIR 1953 Mys 43 (44) ** AIR 1918 All 208 (208) (DB) ** AIR 1925 Cal 420 (421) (DB) ** AIR 1931 Oudh 422 (424) (DB).

153. [New] General power to amend.—The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

[R.S.C., O. 28, R. 12; See O. 6, R. 17.]

Section 152 — Note 17 (contd.)

(4) An order for amendment of a decree or judgment is not open to revision as appeal can be filed against amended decree. AIR 1950 Mad 15 (16) ** AIR 1950 Mad 578 (578).

[But see AIR 1940 Mad 538 (539) ** AIR 1915 Mad 1068 (1068) ** (1912) 16 Ind Cas 933 (934) (DB) (Mad).]

(5) Where the lower Court has had jurisdiction to amend a decree, its order is not revisable although it may have relied on a wrong section, or made the amendment unnecessarily. (1893) 16 Mad 424 (427, 428) (DB). (Wrong section.) ** (1891) 1891 All WN 35 (37) (DB). (Unnecessary amendment.)

(6) Order refusing to amend decree on some ground other than want of jurisdiction is not open to revision. (1887) 10 Mad 51 (52) (DB) ** (1886) 8 All 519 (522) (DB).

(7) An order refusing to amend a decree may be interfered with by the High Court under Section 151 though not under Section 115. AIR 1935 Oudh 461 (462): 11 Luck 413 (DB).

(8) High Court will refuse to interfere on ground of laches and negligence of applicant. AIR 1953 Vindh Pra 2 (3).

(9) Section 152 is wide enough to include a compromise decree. If there is an arithmetical or clerical mistake in compromise decree they can be rectified. An application to amend a consent decree if rejected without notice to other side and without going into question of error such order can be rectified in revision. AIR 1959 Mad 194 (194): (1958) 2 Mad LJ 514.

(10) Amendment of decree is matter of discretion — Court refusing to exercise its discretion — Claim of petitioner cannot be held to be heard and finally decided. AIR 1961 Mad 413 (414): 73 Mad LW 666.

18. Review.— (1) Enquiry under Central Civil Services (C. C. and A.) Rules — Appellate authority has no powers to review its own order under the Rules — He can however review it under Sec. 152. AIR 1968 Manipur 16 (18): 1968 Lab IC 150.

SECTION 153 — SYNOPSIS

1. Scope.
2. "At any time."
3. "Defect or error."
4. "Any proceeding in a suit."
5. Amendment by Court suo motu.

1. Scope.— (1) Sec. 153 confers a general power on Court to amend any defect or error in any proceeding in a suit and to make all necessary amendments for the purpose of determining the real questions between the parties. (1898) 25 Cal 371 (390) (SB) ** Madh BLJ 1954 HCR 1219 (1221).

[See also AIR 1959 Andh Pra 126 (128): ILR (1957) Andh Pra 443.]

(2) The object of this rule is to minimise litigation and avoid multiplicity of proceeding and also to see that the technicalities may not be allowed to stand in the way of substantial justice. (1968) 70 Pun LR 968: 1968 Cur LJ 793.

(3) Where a procedural error, for example, an omission to bring on record legal representatives of a deceased party, is brought to the notice of the Court, the mistake should be rectified even if no actual prejudice has been caused. AIR 1954 Ajmer 80 (80).

[See also AIR 1954 Mys 65 (69): ILR (1953) Mys 521 (FB).]

(4) Court will not aid a party by allowing him to amend his pleading where the mistake was fraudulent or intended to get round a previous decision of the Court. AIR 1925 All 142 (142).

(5) An amendment by way of relinquishment of part of claim cannot be allowed under Section 153 merely for purpose of depriving Court of its jurisdiction. AIR 1943 Nag 293 (294, 295): ILR (1943) Nag 603 (DB).

(6) The power to grant amendment under this section is in the discretion of Court. AIR 1955 Mys 2 (3) ** AIR 1915 Mad 449 (451, 452) (DB).

(7) Application to implead as respondent to appeal one of defendants whose name had been omitted from decree by mistake of the official of a Court — Amendment allowed on ground that mistake of Court or its official should not prejudice the litigants. AIR 1957 Madh B 17 (19) (DB).

[See also AIR 1958 Madh Pra 257 (259) (DB). (Ambiguous order.)]

(8) Suit in name of firm by partners doing business outside India — It is only misdescription of plaintiff — Plaint can be amended by substituting partners' names under Section 153 — Order 1, Rule 10 has no application. **AIR 1961 SC 325 (327, 328, 330): 1961 SCR 982.** (AIR 1928 Bom 191, AIR 1931 Cal 770, **OVERRULED;** AIR 1933 Bom 304 and ILR (1952) 1 Cal 153 and AIR 1955 Mad 294, Approved; ILR 17 Bom 413, Ref.; AIR 1960 Cal 15, Affirmed.)

[See also AIR 1969 Mys 111: (1968) 1 Mys LJ 466. **(AIR 1961 SC 325,** Rel. on.)]

Section 153 — Note 1 (contd.)

(9) Suit instituted against a person who died before the institution of suit — His legal representatives can be impleaded as party-defendants if suit was not barred against them. AIR 1961 Andh Pra 239 (240, 241): (1960) 2 Andh WR 268: ILR (1961) 1 Andh Pra 117. (1928 MWN 240, **DISS. FROM.**) ** AIR 1961 Pat 480 (481, 482) (DB).

(10) Memorandum of appeal — Amendment — Respondent dead when appeal was filed — Legal representatives can be brought on record — Amendment permissible. AIR 1962 Mys 44 (46): 39 Mys LJ 607. (AIR 1956 Madh B 76, **DISSENTED.**)

(11) Where an appeal is filed against a dead party among other respondents, without making the legal representatives of the deceased parties in the memorandum of appeal, and the delay in substitution is condoned by the Court accepting the appellants' plea that the death was known to them much later when they made the application for amendment of the appeal memo, there is no bar to permit the correction of error or defect in the appeal memo, under Section 153, C. P. Code. (1966) 32 Cut LT 944 (951, 952): ILR (1966) Cut 588.

(12) Appeal filed in name of dead person — Memorandum of appeal itself being nullity, question of Court exercising powers under Section 153 and allowing legal representation of deceased appellant to be substituted in his place does not arise. AIR 1961 Punj 57 (60): 62 Pun LR 776 (DB).

(13) Revision against dead person — Amendment by substitution of legal representatives — Application filed beyond limitation — Death of respondent known to petitioner in revision even before decree and order sought to be revised — No question of condonation of delay arises — Section 153 does not apply. AIR 1963 Tripura 44 (46).

(14) Court can order amendment of pleadings in proceedings under Delhi and Ajmer Rent Control Act (1952). AIR 1967 Delhi 61 (63): 69 Pun LR (D) 29 (DB).

(15) Amendments of pleading — Amendments allowed without giving any reasons — Amendments not really changing controversy between parties — Amendments quite necessary for determining real question in issue — No interference in revision. AIR 1969 Pat 181 (182).

(16) Appeal filed without copy of decree — Interim order staying execution — Date of appeal — Respondent dead on date of filing appeal — Substitution of legal representative — Order 22, Rule 4, read with Rule 11, applies — Cause title cannot be amended under Section 153. AIR 1963 Cal 417 (420).

(17) Application for amendment of decree — Dismissal of second appeal by High Court under Order 41, Rule 11 — Application lies to High Court and not to lower Court. AIR 1965 All 226 (228): 1964 All LJ 1057.

(18) Application for amendment of plaint, judgment and decree after the second appeal having been dismissed in limine — Trial Court and not the High Court is competent to entertain the application. (1966) 1966 Cur LJ 195 (196) (Punj).

(19) Plaintiff purchasing, after institution of suit, interests of one of defendants in suit properties — Amendment seeking to include such change by splitting original para in plaint and by correcting new para — Amendment must be allowed. AIR 1969 Pat 181 (182).

(20) Plea of benami not mentioned in plaint — Amendment to include such plea necessary for clarifying plaintiff's case — No change caused by such plea in plaintiff's original stand — Amendment should be allowed. AIR 1969 Pat 181 (182).

(21) Mistakes in typing of dates, figures and mistake about real vendor of property in question — Amendment should be allowed to rectify them. AIR 1969 Pat 181 (182).

(22) Probate — List of assets annexed to probate — Correction in list — Interlocutory application for correction — Application held was unnecessary as the probate Court does not go into the question of title. (1968) 1 Mys LJ 273.

2. "At any time". — (1) The power of amendment can be exercised "at any time" during the proceedings. AIR 1955 Mad 644 (645, 646) ** AIR 1959 Andh Pra 26 (26, 27): ILR (1958) Andh Pra 546. (Amendment of plaint schedule after preliminary decree.) ** (1898) 20 All 478 (480) (DB).

(2) The power to amend is vested both in the Original as well as in the Appellate Court. AIR 1951 Mad 877 (878) ** AIR 1916 Pat 347 (348): 1 Pat L Jour 393 (DB) ** AIR 1922 All 81 (81) (DB).

(3) Power to amend under this section is prima facie limited to amendments during the actual pendency of proceedings and not after the decree has been drawn up and sealed. AIR 1956 Orissa 165 (167) (DB) ** AIR 1924 Bom 166 (166).

[See however AIR 1958 Madh Pra 307 (307). (Amendment at stage of leave to appeal to Supreme Court.)]

(4) Section 153 and Order 6, Rule 17 of the Civil Procedure Code invest the Court with jurisdiction to allow an amendment (of the plaint schedule) even after the preliminary decree is passed in a proper case. AIR 1959 Andh Pra 26 (26, 27): (1958) 2 Andh WR 208 (DB).

3. "Defect or error". — (1) An order erroneous on the merits is not "a defect or error" in proceedings within the meaning of Section 153. AIR 1922 Pat 121 (121): 4 Pat L Jour 287 (DB).

(2) No error in decree passed in terms of compromise — Clerical error in agree-

154. Saving of present right of appeal.—[Repealed by the Repealing and Amending Act, 1952 (48 of 1952), First Schedule.]

Note.—The repealed Section 154 was as follows:—

"Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement."

155. Amendment of certain Acts.—[Repealed by the Repealing and Amending Act, 1952 (48 of 1952), First Schedule.]

156. Repeals.—[Repealed by the Second Repealing and Amending Act, 1914 (XVII of 1914, Section 3, Schedule II.]

Section 153 — Note 3 (contd.)

ment of compromise — Decree cannot be corrected under Sections 151, 152 or 153 — Separate suit for rectification on ground of mutual mistake would be proper remedy. AIR 1961 Ker 13 (14): 1960 Ker LT 890.

(3) A clerical mistake in description of suit land can be rectified at any time by the Court under Section 151 or under Section 152 and Section 153. AIR 1968 Manipur 22 (23).

(4) Person wrongly described in the title of the plaint — The defect or error can be corrected. (1966) 7 Guj LR 918: ILR (1966) Guj 877 (DB).

4. "Any proceeding in a suit". — (1) The term "proceeding" includes any application to a Court of justice, however made, for aid in the enforcement of rights, for reliefs, for redress of injuries, for damages or for any remedial object. AIR 1937 Mad 342 (343).

(2) A memorandum of appeal may be amended under this section. AIR 1952 Orissa 168 (171) (DB).

(3) Section 153 applies to amendment of an application for a final decree in a mortgage suit. AIR 1922 All 446 (447) (DB).

(4) Under Section 153 an application for a personal decree under Order 34, Rule 6 may be amended. AIR 1924 All 804 (805) (DB). (Omission to sign.) ** AIR 1915 Mad 452 (453): 38 Mad 677 (DB). (Addition of alternative prayer.)

(5) Application for restitution not in correct form. It may be amended under this section. AIR 1921 All 321 (322) (DB).

(6) Court has inherent power to amend a power of attorney filed by mukhtiar of a party by the insertion of the mukhtiar's name which was omitted by mistake. (1910) 37 Cal 399 (404) (DB).

(7) Section 153 would apply to a case of amendment of power of attorney. AIR 1934 All 810 (811).

(8) Section 153 prima facie applies to pending proceedings. AIR 1924 Bom 166 (166).

(9) Order 33, Rule 5 does not take away the inherent powers of Courts under Section 151 or their general power to allow amendment under Section 153 — A defect in the verification of the application to sue in forma pauperis can therefore, be permitted to be removed by amendment. AIR 1955 Raj 78 (80): ILR (1953) 3 Raj 232 (DB).

(10) Application for challan for depositing amount for setting aside execution sale is 'proceeding' within Section 153 and may be amended by inclusion of prayer for setting aside sale. AIR 1937 Mad 342 (343).

(11) Verification in application to appeal in forma pauperis — Verification not made in prescribed manner must be allowed to be corrected. AIR 1937 Nag 108 (110): ILR (1938) Nag 245.

(12) Execution of decree stayed pending appeal — Dismissal of appeal — Decree-holder applying to executing Court to proceed with stay petition — Execution petition does not cease to be pending after passing of appellate decree, though petition becomes technically defective after appellate decree — Executing Court can proceed with execution after allowing amendment of execution petition — Amendment can be allowed even after appellate decree has become time barred. AIR 1965 Ker 29 (30, 31): 1964 Ker LT 532.

(13) Certificate of debt — Execution of — Pending execution name of company changed pursuant to provisions of Sections 21 to 23 of Companies Act, 1956 — Identity of Company not changed — No transfer of interest of decree-holder involved — Executing Court had power to amend the petition by substitution of name of the decree-holder. AIR 1966 Cal 585 (587) (DB).

5. Amendment by Court suo motu. — (1) Though the Court has a power of amendment suo motu, it has no power to convert, of its own accord, a suit for declaration into one for possession. (1913) 19 Ind Cas 672 (672) (Mad).

(2) A Court is bound to adjudicate on a claim as brought and cannot direct parties to alter their claims. 1911 Pun Re No. 1: 9 Ind Cas 673 (674) (DB) ** AIR 1932 Bom 394 (396, 397).

(3) Suit heard and posted for judgment — Munsif allowing plaintiff to amend plaint in order to keep evidence in par with pleadings — In no circumstance amendment of plaint should be suggested and allowed by a judge merely because evidence and pleadings do not tally — Order allowing amendment set aside. AIR 1967 Orissa 58 (59): 33 Cut LT 65.

157. Continuance of orders under repealed enactments.—Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf.

[1882, S. 3, second sentence.]

158. Reference to Code of Civil Procedure and other repealed enactments.—In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.

[1882, S. 3, Para 2.]

THE FIRST SCHEDULE

ORDER I

PARTIES TO SUITS

GENERAL

HIGH COURT AMENDMENTS (GENERAL)

Andhra Pradesh

Section 32 of the Andhra State Act, 1953, is as follows:

"32. Practice and procedure in Andhra High Court.

Subject to the provisions of this Part,[a] the law in force immediately before the prescribed day[b] with respect to practice and procedure in the High Court at Madras shall, with the necessary modifications, apply in relation to the High Court of Andhra, and accordingly that High Court shall have all such powers to make rules and orders

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SECTION 157

1. "Rules".— (1) The expression "rules made" means rules properly and validly made. Rules, which though purporting to be made under the old Code, were beyond the powers given by the old Code, do not become valid by reason of the fact that, if they had been made under the new Code, they would be valid. AIR 1916 Mad 1165 (1166) (DB).

2. "Consistent with the Code".— (1) The word 'Code' includes rules in the First Schedule. Hence, the Madras Civil Rules of Practice made under the Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part X of the Code of 1908 are invalid if and in so far as they are inconsistent with any of the rules in the First Schedule of the later Code. AIR 1938 Mad 438 (441): ILR (1938) Mad 734 (FB). (AIR 1914 Mad 652: 37 Mad 17 (FB), **OVERRULED.)** ** AIR 1950 Mad 261 (264): ILR (1950) Mad 651 (DB). (Rule 142 being inconsistent with Order 21, Rule 11 (3) is invalid under Section 157 — AIR 1938 Mad 144 and (1905) 28 Mad 557, Approved — AIR 1949 Mad 631, **OVERRULED.)**

[See also AIR 1935 Mad 893 (895): 59 Mad 342. (Rule 199.)]

Section 158 — Note 1

(1) Per Majority (Jagdish Sahai J. contra): When Section 158 speaks of the "corresponding rule" of the Code of 1908, it refers to the rule in the First Schedule as amended, supplemented or replaced by the rule framed by the High Court. The reference in Section 13 of the Court-fees Act (1870) to Section 351 of the Code of 1859 must be construed as a reference to Order 41, Rule 23 of the Code of 1908, as amended, supplemented, etc., and not limited to those provisions only of Order 41, Rule 23 which were originally enacted in the First Schedule. AIR 1969 All 142 (154) (FB).

ORDER 1 (GENERAL)

1. Scope.— (1) Order deals with the subject of parties to suits and inter alia with the joinder, misjoinder and non-joinder of parties and to a certain extent with the joinder of causes of action. AIR 1918 Cal 858 (859): 45 Cal 111 (DB).

(2) Though Order 1 in terms refers only to "suits", its provisions are also applicable to joinder of parties to appeals. AIR 1923 Lah 638 (639): 14 Lah 744 (DB).

(3) Provisions of Code relating to joinder of parties in a suit have no appli-

with respect to practice and procedure as are immediately before the prescribed day exercisable by the High Court at Madras :

Provided that any rules or orders which are in force immediately before the prescribed day with respect to practice and procedure in the High Court at Madras, shall, until varied or revoked by rules or orders made by the High Court of Andhra, apply with the necessary modifications in relation to practice and procedure in the High Court of Andhra as if made by that Court".

[a] "This Part", that is Part IV.

[b] "Prescribed day" means the date mentioned in sub-section (1) or the date appointed under sub-section (2) of S. 28 of the said Act. It is 5-7-1954.

Assam

Clause 6 of the Assam High Court Order, 1948 (which came into force on 1-3-1948) is as follows :

"6. Subject to the provisions of this Order the law in force immediately before the prescribed day[a] with respect to practice and procedure in the High Court in Calcutta, shall, with necessary modifications, apply in relation to the High Court of Assam, and accordingly that High Court shall have all such powers to make rules and orders with respect to practice and procedure as are immediately before the prescribed day[a] exercisable by the High Court in Calcutta :

Provided that any rules or orders which are in force immediately before the prescribed day[a] with respect to practice and procedure in the High Court in Calcutta, shall, until varied or revoked by rules or orders made by the High Court of Assam,

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Order 1 (Gen.) — Note 1 (contd.)

cation to proceedings taken for execution of a decree. AIR 1943 Mad 179 (181): ILR (1943) Mad 659 (DB).

(4) Where mandamus under Article 226 of the Constitution is sought by several rate payers having different causes of action to compel a municipality to supply scheduled quantity of water for domestic purposes, it would be sufficient to follow analogously the provisions of Order 1. AIR 1956 Cal 291 (295).

(5) Even if the Code of Civil Procedure applies to writ applications still it cannot be taken to override a general rule applicable to such applications. There should be separate applications for separate writs. AIR 1955 Pepsu 159 (160, 162): ILR (1955) Patiala 622 (DB). (Joint petition by several persons against separate orders.) ** AIR 1957 Andh Pra 88 (89). (Joint petition by two or more persons, against similar but separate orders — AIR 1954 Raj 185; AIR 1956 Mad 628 and 55 Bom LR 246, Rel. on.) ** AIR 1968 Raj 20 (22): 1967 Raj LW 144 (DB). (Petitioners challenging validity of same law in same manner.) ** AIR 1965 Mys 143 (148): (1964) 1 Mys LJ 513 (DB). (Persons having joint interest in subject-matter but possessing separate and distinct rights.) ** AIR 1962 Guj 21 (25): (1961) 2 Guj LR 635 (DB). (Single petition by two or more persons to enforce separate claims.) ** AIR 1960 All 366 (366): 1959 All LJ 864 (DB) ** AIR 1959 Mad 137 (140): (1959) 1 Mad LJ 53 (DB). (Interests of petitioners similar, but not joint.)

(6) In the administrative proceedings under the U. P. Encumbered Estates Act, technical rules of the First Schedule of the Civil P. C., regarding impleading of parties should not be invoked and the matter should be viewed in a more liberal way. **AIR 1953 SC 521 (524, 526):** 1954 SCR 506: ILR (1954) 1 All 168. (AIR 1942 Oudh 16; AIR 1942 Oudh 339; AIR 1947 All 18; ILR (1946) All 891 (FB), **OVERRULED.)**

2. "Party", meaning of. — (1) A person can become a party to a suit only by his name appearing on record of suit as a party. ('30) AIR 1930 Cal 263 (264) (DB).

(2) Person really interested in the suit does not become a party merely because the party on record is only his benamidar. AIR 1930 Cal 263 (264) (DB).

(3) The introduction of a party at one stage of a suit is good for all subsequent stages thereof. AIR 1917 PC 156 (161): 45 Cal 94 (110): 44 Ind App 218.

(4) Mere joinder of person as a plaintiff does not entitle him to be associated in a decree in favour of the person who alone has the real title. AIR 1925 PC 168 (168): 52 Ind App 211: 6 Lah 388.

(5) The rule of common law that the same person cannot be both a plaintiff and a defendant loses much of its force in India, where the Courts are Courts of equity as well as of law, when all the parties are before the Court and their rights can be determined and adjusted. AIR 1946 Bom 516 (532) ** AIR 1940 Pat 153 (155) (DB).

apply with the necessary modifications in relation to practice and procedure in the High Court of Assam as if made by that Court."

[a] "The prescribed day" is the 5th day of April, 1948. Assam High Court is now known as Assam and Nagaland High Court — See State of Nagaland Act, 27 of 1962, S. 13 [1-12-1963]. S. 15 of that Act says that the practice and procedure in the High Court of Assam shall, with necessary modifications apply to the common High Court.

Orissa

By virtue of clause 6 of the Orissa High Court Order, 1948, any rules or orders which are in force immediately before 26-7-1948 with respect to practice and procedure in the Patna High Court shall, until varied or revoked by the Orissa High Court, apply with necessary modifications in relation to practice and procedure in the Orissa High Court as if made by that Court.

Oudh

"All rules framed and amendments made by the erstwhile Chief Court of Oudh in the First Schedule of the Code of Civil Procedure, 1908, be deleted and the rules framed and amendments made therein by the Allahabad High Court be made applicable to all Civil Courts in the State of Uttar Pradesh...."

—U. P. Govt. Gaz., 1953, Part II [17-1-1953.]

High Courts for the New States.

As to the practice and procedure that should be followed in the new or reorganised State of Bombay, Kerala, Madhya Pradesh, Mysore, Punjab and Rajasthan, S. 54 of the States Reorganization Act, 1956, is as follows:

"54. Practice and procedure.

Subject to the provisions of this Part,[a] the law in force immediately before the appointed day[b] with respect to practice and procedure in the High Court for the corresponding State[c] shall, with the necessary modifications, apply, in relation to the High Court for a new State,[d] and accordingly, the High Court for the new State shall have all such powers to make rules and orders with respect to practice and procedure as are, immediately before the appointed day exercisable by the High Court for the corresponding State :

Provided that any rules or orders which are in force immediately before the appointed day with respect to practice and procedure in the High Court for the corresponding State[c] shall, until varied or revoked by rules or orders made by the High Court for a new State,[d] apply with the necessary modifications in relation to practice and procedure in the High Court for the new State[d] as if made by that Court."

[a] "This Part," that is Part V.

[b] "Appointed day" means 1-11-1956.

[c] "Corresponding State" means, in relation to the new State of Bombay, Madhya Pradesh, Mysore, Punjab or Rajasthan, the existing State with the same name and in relation to the new State of Kerala, the existing State of Travancore-Cochin.

[d] "New State" means a Part A State formed by the provisions of Part II of the said Act. After Eighth Amendment of the Constitution territories of India are divided into States and Union Territories only.

Gujarat

Section 32 of the Bombay Reorganisation Act, 1960, is as follows:—

"32. Subject to the provisions of this Part[a] the law in force immediately before the appointed day[b] with respect to practice and procedure in the High Court of Bombay shall, with the necessary modifications, apply in relation to the High Court of Gujarat, and accordingly, the High Court of Gujarat shall have all such powers to make rules and orders with respect to practice and procedure as are immediately before the appointed day[b] exercisable by the High Court of Bombay :

Provided that any rules or orders which are in force immediately before the appointed day[b] with respect to practice and procedure in the High Court of Bombay shall, until varied or revoked by rules or orders made by the High Court of Gujarat, apply with

the necessary modifications in relation to practice and procedure in the High Court of Gujarat as if made by that Court."

[a] "This Part" means Part IV.

[b] "Appointed day" means the 1st day of May, 1960.

Punjab

Punjab has been reorganised into two States, namely, Punjab and Haryana, and one Union Territory, Chandigarh. Two districts, Lahaul and Spiti, have been transferred to Himachal Pradesh along with some other villages on the border. But for all the three Units, there is a common High Court known as Punjab and Haryana High Court. Jurisdiction of this common High Court extends to Union Territory of Chandigarh as well. Practice and procedure in the High Court of Punjab, with necessary modifications will apply to this common High Court — See the Punjab Reorganisation Act, 31 of 1966, Ss. 29, 30 and 33 [1-11-1966].

Delhi and Himachal Pradesh

A new High Court for the Union Territories of Delhi and Himachal Pradesh has been constituted under the Delhi High Court Act, w.e.f. 31-10-1966. Jurisdiction of this High Court has been extended to the Union Territory of Himachal Pradesh with effect from 1-5-1967. This High Court has been granted original side as well—see Delhi High Court Act, 1966 (26 of 1966) Ss. 4 (2), 5 and 7. Of the 10 Union Territories, Manipur, Tripura and Goa, Daman and Diu have Judicial Commissioners' Courts—see Acts 15 of 1950 and 16 of 1964.

Union Territories

Union Territories: Delhi and Himachal Pradesh have a common High Court — see Act 26 of 1966. In relation to Chandigarh, High Court is the Punjab and Haryana High Court — see Act 31 of 1966, S. 4; Pondicherry falls within the Jurisdiction of Madras High Court; Andaman and Nicobar Islands come under Calcutta High Court; Laccadive, Minicoy and Amindivi Islands are governed by the Kerala High Court and Dadra and Nagar Haveli have Bombay High Court as the High Court.

R. 1. Who may be joined as plaintiffs.—All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

[1882, S. 26; 1877, S. 26; R. S. C., O. 16, R. 1. See O. 2, R. 3.]

ORDER 1, RULE 1 — SYNOPSIS

1. **Scope.**
2. **Plaintiffs having different interests.**
3. **Same act or transaction.**
4. **Any common question of fact or law.**
5. **"Jointly".**
6. **"Severally".**
7. **"In the alternative".**
8. **Appeal.**
9. **Necessary and proper parties** — See Notes on Order 1, Rule 10.

1. Scope. — (1) Order 1, Rule 1 makes it clear that, for several plaintiffs to join in one suit, it is not necessary that their causes of action should be identical. AIR 1923 Mad 331 (332) ** AIR 1935 Cal 573 (574): 63 Cal 163 (DB).

(2) In order to enable several persons to join in one suit as plaintiffs both the following conditions must be fulfilled; viz., (1) right to relief must arise out of same act or transaction or series of acts or transactions; and (2) the matter must be such that, if the plaintiffs brought separate suits, any common question of law or fact would arise. AIR 1956 Assam 7 (8).

(3) Policy of Order 1, Rule 1 is that, even in cases where the plaintiffs seek individual reliefs, where the investigation would to a great extent be identical in each individual case, they may unite as co-plaintiffs and thus avoid needless expense. AIR 1928 Cal 92 (93) (DB).

(4) Interest of every plaintiff in entire subject-matter of suit not necessary. AIR 1956 Assam 7 (8) ** AIR 1942 All 122 (126): ILR (1942) All 103 (DB).

(5) The rule has been held to be applicable to writ petitions under Article 226, by virtue of Section 141. Where the petitioners were discharged from service by a single order of the Collector, it was held that a single application was maintainable at their instance as a common question of law and fact arose. AIR 1958 Andh Pra 16 (19): ILR (1957) Andh Pra 678 (DB).

(6) No Court is entitled to order a person to be added as a plaintiff without the consent of the plaintiff who is already on record and who has taken the trouble

Order 1, Rule 1 — Note 1 (contd.)

of incurring the cost of preparing the brief, engaging a counsel and instituting the claim in Court. AIR 1955 Bhopal 22 (23).

(7) The rule does not say that any person must join as plaintiff to a suit; nor does it say anything as to who are necessary or proper parties to a suit, whom it may be essential or advisable to join. (1887) 9 All 486 (491) (DB).

(8) The rule merely provides for procedure and has nothing to do with payment of Court-fees. Hence, although under this rule several persons may join as plaintiffs in the same suit, Court-fees may have to be paid under the Court-fees Act as if separate suits were brought. AIR 1935 Cal 573 (576): 63 Cal 163 (DB).

(9) The petitioners challenged the election of three members from their constituency to the Gram Panchayat. They also challenged the election of two members from Gram Panchayat to the Anchal Panchayat. **Held,** that the application was not bad for non-joinder of other members of Gram Panchayat and Anchal Panchayat as parties. (1965) 69 Cal WN 346 (367).

(10) Judicial discretion in addition of parties is to be exercised subject to provisions of O. 1, R. 1 and Order 2, Rule 3. AIR 1969 Raj 131 (133): 1969 Raj LW 121.

(11) Persons permitted to join as plaintiffs in one suit under Order 1, Rule 1 are not necessarily persons jointly entitled to institute a suit within meaning of Sec. 7, Limitation Act 1908. AIR 1969 Ker 163 (166): 1968 Ker LT 673 (FB).

2. Plaintiffs having different interests.— (1) In a suit for possession, where one of the plaintiffs is the purchaser from the cosharer of the other plaintiff, there is no misjoinder. (1912) 16 Ind Cas 623 (624) (DB) (Cal).

(2) The rule permits a suit being filed by a person in a double capacity, provided the conditions mentioned therein are not transgressed. AIR 1956 Madh B 35 (37) ** AIR 1918 Cal 870 (873, 874) (DB) ** AIR 1915 Bom 284 (285): 40 Bom 401.

(3) A suit by plaintiff to recover possession of certain properties in his individual capacity and certain other properties in his capacity as the shebait of an idol is maintainable. AIR 1928 Cal 199 (202): 55 Cal 164 (DB).

(4) Suit by certain share-holders of a company for avoiding contract of allotment of shares and refund of money paid — Plaintiffs not having identical interest but efficacy of each contract depending upon different facts and different conduct of parties vis-a-vis the company and the conduct of the company qua each shareholder — Facts of each case requiring different approach and analysis — Order 1, Rule 1 or Order 1, Rule 8 has no application. AIR 1953 Bom 112 (117).

3. Same act or transaction.— (1) The rule enables different plaintiffs to join in one suit where the right to relief alleged to exist in each of them arises out of the same transaction and there is a common question of fact or law to be decided. AIR 1933 Pat 644 (645).

(2) Co-shares suing the lambardar for profits may join in the same suit. AIR 1929 All 668 (668, 669): 51 All 994 (DB).

(3) Co-sharers, although they have been collecting rents separately, may join in same suit for rent against tenant, though the rents refer to different periods. (1911) 10 Ind Cas 891 (892) (DB) (Cal).

(4) A contingent reversioner may join as co-plaintiff in the presumptive reversioner's suit to set aside an alleged invalid adoption, the object of the suit being to remove an apprehended injury which is common to the interest of all reversioners, presumptive as well as contingent. AIR 1915 PC 124 (127): 38 Mad 406: 42 Ind App 125.

(5) Where several plots of land belonging to different owners have been acquired by same notification under Section 4, Land Acquisition Act, the several owners may join in one suit for possession over them. AIR 1956 Vindh Pra 16 (16). (Such a suit not bad for multifariousness.)

(6) Lessee executing Kabuliyat in favour of lessor — Lessor transferring his half interest to C and other half to P — Successors in interest of C and P suing lessee for ejectment after expiry of lease — Plaintiff's right to eject held arose from single act of original agreement of tenancy — That the plaintiffs could sue for their separate parts did not preclude them from instituting one suit. AIR 1956 Assam 7 (8).

(7) A suit by mother on her own behalf and on behalf of her minor sons, on a promissory note executed in her favour for the debt due to her minor sons, is not bad — Holder of promissory note is proper party to suit by owner of debt on promissory note. AIR 1956 Raj 174 (179): ILR (1956) 6 Raj 698 (DB).

(8) Where rights of several plaintiffs do not arise out of same transaction or series of transactions but arise out of different transactions, there can be no valid joinder of such plaintiffs under this rule. AIR 1923 Pat 411 (412) (DB) ** AIR 1925 Bom 342 (342) (DB).

(9) Defendant in execution of decree against P attaching bus jointly owned by N and P. **Held,** that N and P had a right of suit and the addition of the Taxi Motor Association as plaintiffs could not deprive them of that right. Even though P had joined the Association for certain purposes, they had not foregone their rights of proprietorship of the bus. 1962 Raj LW 342: ILR (1962) 12 Raj 771.

(10) Where plaintiff is manager of joint family he need not add other members as parties. AIR 1968 Andh Pra 291 (295) ** AIR 1964 All 495 (496): 1963 All LJ 1106

Order 1, Rule 1 — Note 3 (contd.)

(DB). (Father (karta) in case of Hundi in favour of Karta and minor son.)

(1) One co-owner can alone maintain action against trespasser. AIR 1968 Andh Pra 291 (295) ** (1968) 70 Pun LR 515: 1968 Cur LJ 38. (For example a person who has taken possession of land by reason of the consolidation authorities giving effect to an erroneous revenue entry.)

4. Any common question of fact or law. — (1) Although plaintiffs may be suing same defendant and for a similar relief, and their rights may arise out of same transaction, they cannot join in one suit where case of each plaintiff gives rise to different questions of fact and law. AIR 1926 Mad 57 (57, 58) ** AIR 1926 Mad 1140 (1140) ** AIR 1962 Tripura 7 (9).

(2) Where a defendant in a suit claims relief as against a co-defendant, in respect of the same transaction as that with reference to which the suit is brought, he can be added as a co-plaintiff, for, if he brought a separate suit, a common question of law and fact would arise. AIR 1939 Pat 157 (158) (DB).

(3) The fact that the case of each plaintiff gives rise to similar questions of fact and law would not entitle them to join in one suit. AIR 1956 Pepsu 80 (82): ILR (1956) Patiala 141.

(4) It is not necessary that all questions arising in a case should be common to all suits if separate suits were instituted. Even if one common question of law or fact could arise in all the suits the requirement of this rule would be satisfied. AIR 1956 Assam 7 (8).

(5) Suit property purchased by three persons in three different portions under separate deeds — Suit by all of them for ejectment of tenant of the whole property is not bad for misjoinder of parties. AIR 1964 All 350 (352): 1963 All LJ 856.

(6) Persons assessed under Section 114 of District Boards Act challenging vires of S. 114 could join together as plaintiffs. 1965 All LJ 965: 1965 All WR (HC) 754.

(7) There was misjoinder of plaintiffs where each plaintiff had separately to prove his own possession for more than 60 years and there was no common question of fact or law involved. AIR 1964 Orissa 159 (160): ILR (1964) Cut 160.

(8) Where each of the plaintiff worker was entitled to different amounts of leave, it was held that the plaintiff could not join one suit against the employer for declaration that they were entitled to leave with wages. 1968 Lab IC 1322 (1323) (Guj).

(9) Nuisance by noise created by hammering metal sheets by heavy hammers. Suit by only three persons although many others were affected held valid. AIR 1968 Cal 91 (99): 72 Cal WN 717.

(10) One or some heirs of deceased Mohamedan cannot represent the entire body of the heirs in a suit to recover debt due to the deceased. AIR 1963 Bom 170 (171): 65 Bom LR 1 (DB).

(11) Once all the parties jointly interested are before the Court, it can make an appropriate order and can give judgment in favour of all the persons interested whether they be joined as plaintiffs or defendants. AIR 1963 Bom 170 (171): 65 Bom LR 1 (DB).

5. "Jointly". — (1) Though the rule is permissive it does not affect the general principle of law that all persons jointly entitled to any relief must be made parties to the suit either as plaintiffs or as defendants. AIR 1950 Pat 377 (378) (DB) ** ILR (1951) 1 Cal 665 (667) ** (1908) 35 Cal 331 (344): 35 Ind App 73 (PC).

(2) See the following cases as illustrations of persons in whom the right to relief exists jointly. (1886) 10 Bom 32 (34) (DB). (Joint owners — Suit for possession.) ** (1881) 3 Mad 234 (235) (DB). (Do.) ** AIR 1923 Mad 337 (337) (DB). (Executors who have proved will suing recovery of property of deceased.) ** ILR (1951) 1 Cal 665 (667). (Co-trustees — Suit for possession of trust property.) ** (1882) 8 Cal 42 (50): 8 Ind App 135 (PC). (Do.) ** AIR 1922 Mad 317 (318, 319) (DB). (Do.) ** AIR 1916 Pat 44 (45): 1 Pat L Jour 437 (DB). (Members of committee appointed under Religious Endowments Act suing for removal of trustee.) ** AIR 1932 Mad 583 (584) (DB). (Joint promisees under contract suing to enforce contract.) ** 1964 Ker LJ 676. (Legal representatives for realising ancestral debt.)

(3) A suit by members of a Hindu joint family to recover a property belonging to joint family must be by or on behalf of all the members. ILR (1954) 4 Raj 485 (488) (DB) ** (1907) 29 All 311 (317) (DB) ** (1894) 17 Mad 122 (126) (DB) ** AIR 1968 Andh Pra 291 (295).

(4) Where a number of persons are jointly entitled to the same relief in respect of a transaction and one of them wishes to sue to enforce that relief, the proper course is for him to ask the other persons to join in the suit as co-plaintiffs. If they refuse to join in the suit as plaintiffs, they must be joined as defendants. AIR 1942 Cal 295 (296) (DB). (Case of shebaits.) ** (1967) 2 Andh WR 200 (DB). (One of two joint owners seeking eviction of tenant — Other co-owners opposing petition joined as respondents.) ** AIR 1963 Bom 170 (171): 65 Bom LR 1 (DB).

[See however AIR 1957 All 369 (371).]

(5) A suit should not be dismissed merely because the plaintiff fails to prove that before joining the persons jointly interested with him as defendants, he asked them to join as co-plaintiffs and they refused to do so. (1908) 18 Mad L Jour 495 (496) ** (1902) 24 All 226 (228) (DB) ** AIR 1923 Cal 506 (507) (DB) ** (1899) 26 Cal 409 (412) (FB) ** AIR 1963 Bom 170 (172): 65 Bom LR 1 (DB).

R. 2. Power of Court to order separate trials.—Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.

[R. S. C., O 16, R. 1.]

R. 3. Who may be joined as defendants.—All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise.

[1882 and 1877, S. 28; Cf. R.S.C., O. 16, R. 4. See O. 11, Rule 3.]

Order 1, Rule 1 — Note 5 (contd.)

(6) A suit by some of shebaits on behalf of the deity is maintainable where the Court cannot find out that any known shebait has been left out. AIR 1957 Cal 117 (118) (DB).

6. "Severally".— (1) Where the same transaction entitles each one of a number of persons to relief individually and not jointly, they may all join as plaintiffs in the same suit if the questions to be decided are common. AIR 1932 All 401 (402) (DB) ** (1897) 24 Cal 385 (388, 390) (DB). (Such course is not obligatory; they can also sue separately.)

(2) Mandamus sought by one writ application by several ratepayers having different causes of action to compel a municipality to supply scheduled quantity of water for domestic purposes. It would be sufficient to follow analogously provisions of Order 1 and give relief to those applicants who were found to be entitled to it. AIR 1956 Cal 291 (295).

7. "In the alternative".— (1) A and B sue C alleging that either A or B is entitled to relief against C in respect of a certain transaction. Joinder of A and B is permissible under this rule. AIR 1921 Nag 9 (10) ** AIR 1927 Oudh 484 (485): 3 Luck 241 (DB) ** (1903) 26 Mad 647 (649) (FB).

(2) A father, and B son, suing to recover M's property — B claiming as adopted son of M — A claiming as nearest reversioner of M's deceased son if B's claim failed — Causes of action although alternative were distinct, separate and antagonistic — Suit is bad for misjoinder of plaintiffs and causes of action. AIR 1950 Mad 760 (761).

(3) The rule does not warrant the joinder, as plaintiffs in one suit, of rival claimants each of whom denies the right of the other. AIR 1955 Bhopal 22 (23). (AIR 1918 PC 49, Rel. on.)

(4) Where it is not alleged that the right to relief exists in the alternative but the plaintiffs are joined in the hope of getting a decree by something like a mass attack on the defendants and of afterwards dividing the fruits of victory among the plaintiffs by further litigation, inter se, such a suit, is inconvenient in plan and must be condemned. AIR 1918 PC 49 (50).

8. Appeal.— (1) Where a suit is filed on a promissory note executed by first defendant in favour of second defendant and assigned by latter to plaintiff and is dismissed as against first defendant but is decreed in full against second defendant, plaintiff and second defendant can prefer a joint appeal to have first defendant also made liable. AIR 1923 Lah 638 (639) (DB).

9. Necessary and proper parties.— See Notes on Order 1, Rule 10.

Order 1, Rule 2 — Note 1

(1) The rule applies only to cases in which the plaintiffs are properly joined in a suit under Rule 1, but in which separate trials or election is necessary for avoiding embarrassment or inconvenience or delay. It has no application to cases of misjoinder of plaintiffs. (1913) 18 Ind Cas 181 (182) (Low Bur.) ** (1904) 26 All 218 (220) (DB).

[But see AIR 1964 Orissa 159 (160). (Suit by several plaintiffs against State each claiming prescriptive title by adverse possession to parcel of land in his exclusive possession — Misjoinder of plaintiffs and causes of action — Order 1, Rule 2 is applicable.) ** AIR 1914 Cal 795 (795) (DB).]

(2) Where the same plaintiff sues for possession of several properties in separate capacities, as for instance, in a personal capacity and in the capacity of a trustee, the Court may order separate trials. AIR 1928 Cal 199 (202): 55 Cal 164 (DB).

(3) The High Court can, in revision, subject to conditions laid down in Section 115, interfere with an order under this rule. AIR 1918 Mad 1137 (1139) ** (1922) 16 Mad LW 175 (176) (DB).

ORDER 1, RULE 3 — SYNOPSIS

1. Scope and object.
2. "All persons may be joined as defendants against whom any right to relief . . . . . alleged to exist".
3. Parties must be within jurisdiction of Court.
4. "Alleged".
5. In respect of the same act or transaction.
6. "Jointly".
7. Joint tort-feasors.
8. "Severally".
9. "In the alternative".

STATE AMENDMENT

Bihar

In its application to the Scheduled Areas in the State of Bihar, in O. 1, R. 3, following proviso shall be added, namely :—

"Provided that in suits for declaration of title or for possession relating to immoveable properties of a member of the Scheduled Tribes as specified in Part III to the Schedule to the Constitution (Scheduled Tribes) Order, 1950, the Deputy Commissioner concerned shall also be joined as a defendant."

—Bihar Scheduled Areas Regulation, 1969 (1 of 1969), S. 3 and Sch. [8-2-1969.]

Order 1, Rule 3 — Synopsis (contd.)

10. Ancillary reliefs.

11. Separate trials.

12. Common question of law or fact.

13. Appeal.

1. Scope and object.— (1) The object of Order 1, Rule 3 is to avoid multiplicity of suits and needless expense, if it could be done without embarrassment to parties and Court. AIR 1928 Cal 92 (93) (DB) ** 1960 Jab LJ 1154: ILR (1962) Madh Pra 140.

(2) It is not necessary that all the defendants should be interested in all the reliefs and transactions comprised in the suit or that the liability of all the defendants should be the same. AIR 1936 Mad 449 (454) (DB) ** AIR 1938 Nag 461 (463): ILR (1939) Nag 29 ** 1959 Ker LT 849.

(3) Under Order 1, Rule 3 it is not necessary that the evidence as regards each of the defendants should be the same. AIR 1928 Bom 91 (94) ** AIR 1918 Cal 858 (864): 45 Cal 111 (DB).

(4) It is not essential for applicability of rule that the cause of action against each of the defendants should be the same. AIR 1947 Cal 374 (377): ILR (1947) 1 Cal 559 (DB) ** AIR 1946 Pat 429 (430) ** AIR 1928 Cal 199 (200): 55 Cal 164 (DB) ** (1883) 5 All 163 (170) (FB).

(5) For applicability of the rule both the conditions mentioned therein should exist. AIR 1954 Tripura 21 (23) ** AIR 1926 Mad 911 (912): 49 Mad 836 (FB) ** AIR 1926 Sind 60 (68): 19 Sind LR 395 (DB) ** 1960 Jab LJ 1154: ILR (1962) Madh Pra 140.

(6) If there is one question common to all the defendants which is of sufficient importance in proportion to the rest of the action that is enough for purposes of Order 1, Rule 3. ILR (1956) 1 Cal 324 (326) (DB) ** AIR 1950 Cal 479 (482) (DB) ** AIR 1942 Mad 334 (336) ** AIR 1932 Bom 1 (2) (DB).

(7) In order that the requisite as to there being the same act or transaction or the same series of acts or transactions may be satisfied some common link or nexus must be found. AIR 1953 Cal 185 (186): ILR (1954) 1 Cal 154 (DB).

(8) The provisions of rule are not imperative and obligatory. **AIR 1953 SC 521 (525): 1954 SCR 506: ILR (1954) 1 All 168** ** AIR 1963 All 496 (497): 1963 All LJ 546 (DB).

(9) Order 2, Rule 3 must be read so as not to clash with this rule. AIR 1950 Cal 479 (481) (DB) ** AIR 1931 Bom 330 (330) (DB) ** AIR 1918 Cal 858 (859, 862, 863): 45 Cal 111 ** AIR 1934 Mad 367 (368): 57 Mad 1031 (DB).

(10) The combined effect of Order 1, Rule 3 and Order 2, Rule 3 is to enable a plaintiff to join not only the different causes of action against the defendant but also the different causes of action against different defendants if he is unable to bring his case within the purview of O. 1, Rule 3. Madh BLJ 1954 SCR 1233 (1235).

(11) Under this rule a person against whom damages are claimed on the basis of a breach of contract can be joined as defendant with another against whom damages are claimed on the basis of a tort where both the causes of action arise out of the same transaction or series of transactions. AIR 1938 Rang 185 (188): 1938 Rang LR 303 (SB). (AIR 1936 PC 34: 61 Ind App 1: 56 All 1, Followed.) ** AIR 1950 Cal 479 (480, 481, 482) (DB).

(12) In an appeal in proceedings under Section 11, U. P. Encumbered Estates Act, it is sufficient that those who took an active part in the proceedings are impleaded. It is not necessary to implead each and every creditor, who either did not appear or put forward a written statement under Section 10 of the Act or took no active part in the proceedings under Section 11 (2). **AIR 1953 SC 521 (524, 525, 526): 1954 SCR 506: ILR (1954) 1 All 168.** (AIR 1942 Oudh 16; AIR 1942 Oudh 339 and AIR 1947 All 18: ILR (1946) All 891 (FB), **OVERRULED.**)

[See also (1968) 70 Pun LR 234 (236, 237). (Case under E. P. Utilization of Lands Act 38 of 1949.)]

(13) Even, if the Code applies to writ applications under Article 226 of the Constitution, still it cannot be taken to override a general rule applicable to such applications that there should be separate applications for separate writs. AIR 1955 Pepsu 159 (160, 162): ILR (1955) Patiala 622 (DB).

(14) The Collector of Customs is not a legal entity, but is merely an office occupied by several persons. Hence a suit cannot be filed against or in the name of the Collector of Customs. AIR 1960 Bom 196 (200): 61 Bom LR 1388.

Order 1, Rule 3 — Note 1 (contd.)

(15) If relief can be claimed against two persons, but only one is impleaded as a defendant relief can be granted against him only. No relief can be granted against the others. Relief cannot be refused against the one impleaded on the plea that the other was not impleaded. AIR 1963 All 549 (550): 1963 All LJ 389 (FB).

(16) Under the law a vendor is not a necessary party, where a third person claims superior right both against the vendor and the vendee, and institutes a suit to safeguard his rights against the vendee, who has by obtaining a sale from the vendor thrown a cloud on the title of the plaintiff. ILR (1960) 10 Raj 305.

(17) Persons who can be sued jointly as defendants, may be sued either separately, one suit against each of them or jointly in one suit. AIR 1963 All 496 (497): 1963 All LJ 546.

2. "All persons may be joined as defendants against whom any right to relief . . . alleged to exist." — (1) For the purpose of Admirally proceedings a ship has been held to be a "person". (1888) 12 Bom 237 (241).

(2) The rule is not imperative. AIR 1935 Mad 750 (752) (DB).

(3) A plaintiff is not bound to sue every possible adverse claimant in the same suit. He is dominus litis and may choose to implead only those persons as defendants against whom he wishes to proceed and may leave the questions as against others to be decided on a future occasion or allow them to be barred at his own risk. (1903) 27 Bom 31 (41) (DB).

(4) Plaintiff can sue any or all of the joint tort-feasors in one suit though by suing some persons only his remedy against others might become barred. (1907) 6 Cal L Jour 383 (390, 391) (DB) ** AIR 1935 Mad 750 (752) (DB).

(5) A suit is not bad for misjoinder of parties even if every one of the defendants alleged to have been in conspiracy is not proved to be a conspirator. AIR 1956 Nag 146 (150): ILR (1956) Nag 378 (DB).

(6) As a general rule only those persons can be joined as defendants to a suit against whom any right to relief is alleged to exist. AIR 1949 Assam 21 (21): ILR (1949) 1 Assam 51 (DB) ** AIR 1928 Cal 23 (24) (DB) ** AIR 1923 Pat 65 (70): 2 Pat 110 (DB).

(7) Transfer of shares by member to non-member — Transferee's name registered in Company's register cancelled subsequently without notice to transferee — Transferee bringing suit for rectification of Register — Transferor held was not necessary party. AIR 1962 Punj 277 (280): (1962) 32 Com Cas 1022.

(8) Where the right to relief exists in the plaintiff jointly with others and such others refuse to join him as plaintiffs, it will be necessary to add them as defendants though no right to relief is alleged to exist against them. AIR 1918 Mad 1137 (1139).

(9) If a party is brought on record as a defendant, then naturally it follows that that party should be allowed to exercise all the rights and privileges conferred by the Civil Procedure Code. The Civil Procedure Code does not create a class of defendants who could be called spectator or dummy defendants. AIR 1957 Mad 779 (780).

(10) All persons against whom any right to relief is alleged to exist should be in impleaded as defendants. AIR 1963 All 549 (550): 1963 All LJ 389 ** AIR 1959 Raj 17 (21): ILR (1958) 8 Raj 1189. (Persons in possession, in an action for recovery of land.)

(11) In a declaratory suit by reversioner impeaching alienation by limited owner on death of one of the defendants pending suit, suit does not abate — Bringing legal representatives of deceased on record is not necessary. AIR 1967 Pat 172 (174): 1966 BLJR 406 (DB).

(12) Foreign Court passing separate decrees in same suit — Suit on basis of such decrees—All persons against whom decrees are passed can be joined together as parties to such suit. 1965 Cur LJ 485 (Punj).

(13) In a suit for redemption of a mortgage the adding as a party of a person claiming title to the mortgaged property is not abnoxious to this rule. AIR 1967 Mad 453 (454): (1967) 1 Mad LJ 399.

(14) In a suit for recovery of money under a mortgage claim and a promissory note, a defendant interested only in the second mortgage could be properly impleaded under Order 1, Rule 3. (1963) Mys LJ (Supp) 121 (DB).

(15) Judgment-debtor is necessary party to a claim suit if the subject matter of the suit is the judgment-debtor's right to the property. AIR 1963 Ker 236 (240): 1963 Ker LT 681.

(16) Plaintiff instituted a suit against A and B in effect and in substance to enforce the claim for a share in certain assets of his deceased father including father's share in partnership business carried on with A and some assets of his father collected by A. The suit was not bad either for misjoinder of parties or of causes of action, 1959 Ker LT 849: 1959 Ker LJ 889.

3. Parties must be within jurisdiction of Court.— (1) If Court has no jurisdiction by reason of Sections 19 and 20 over one of defendants joined under Order 1, Rule 3 and Order 2, Rule 3, the suit cannot be entertained against such defendant and his name must be struck out from array of the parties. AIR 1955 Mad 595 (596). (AIR 1922 Cal 500: 49 Cal 895, Relied on.)

(2) Order 1. Rule 3 assumes the existence of a suit in a proper forum, the Court having jurisdiction to try the suit. If the Court has such jurisdiction, then Order 1,

Order 1, Rule 3 — Note 3 (contd.)
Rule 3 may come into play. AIR 1922 Cal 500 (501): 49 Cal 895 (DB).

4. "Alleged."— (1) Question of misjoinder must be judged from the fact whether it is alleged in the plaint that there is against the defendants any right to relief arising out of the same act or transaction. AIR 1932 Bom 1 (2) (DB) ** AIR 1960 Ker 127 (129): 1959 Ker LT 1110 (DB).

(2) Correctness or otherwise of allegations in plaint is not material. The question is whether upon facts as alleged in plaint and having regard to relief asked for, there is any misjoinder. (1905) 27 All 564 (566) (DB).

(3) Question of misjoinder does not depend upon defence set up or on the decree awarded to the plaintiff. AIR 1929 Cal 667 (668) (DB) ** AIR 1919 Sind 55 (56): 13 Sind LR 133 (DB).

5. In respect of the same act or transaction.— (1) The word "same" preceding the words "act or transaction" applies also to the words "series of acts or transactions". AIR 1942 All 387 (389): ILR (1942) All 862 (DB).

(2) "Some common link on nexus" must be found in order that the requisite as to there being the same act or transaction or the same series of acts or transactions may be satisfied. AIR 1953 Cal 185 (186, 187): ILR (1954) 1 Cal 154 (DB) ** 1960 Jab L Jour 1154: ILR (1962) Madh Pra 140.

(3) A right to relief arises out of same act or transaction where the plaintiff challenges an order or act of a Court or of an executive authority, joining several persons as defendants who claim rights under the said act or order as against the plaintiff, whether jointly, severally or in the alternative. AIR 1950 Assam 133 (137): ILR (1950) 2 Assam 257 (DB) ** (1898) 23 Bom 266 (271) (DB) ** AIR 1925 Pat 228 (232) (DB).

(4) A right to relief cannot be said to arise out of the same act or transaction if the case against each defendant is entirely distinct and separate in its subject-matter from that of the other defendants. A mere finding that there were different causes of action as against different sets of defendants is not sufficient to conclude that the condition under Order 1, Rule 3 as to common act or transaction was not satisfied. (1884) 6 All 106 (108) (DB) ** (1911) 12 Ind Cas 813 (822) (DB) (Bom) ** AIR 1937 Nag 99 (100): ILR (1937) Nag 349.

(5) Question as to joinder depends not on a common cause of action but on common basis of acts or series of acts. AIR 1951 Pat 364 (365) (DB).

(6) Where a plaintiff alleges a right against a person and sues to enforce it, other persons who claim or seek to exercise the same right in opposition to the plaintiff may be joined as defendants, because the infringement of the plaintiff's right is the transaction out of which the whole claim arises. (1906) 29 Mad 87 (89) ** AIR 1933 All 957 (958) (DB).

(7) In a suit for recovery of property by an owner against several persons who are alleged to have unlawfully got into possession of various parcels of land and combined to resist the right and title of the plaintiff, all such persons may be joined in one suit. AIR 1942 Mad 334 (336) ** (1886) 13 Cal 147 (153, 154) (DB) ** AIR 1924 Nag 55 (56): 19 Nag LR 178 ** (1909) 33 Bom 293 (304) (DB).

(8) Suit against 61 sets of tenants in respect of items of lands in their possession for appointment of receiver on allegation that they conspired together to carry away the crops so as to deprive plaintiff of his waram — Suit is maintainable. AIR 1958 Mad 413 (414).

(9) Where no connection or conspiracy is alleged to exist between the various persons joined as defendants, or if it is not alleged that they acted in concert or under a common title, it cannot be said that the plaintiff's right to relief arises out of the same transaction or series of transactions and the suit will be bad for misjoinder of defendants. AIR 1949 Orissa 80 (83): ILR (1949) 1 Cut 174 (DB) ** AIR 1947 Cal 374 (377): ILR (1947) 1 Cal 559 (DB) ** AIR 1918 All 425 (426): 40 All 7 (DB).

(10) Where a limited owner, alienates different portions of the property to different persons over a number of years such acts should be properly considered as constituting one single series of acts. ILR (1956) 1 Cal 324 (326) (DB).

(11) Property situated at different places, allienated to different persons by a person having limited interests. Suit for recovery of the properties filed against the different persons held not bad for multifariousness as there was a single cause of action viz. death of the alienator. AIR 1968 Mys 82 (84): (1967) 1 Mys LJ 27.

(12) A single suit by a corporation for arrears of rates and taxes against different owners of certain premises which had been sub-divided prior to the period for which the rates and taxes were claimed is not maintainable. AIR 1952 Cal 222 (224, 225): ILR (1950) 1 Cal 108.

(12) Suit against a fraudulent trustee for breach of trust and embezzlement of money — All his agents who had, connived at breach of trust also impleaded. No misjoinder. AIR 1934 Mad 367 (370): 57 Mad 1031 (DB).

(13) Single suit by reversioner challenging various transfers by two co-widows — There are two series of transactions — One by one widow and other by the other widow — Suit is bad — Transfers by one may be included in one suit. AIR 1952 Nag 303 (305): ILR (1952) Nag 182 (FB).

(14) After a partnership is dissolved and accounts settled, it is not possible for a

Order 1, Rule 3 — Note 5 (contd.)

partner to claim in one action a relief against an alleged debtor of the dissolved partnership and also a relief against the other partner of the dissolved partnership for a specific sum of money which would involve the setting aside of a settlement of accounts. The right to such two reliefs cannot be said to be in respect of the same transaction or arising out of the same transaction within the meaning of Order 1, Rule 3. AIR 1957 All 383 (384).

(15) A suit for damages against railway carrier for loss of goods impleading therein the insurance company with whom the goods were insured and also praying for a decree against the latter is maintainable as the principal cause of action is the loss of goods. AIR 1961 Mad 64 (65): (1960) 2 Mad LJ 243.

(16) Petition by husband for dissolution of marriage — Wife living in adultery with co-respondent — Co-respondent cannot be joined as party for claim for damages. AIR 1964 Andh Pra 308 (313): (1964) 1 Andh WR 389 (DB).

(17) Claim against first defendant is failure to pay rent. Charge against second defendant is negligence in failing to include previous year's rent in a previous suit. Held there is misjoinder of causes of action and parties. AIR 1964 Andh Pra 412 (414): (1963) 2 Andh WR 1.

(18) Suit for declaration that suit property belongs to public trust and for recovery of possession from alienees to whom it is sold in breach of trust — Alienees rightly impleaded as party defendants — Suit maintainable under Section 50 Bombay Public Trusts Act. (1962) 3 Guj LR 843 (854).

6. "Jointly."— (1) In all cases of joint liability or a joint and several liability all persons liable may be joined as defendants. (1895) 19 Mad 60 (61) (DB).

(2) In a suit for damages against A for breach of contract, C, D and E can be joined as defendants on the allegation that they conspired with A to bring about the breach. AIR 1950 Cal 479 (480) (DB).

7. Joint tort-feasors.— (1) Each of the joint tort-feasors is responsible for the injury sustained by the common act and they can all be sued together. AIR 1956 Nag 146 (150): ILR (1956) Nag 378 (DB) ** (1907) 6 Cal L Jour 383 (390, 391) (DB) ** AIR 1960 Ker 127 (129, 130): 1959 Ker LT 1110 (DB). (Different trespassers in a suit for ejectment.)

(2) In a suit for damages for assault against A and B where the act was done simultaneously in pursuance of a conspiracy, there is no misjoinder. (1902) 26 Bom 259 (264) (DB).

(3) The director would be liable for the tort of his agent where the suit is for damages caused by action of the agent. AIR 1960 Madh Pra 323 (329): 1960 MPLJ 865 (DB).

(4) Non-joinder of the limited concern who was one of the insured persons along with defendants 1 and 2 did not make the suit defective especially when the issue was not raised at the trial Court. AIR 1964 Pat 548 (553): ILR 42 Pat 415 (DB).

(5) If the master as a joint tort-feasor is jointly and severally liable for the damages the suit cannot fail simply because the driver who is also liable, has not been impleaded as a party. AIR 1964 Assam 85 (89): ILR (1963) 15 Assam 474 (DB).

(6) Suit for recovery of possession against several defendants — Conspiracy among defendants 'for keeping plaintiff out of possession of the disputed property alleged — Claims against each defendant found to be interconnected — Suit maintainable and not bad for multifariousness. (1962) 66 Cal WN 391 (DB). (AIR 1918 Cal 858 and AIR 1950 Cal 479, Rel. on.)

(7) Suit against municipality for damages caused to plaintiffs house due to not properly filling up adjoining land dug up for connecting flush latrine with sewer line. Held owners of flush latrine, contractors and plumber could not be joined as defendants as causes of action involved in each case are different. 1962 Jab LJ 576.

(8) Suit for ejectment and rent against P — Leave to amend plaint alleges that sale of part of the property to L and rent note in favour of P for the other part of the property are closesly connected and that P and L are conspiring to defeat plaintiff's claim — Held there is a clear nexus and L be joined as second defendant. 1960 Jab LJ 1154: ILR (1962) Madh Pra 140.

8. "Severally."— (1) In suits for contribution arising out of the same matter, all persons liable to contribute may be joined and the liability of each may be determined in proportion to his interest and provided for separately. (1890) 12 All 110 (113, 114) (DB).

(2) A suit to set aside a revenue sale for arrears of rent against several persons each of whom had purchased different separate items of property is not bad for misjoinder, the proceeding complained of being one, and the ground upon which it is impugned being also the same. (1904) 27 Mad 94 (97, 98) (DB).

(3) In a suit for damages against A for breach of contract, persons who conspired with A to bring about the breach can be joined as defendants under this rule. AIR 1950 Cal 479 (480, 481) (DB).

(4) Where a Hindu reversionary heir sues after the death of the widow for recovery of possession of immovable property belonging to the last male owner alleged to have been improperly alienated, he is entitled to join all the alienees in one suit as defendants. ILR (1956) 1 Cal 324 (327) (DB) ** AIR 1926 Nag 316 (317) (DB) ** (1909) 36 Cal 780 (798): 36 Ind App 103 (PC). (This principle applies also

Order 1, Rule 3 — Note 8 (contd.)
to suits for declaration.) ** AIR 1920 Lah 19 (20): 1 Lah 295 (DB). (Do.)

(5) Suit by junior member of joint Hindu family to set aside alienation — All alienees can be joined as defendants. AIR 1920 Lah 19 (20): 1 Lah 295 (DB).

(6) Suit by heir or successor in interest to set aside alienations by predecessor in interest — Alienees can be joined as defendants. AIR 1916 Bom 310 (311): 40 Bom 310 (311): 40 Bom 351 (DB). (Heir.) ** AIR 1928 Mad 820 (820) (DB) ** AIR 1926 Mad 911 (912, 913): 49 Mad 836 (FB).

(7) In a suit for partition of properties belonging to a joint Hindu family by a junior member against the father, it was held that the vendees and mortgagees and others, who had obtained decrees against the father which were alleged to be collusive and fraudulent, were properly joined as parties. AIR 1922 Mad 332 (333): 45 Mad 194 (DB).

(8) In a suit against the mortgagee for partition all persons having interest in the property sought to be partitioned must be made parties. AIR 1952 Kutch 37 (38).

9. "In the alternative."— (1) A suit for sale by the transferee of a mortgage against the mortgagor in which is also included a claim in the alternative for damages against the transferor, if it should appear that any portion of the debt had been discharged by the mortgagor before the transfer and so was not recoverable from the mortgagor, is not bad for misjoinder. For the right to relief arises out of the same transaction though in the alternative. (1908) 31 Mad 252 (254, 256, 257) ** (1910) 7 Ind Cas 69 (69) (DB) (All).

(2) In suits for rent against tenants, an alternative claim against the plaintiff's co-sharers or vendors can be joined, if it is alleged by the tenants that the co-sharers have received the whole or a portion of it from the tenants. AIR 1919 Cal 903 (904) (DB).

(3) Purchaser of land from A dispossessed by B — Suit by purchaaser for declaration of title against B — A can be joined as defendant by praying that he should refund money if B is found to be owner. (1902) 29 Cal 257 (259) (DB).

(4) Where the plaintiff filed a suit for recovery of money against two defendants alleging that one of them was his agent and had lent the other the suit amount and prayed for a decree against the other if the loan was true or in the alternative, against the agent if he did not advance the loan, it was held that the suit was not bad for misjoinder of defendants. (1906) 29 Mad 50 (51) (DB).

(5) Where it is doubtful which of the two defendants is liable to the plaintiff, both of them may be joined in one suit with a claim for alternative relief. AIR 1928 Bom 91 (94, 95) ** 1960) Jab L Jour 1154: ILR (1962) Madh Pra 140.

(6) In a suit for apportionment and recovery of the plaintiff's share of the rent, where it is doubtful who are the other co-sharers, all those who claim to be co-sharers may be made defendants under this rule and a decree as to apportionment may be passed in the presence of all parties so as to avoid a multiplicity of suits. (1940) 44 Cal WN 1053 (1055, 1056) (DB).

(7) This rule presupposes that the Court has jurisdiction to grant either of the reliefs, though which of them should be granted, would depend on the findings to be given at the trial. Order 1, Rule 3 must be read subject to other provisions. AIR 1954 Mad 516 (519).

(8) Where a plaintiff claims in the alternative damages against all the defendants and his right to relief arises out of the same series of transactions and where common questions of law and fact would arise if the plaintiff is compelled to bring separate suits against them the provisions of Order 1, Rule 3 are attracted and there is no misjoinder of parties. AIR 1957 Tripura 37 (40).

10. Ancillary reliefs.— (1) Where there is one cause of action against some defendants and relief claimed against other defendants is only ancillary to relief to be given to plaintiff and not in respect of a distinct and separate cause of action, the suit is not bad for misjoinder. AIR 1938 Rang 420 (422): 1938 Rang LR 397.

(2) Where A and B are co-sharers of certain lands in possession of C and D and A sues B, C and D claiming to eject C and D from his share, and for partition of his share as against B, the claim against B is merely ancillary to relief claimed as against C and D which cannot be properly worked out without a partition of A's share. For this purpose B may be properly joined as a party to the suit. (1906) 29 Mad 29 (31, 32) (DB).

11. Separate trials.— (1) Though O. 1, Rule 2 applies in terms only to the joinder of plaintiffs and there is no corresponding rule in regard to the joinder of defendants, the principle of that rule is applicable to the case of the joinder of defendants also. AIR 1928 Cal 199 (201, 202): 55 Cal 164 (DB).

(2) Where trial of suit is likely to be embarrassing owing to a variety of defences, Court may order separate trials or make such other order as may be expedient. AIR 1952 Nag 303 (305): ILR (1952) Nag 182 (FB) ** (1909) 33 Bom 293 (305) (DB) ** AIR 1928 Cal 199 (202): 55 Cal 164 (DB).

12. Common question of law or fact.— (1) It is necessary for joining persons as defendants in same suit, that a common question of law or fact should arise in the case. ILR (1955) Patiala 60 (63) ** AIR 1950 Assam 133 (137): ILR (1950) 2 Assam 257 (DB) ** AIR 1961 Madh Pra 46 (47).

R. 4. Court may give judgment for or against one or more of joint parties.—Judgment may be given without any amendment—

(a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to;

(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

[1882 and 1877, Ss. 26, 28.]

R. 5. Defendant need not be interested in all the relief claimed.—It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

[R. S. C., O. 16, R. 5.]

R. 6. Joinder of parties liable on same contract.—The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes.

[1882 and 1877, S. 29; R. S. C., O. 16, R. 6.]

Order 1, Rule 3 — Note 12 (contd.)

(2) If there is one question common to all defendants which is of sufficient importance in proportion to the rest of the action, that is enough. ILR (1956) 1 Cal 324 (326) (DB) ** AIR 1958 Cal 710 (712) (DB) ** AIR 1950 Cal 479 (482) (DB).

(3) The expression "common question of law or fact' however, does not mean similar question of law or fact. AIR 1952 Cal 222 (224, 225): ILR (1950) 1 Cal 105 ** AIR 1961 Madh Pra 46 (47). (Suit for eviction by purchaser of premises against two separate tenants.)

13. Appeal.— (1) Single Judge of High Court holding suit bad for misjoinder of defendants and ordering plaintiff to elect to proceed against some only. Order is a 'judgment' within Clause 15, Letters Patent. AIR 1918 Cal 858 (861): 45 Cal 111 (DB).

(2) Order by a lower Court holding suit bad for misjoinder not being an appealable order, no appeal but revision will lie from it. AIR 1951 Pat 364 (365) (DB).

Order 1, Rule 4 — Note 1

(1) Clause (a) of Rule 4 must be read with Order 1, Rule 1. Where several plaintiffs join under Order 1, Rule 1 in a suit, but it is found that only some of them are entitled to relief, a judgment may, under this rule, be given for such relief in favour of such persons. AIR 1927 Oudh 484 (485): 3 Luck 241 (DB) ** AIR 1959 Andhra Pra 126 (127) (DB). (Suit by A and B on promissory note executed by C in favour of B — Plaint alleging advance of money by A and B being benami for A — B admitting truth of the allegations and consenting to decree being passed in favour of A — C objecting to A suing on pronote — Court can pass decree in favour of B without amending plaint to include alternative prayer to that effect.)

(2) Where A and B sue C on the allegation that A alone is entitled to relief and that B is added merely as a pro forma party, but B alone is found to be entitled to relief, judgment cannot be given in his favour without amendment. AIR 1929 Bom 51 (53) (DB).

(3) Clause (b) of this rule must be read with Order 1, Rule 3. Where several defendants have been impleaded under Order 1, Rule 3 but some of them alone are really found to be liable, judgment may, under this rule, be given against them without any amendment, according to their respective liabilities. AIR 1965 All 77 (78) ** 1895 All WN 23 (24) ** (1879) 4 Cal 949 (953) (DB).

Order 1, Rule 5 —Note 1

(1) A suit which is otherwise properly constituted shall not be bad for misjoinder merely because the defendants are not equally interested in the relief claimed in the suit. (1907) 31 Bom 516 (522) ** AIR 1938 Nag 461 (463): ILR (1939) Nag 229.

(2) Suit for accounts against agents is not necessarily bad for misjoinder merely because plaintiff asked for accounts for one period against one of them and for a different period against the other. (1881) 7 Cal 654 (658) (DB).

(3) Suit on mortgage and promissory note against defendant — Subsequent mortgagee from defendant can be impleaded though he is not interested in the claim under the promissory note — Suit not bad for multifariousness. 1963 Mys LJ (Supp) 121 (DB).

(4) A suit is not bad for misjoinder merely because relief claimed as against some of defendants is only ancillary to main relief claimed in suit. (1906) 29 Mad 29 (31) (DB).

ORDER 1, RULE 6 — SYNOPSIS

1. Joint liability.

2. Joint and several liability.

3. Suit against one of several partners.

Order 1, Rule 6 — Synopsis (contd.)

4. Whether decree against one co-contractor precludes suit against other co-contractors.

5. "Any one contract."

6. Suits on bills of exchange, hundis, and promissory notes.

1. Joint liability.— (1) A liability is joint if on the death of one of the joint promisors the liability becomes the liability of the surviving promisors and no liability devolves upon the heirs or legal representatives of the deceased promisor; survivorship is the distinguishing mark of a joint contract. AIR 1918 Cal 512 (516) (DB).

(2) A joint promise by A and B creates under Section 43 of the Contract Act, a joint and several liability. (1898) 17 Bom 6 (11) (DB) ** (1900) 22 All 307 (316, 319) (DB) ** AIR 1918 Cal 512 (513) (DB) ** (1910) 33 Mad 317 (319) (DB) ** AIR 1959 J and K 96 (98).

2. Joint and several liability.— (1) Where under this rule the plaintiff sues one or some of the persons jointly and severally liable, the latter have no right to insist on the joinder of the other promisors so liable as parties to the suit. AIR 1933 Nag 324 (326) ** (1900) 22 All 307 (315, 316) (DB).

(2) Section 43 of the Contract Act has to be read with Order 1, Rule 6 Civil P. C. to find out the precise position of joint liability on a contract under the Indian Law. This rule makes the legal consequences of a joint and several liability on a contract practically same as those of several liability. This is, however, limited to the question of joinder of parties in the same contract and is a matter of procedure. AIR 1964 Cal 196 (206) (DB).

3. Suit against one of several partners.— (1) Section 43 of the Contract Act applies to contracts entered into with firms or partnerships. Hence, by virtue of Order 1, Rule 6, a plaintiff in enforcing such a contract is not bound to implead all the members of a firm as defendants, but is entitled to sue, as he chooses, one or more of them, for the performance of the entire contract. (1892) 17 Bom 6 (11) (DB) ** (1902) 1902 Pun Re No. 37, p. 139 (141) ** (1898) 21 Mad 256 (257) (DB) ** AIR 1959 J and K 96 (97, 98).

4. Whether decree against one co-contractor precludes suit against other co-contractors.— (1) A and B jointly promise to pay C a certain sum of money. C sues A separately and obtains a decree. He then executes the decree against A and the decree remains unsatisfied or is only partially satisfied. C cannot subsequently bring a separate suit against B for the amount remaining due to him under the contract. (1878) 3 Cal 353 (359, 360) (DB) ** (1882) 5 Mad 37 (44) (DB) ** (1885) 8 Mad 376 (378) (DB) ** (1900) 22 All 307 (315, 316, 317) (DB) ** AIR 1933 Bom 407 (408). (Dissenting from AIR 1917 Bom 268 and 24 Bom 77.)

(2) C sues both A and B (joint promisors), but A consents to a judgment against him. C can thereafter prosecute the suit against B alone. AIR 1917 Bom 268 (273) ** (1901) 25 Bom 378 (386).

(3) Joint-debtor satisfying decree — Co-promisors are still liable to contribute and cannot escape liability though they are exonerated in prior proceedings. AIR 1965 Andh Pra 98 (101): ILR (1963) Andh Pra 931.

5. "Any one contract."— (1) The rule only applies where defendants are liable on same contract. It does not apply where defendants are liable on different contracts. AIR 1928 Cal 490 (491).

6. Suits on bills of exchange, hundis and promissory notes.— (1) The drawer and the acceptor of a bill of exchange can be joined as co-defendants in a suit brought by the holder of the bill. (1878) 3 Cal 541 (541) ** (1878) 1 All 392 (393) (DB) ** AIR 1914 Lah 405 (406).

(2) A draws a bill of exchange payable at sight on B and the latter, on presentation, refuses to accept it. In such a case, the holder of the bill has no cause of action against B and cannot add B as a co-defendant with A. (1878) 3 Bom 182 (183) (DB).

(3) Where the endorsee sues the endorser for renewal of a lost cheque, the drawer also must be impleaded as the cheque cannot be renewed without his co-operation. (1880) 2 All 754 (755) (DB).

(4) Where the holder of a bill of exchange sues the drawer, the acceptor and the endorser, the decree cannot provide that the endorser should be exempt from liability until the plaintiff has exhausted his remedies against the drawer and the acceptor. (1889) 16 Cal 804 (805, 806) (DB).

(5) Suit on promissory note by holder in due course against sons of executant without making the original payee party to the suit — Procedure — Third party procedure not applicable against original payee — But original payee proper party (vide Order 1, Rule 6) and should be impleaded under Order 1, Rule 10 — Sons of original payee not necessary parties — Suit laid at the instance of an endorsee — Only parties that could be impleaded are those whose names are mentioned in the note. AIR 1962 Mad 202 (205): (1962) 1 Mad LJ 246.

R. 7. When plaintiff in doubt from whom redress is to be sought.— Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

[R. S. C., O. 16, R. 7.]

R. 8. One person may sue or defend on behalf of all in same interest.— (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit.

[1882 and 1877, Ss. 30, 32. Cf. R. S. C., O. 16, R. 9.]

Order 1, Rule 7 — Note 1

(1) Order 1, Rule 7 enables the plaintiff to bring one suit against a number of persons in the alternative where he is in doubt as to which of them is liable to him. (1906) 29 Mad 50 (51) (DB) ** (1907) 31 Bom 516 (522, 523). (Suit for rent.)

(2) Plaintiff in doubt as to which of the defendants is really in possession and against whom effectual decree for ejection and possession can be passed — Case attracts provisions of Order 1, Rule 7. 1960 Jab LJ 1154 (1156).

(2) A sues B for a sum of money lent to B by C, A's agent. B denies the loan but C maintains, he made the loan. A, in such a case, may join C as a co-defendant in the suit praying for relief against him in the alternative. (1906) 29 Mad 50 (51) (DB) ** AIR 1928 Bom 91 (94, 95).

(3) Plaintiff alleged that both defendants claimed a charge for use of certain water and prayed that Court should determine which of defendants was entitled to the charges, and that the other should be restrained from interfering with plaintiff, and compelled to refund charges he had already collected.

Held, there was no misjoinder. (1909) 4 Ind Cas 312 (313) (DB) (Mad).

(4) In a suit for damages for injuries sustained by the plaintiff while travelling in a bus, as a result of rash driving, against the driver and owner of a motor bus, the insurance company with whom the bus is insured against third party risks, can be impleaded as defendant under the principle underlying Order 1, Rules 7 and 10 (2). AIR 1951 Nag 280 (281): ILR (1950) Nag 955.

(5) Even at the final stages of hearing both the defendants blaming each other — Case of one of them found to be acceptable — Plaintiff held justified in making both the defendants parties and proceeding against both till the end — Unsuccessful defendant held should be asked to bear the cost of the other defendant in addition to the cost of the plaintiff. AIR 1963 Cal 163 (178): 1963 Cal LJ 43.

(6) Where the plaintiff claims from two defendants in the alternative and gets a decree against one, he has no cause of action left and an appeal against the other is incompetent. AIR 1935 Rang 397 (398): 13 Rang 186 ** AIR 1951 Raj 74 (79) (DB).

(7) Order 1, Rule 7 is a provision which resolves the conflicts of the plaintiff. But the doubt in the mind of the plaintiff as to who is liable is no part of his to right to institute a suit. The doubt as to which of the defendant is liable relates to the exercise of the right which is a totally different matter from the right itself. AIR 1959 Cal 247 (251): ILR (1959) 2 Cal 54.

ORDER 1, RULE 8 — SYNOPSIS

1. Scope and object.
2. Numerous persons.
3. Clubs and other associations.
4. Suit to set aside fraudulent transfers.
5. Suit by a member of a community in his own right.
6. Suit to establish or negative a public right.
7. "Having the same interest."
7-A. Suit by or against trustees.
7-B. Suit by or against community.
8. Matters in respect of which representative suit can be brought.
9. Representative suit for damages.
10. Permission of Court.
11. Permission when to be granted.
12. Form of permission.
13. Who may apply for permission.
14. "May be sued."
14-A. "May defend."

HIGH COURT AMENDMENTS

Assam & Nagaland

Same as that of Calcutta.—see Assam High Court Order, 1968, Cl. 6; Act 27 of 1962, Ss. 13, 15 [w. e. f. 1-12-1963].

Calcutta: Andaman and Nicobar Islands

In sub-rule (1) for the first sentence commencing with the words "where there are" and ending with "persons so interested," substitute the following—

"Where there are numerous persons having the same interest in one suit, the Court may direct that one or more such persons may sue or be sued, or may defend, in such suit, on behalf of, or for the benefit of, all persons so interested" [2-4-1938].

Gujarat

In Order 1 Rule 8 sub-rule (1), after the first sentence ending with the words "so interested," the following sentence shall be inserted, namely,—

"The Court may in suitable cases direct that two or more persons having the same interest in the suit may sue or be sued or may defend, in such suit, on behalf of, or for the benefit of, all persons so interested." [17-8-1961].

Maharashtra

In Order, 1, Rule 8, for existing sub-rule (1) and marginal note, substitute the following :

Order 1, Rule 8 — Synopsis (contd.)

15. Notice of suit.
16. Title of suit.
17. Addition of parties.
18. Suit in name of wrong plaintiff.
19. Addition of parties after decree.
20. Decree in a representative suit.
21. Costs.
22. Compromise.
23. Withdrawal. See Notes under O. 23, Rule 1.
24. Abatement of suits and appeals.
25. Applicability to arbitration proceedings.
26. Applicability to writ petitions.
27. Revision.

1. Scope and object.— (1) Order 1, Rule 8 forms an exception to the general rule that all persons interested in a suit ought to be joined as parties to it. The rule is one of convenience based upon reason and good policy and saves the trouble and expense which would otherwise have to be incurred in such cases. AIR 1957 Andh Pra 956 (957) ** AIR 1957 Madh B 173 (174) ** ILR (1955) 5 Raj 910 (913) ** AIR 1955 Mad 281 (287): ILR (1955) Mad 339 (FB) ** AIR 1957 Andh Pra 956 (957) ** (1962) 66 Cal WN 912. (The provision of this rule applies only (1) if the parties are numerous (2) they have the same interest, and (3) necessary permission is obtained from the Court and notice is given.)

(2) There is nothing in Order 1, Rule 8 which requires that a person who seeks to institute a suit in a representative capacity must establish that he had obtained sanction of the persons interested on whose behalf the suit is to be proposed to be instituted. **AIR 1965 SC 11 (16): (1964) 4 SCR 945.**

(3) The provisions of Order 1, Rule 8, C. P. C. are meant to save time and ensure a common trial on questions on which a large body of persons are interested and also to avoid multiplicity of suits. (1961) 1 Andh WR 68: (1960) Andh LT 863.

(4) The language of the rule is quite wide and can apply to all suits of whatever nature or description provided the conditions set out in it are satisfied. ILR (1952) 2 Raj 900 (904) (DB). (Suit for partition.)

(5) Order 1, Rule 8 is merely an enabling provision and provides no new right of suit but merely a right of representation where a right of suit already exists and that right of suit is provided by the invasion of the special right of the limited class represented. AIR 1968 Pat 422 (432) (DB).

(6) The rule presupposes that each one of the numerous persons by himself has a right of suit. A person who has no right of suit on behalf of himself cannot therefore be allowed to sue in a representative capacity. AIR 1947 Mad 100 (101) ** AIR 1957 Andh Pra 964 (965) ** AIR 1942 Cal 360 (364): ILR (1942) 1 Cal 533 (DB).

(7) Under Order 1, Rule 8 same suit may be a representative one both as regards plaintiffs and as regards defendants. AIR 1935 Mad 542 (543) ** AIR 1960 Madh Pra 288 (288, 289): 1959 MPLJ 458 (FB). (It is only just and proper that in a case where a person's rights are threatened by

"One person may sue or defend on behalf of all in same interest.

(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend in such suit on behalf of or for the benefit of all persons so interested. The Court may in suitable cases direct that two or more persons having the same interest in the suit may sue or be sued or may defend in such suits on behalf of or for the benefit of, all persons so interested. But the Court shall in such cases give at the plaintiff's expense notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct" [1-11-1966].

Mysore

In Order 1, for Rule 8, substitute the following:

"(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court sue or be sued, or may defend, any such suit, on behalf of or for the benefit of all persons so interested.

(2) The Court may, if it deems fit or desirable to do so on a reading of the pleadings in the case, direct that one or more of such persons shall sue or be sued or defend any such suit on behalf of or for the benefit of all persons having the same interest as the first mentioned person or persons and for the said purpose call upon such person or persons to file affidavits furnishing the particulars required by sub-rule (2) of Rule 4 of Order VII or Rule 7-A of Order VIII of this Code as the case may be.

(3) The Court shall in all such cases give at the expense of such party as it may decide, notice of the institution of the suit to all such persons so interested either by personal service or, where from the number of persons or any other cause such personal service is not reasonably practicable, by public advertisement, as the Court may in each case direct.

(4) Any person on whose behalf or for whose benefit a suit is instituted or defended under the provisions of this rule may apply to the Court to be made a party to such suit." [30-3-1967].

Order 1, Rule 8 — Note 1 (contd.)

numerous persons, he should be permitted to sue them, making a few of them to represent themselves and the rest. Order 1, Rule 8 is attracted in a suit of this nature.)

(8) The rule is not conclusive or exhaustive as to the mode in which a representative suit may be instituted or defended. The rule is only an enabling provision. AIR 1956 Pepsu 69 (71).

(9) Ordinarily, a representative suit can only be brought by following the procedure mentioned in this rule. AIR 1940 Mad 789 (790): ILR (1940) Mad 808 (DB).

(10) Where under the substantive law itself a person is entitled to represent a body of persons having the same interest in a certain matter and sue on behalf of such body, he can do so without following the procedure laid down in this rule. AIR 1953 Vind Pra 4 (6). (Manager of a joint Hindu family.)** AIR 1944 Lah 220 (234): ILR (1945) Lah 67 (FB). (Suit by manager relating to joint Hindu family.) ** AIR 1940 Cal 385 (387). (Hindu reversioner suing to restrain alienation by limited owner.) ** AIR 1939 Mad 751 (753) (DB). (Karnavan of Malabar tarwad.)

[See also AIR 1963 Pat 274 (276): ILR 44 Pat 255 (DB). (Minor member authorised by other members of family to represent them in the mortgage transactions — Suit on mortgage — Representation of family by minor through guardian—Validity of suit not affected.)]

(11) Though a suit under Section 92 of the Code is a representative one, procedure laid down in this rule need not be followed. AIR 1941 Bom 317 (319): ILR (1941) Bom 556 (DB).

[See however AIR 1952 Kutch 92 (93).]

(12) Order 1, Rule 8 can be applied to applications which are in nature of suits. AIR 1936 Bom 250 (255): 60 Bom 645.

(13) The rule does not apply when a special procedure is prescribed by any local or special enactment. AIR 1938 Lah 369 (389) (FB). (Punjab Sikh Gurdwaras Act of 1925, Section 5.)

(14) Under Order 1, Rule 8, Civil P. C. one of the co-mortgagors can redeem the entire mortgage and the mere fact that the integrity of the mortgage is broken will be of no consequence. AIR 1965 Punj 224 (225).

2. Numerous persons.— (1) For applicability of Order 1, Rule 8 it is essential that numerous persons should be interested in the suit. The rule does not fix any limit to the number. AIR 1957 All 270 (272, 273) (DB) ** ILR (1952) 2 Raj 900 (904) (DB) ** AIR 1937 Bom 238 (241): ILR (1937) Bom 326 ** (1962) 66 Cal WN 912.

Order 1, Rule 8 — Note 2 (contd.)

(2) The word 'numerous' implies a group of persons, such as would make it inconvenient to implead all of them individually. AIR 1950 All 405 (406).

(3) The question whether the persons interested in the litigation are numerous has to be decided by the Court on the facts of each case. ILR (1952) 2 Raj 900 (904) (DB) ** AIR 1959 Ker 379 (380): 1957 Ker LT 932. (30 persons held numerous.)

(4) The rule contemplates the case of parties too numerous to be conveniently made parties to the suit. (1880) 2 Mad 328 (332) (DB).

(5) A hundred persons were held to be "numerous" within the rule. AIR 1929 Mad 44 (45) ** (1888) 1888 WN 102 (103).

(6) It is not necessary that the number of persons should be capable of ascertainment. AIR 1933 Lah 749 (751): 15 Lah 123 (DB).

(7) Under Order 1, Rule 8 it is necessary that the body of persons represented by plaintiffs must be sufficiently definite for the Court to recognize as participants in the suit. AIR 1948 PC 66 (70): 75 Ind App 1: ILR (1948) Nag 179.

(8) A suit is maintainable on behalf of a fluctuating body, e.g., the inhabitants of a town or village. AIR 1927 Lah 196 (197) ** AIR 1957 Mad 446 (448). (Ryots of village.) ** (1894) 21 Cal 180 (182) (DB) ** AIR 1929 Mad 44 (45) (DB).

(9) The members of a defined sect or caste or class or the followers of a particular religion, like the Mahomedan community or the Hindu community can bring a representative suit under Order 1, R. 8. (1906) 33 Cal 905 (912) (DB) ** (1904) 31 Cal 839 (845) (DB). (Digambari sect Jains.) ** AIR 1932 Bom 122 (125): 56 Bom 242 (FB) ** (1895) 19 Bom 391 (398, 399) (DB). (Raiyats of a village.) ** (1882) 8 Cal 32 (41) (DB). (Worshippers at a mosque.) ** AIR 1964 Orissa 18 (20): 29 Cut LT 208. (Suit by Hindus.)

[See also 1968 Raj LW 337.]

(10) Suit is not maintainable on behalf of the public in general. (1886) 9 Mad 463 (468) (DB).

[See however AIR 1934 Cal 345 (347, 348) (DB).]

(11) A suit on behalf of whole Hindu community is not impeachable on ground of the number being incapable of ascertainment. (1906) 33 Cal 905 (911) (DB). (20 Cal 397, **DISSENTED FROM.**)

(12) It is the duty of the party seeking permission to tell the Court the exact number of persons, having same interest where parties are determinable and definite. Mere allegation that number of defendants are numerous is not enough. ILR (1952) 2 Raj 900 (905) (DB).

(13) Numerous persons — Suit for possession and mesne profits by joint owners of suit land — Defendants also claiming joint ownership in themselves in such land — Prior proceedings also fought out on such basis — Plaintiffs obtaining Court's permission to sue the defendants in representative capacity — Suit, held, maintainable — No separate suit need be brought against each of the defendants. AIR 1968 Manipur 64 (67).

3. Clubs and other associations.— (1) In the case of unincorporated associations like clubs, etc., the secretary or other officers of the club cannot sue or be sued except by obtaining permission under this rule, even though he or they may have been authorised by a resolution of the association to sue or to defend a suit. AIR 1958 Madh Pra 189 (191) ** AIR 1929 Cal 445 (447) (DB). (Secretary of Brahma Samaj.) ** AIR 1964 Cal 57 (58): 67 Cal WN 903. (Amendment not allowed since it would change the character of the suit.)

[See also (1967) 33 Cut LT 95: ILR (1966) Cut 825. (The plaintiff not having obtained Court's permission to sue B an unregistered association under Order 1, Rule 8, it was held the plaintiff's suit as a whole was liable to be dismissed.) ** AIR 1961 Punj 111 (112, 113). (The fact that the plaintiff had already impleaded all possible defendants, does not preclude him from making a subsequent application under Order 1, Rule 8.) ** 1968 Ker LR 665. (Suit filed by plaintiffs on behalf of Vishwakarma Samudayam describing themselves as its President and secretary — Application under Order 1, Rule 8 seeking only permission and not conversion of suit in representative suit — Suit cannot be said to have been instituted on date of application within Section 22 of Limitation Act (1908).)]

(2) Suit by unregistered Sangam through its President for recovery of money — Members of Sangam though distributed over many villages having community of interest — Court has jurisdiction to cure defect by giving them permission to amend plaint and to sue in representative capacity. (1965) 78 Mad LW 626.

(3) Order 1, Rule 8 applies only when there is a properly constituted suit before the Court. AIR 1954 Nag 29 (30).

(4) A benamidar of an unregistered body has a right to sue as a legal owner, for possession against a trespasser. Hence no permission under this rule is necessary to maintain such a suit. AIR 1946 Oudh 144 (145): 21 Luck 292.

(5) A representative suit for possession of certain land in which all the Khewatdars of a village were interested was brought by an association named Shamlat Committee Ajmer, through its President. Held that as the committee was not a legally constituted corporation and as all the Khewatdars of the village were interested in the property, all of them should have

Order 1, Rule 8 — Note 3 (contd.)
joined together in the institution of the suit. The suit as framed being only on behalf of the members of the Committee was defective and not maintainable. AIR 1951 Ajmer 1 (3).

(6) A society registered under the Societies Registration Act can be validly represented by its office-bearers in a suit filed against it. AIR 1957 Trav-Co 259 (260).

(7) Society registered under particular name — Society can validly adopt different name for institution of suit by and against it — Suit instituted in that different name is maintainable. AIR 1966 All 570 (574): ILR (1965) 1 All 483 (DB).

(8) An unregistered society cannot file the suit in the name of the society itself. 1967 All LJ 602 ** 1968 Ker LT 285: 1968 Ker LR 180.

(9) Where a suit has been filed in a representative capacity under Order 1, Rule 8, the absence of a resolution by the Sabha empowering plaintiffs to file the suit is no bar to its maintainabilty. AIR 1967 J and K 52 (56).

4. Suit to set aside fraudulent transfers.— (1) A suit to set aside a transfer of immoveable property on the ground that it is in fraud of the creditors of the transferor must be brought by or on behalf of all the creditors and not by some only of creditors for their benefit alone. AIR 1943 Mad 531 (534): ILR (1944) Mad 133 (DB) ** (1905) 32 Cal 198 (217): 32 Ind App 1 (PC) ** AIR 1932 Bom 498 (504): 56 Bom 595 (DB).

(2) Suit under Order 21, Rule 63 — Allegations that deed of assignment in favour of transferee was in fraud of creditors — Relief for setting aside document — Point that action should have been brought as a representative one on behalf of all creditors after complying with provisions of Order 1, Rule 8 — Question held was pure question of law and could be dealt with in second appeal. AIR 1963 Ker 356 (357): 1962 Ker LT 801.

(3) A creditor pleading Section 53 of the Transfer of Property Act in defence need not do so in a representative capacity. AIR 1939 Bom 508 (512).

[But see AIR 1967 Raj 283 (287): 1967 Raj LW 307 ** AIR 1963 Guj 276 (276). (A suit for declaration that certain partition between the sons of the judgment-debtor was a transfer and fraud on creditors, when not filed in a representative capacity on behalf of all creditors is not maintainable.) ** AIR 1963 Ker 356 (357): 1962 Ker LT 801. (Suit under Order 21, R. 63, Civil P. C. — Allegations that deed of assignment was in fraud of creditors—Principles of Section 53, T. P. Act relied on — Suit must be representative one under Order 1, Rule 8.)

(3) Representative suit — Suit by one creditor under Order 21, Rule 63, Civil P. C. — Permission under Order 1, Rule 8, not obtained — Suit is not representative suit within the scope of Section 53, T. P. Act. AIR 1960 Punj 417 (418): 62 Pun LR 224.

(4) Though the principle of Section 53, T. P. Act has been followed in Punjab the technicalities and procedure prescribed in certain sections of the Act have never been treated as a prevailing law. In Punjab therefore a suit by a creditor under Sec. 53, T. P- Act need not be filed on behalf of or for the benefit of all the creditors under Order 1, Rule 8. AIR 1961 Punj 398 (399): 63 Pun LR 319 (DB).

(5) A suit impeaching a transfer as being in fraud of creditors need not be brought in a representative capacity if at time of instituting suit there were no other creditors or plaintiff was not aware of existence of other creditors. AIR 1940 Oudh 200 (201, 202): 15 Luck 503.

(6) It is not necessary to bring a suit within Section 53 that there should be another creditor existing to the knowledge of the plaintiff creditor. Even if plaintiff is only creditor he can maintain a representative suit on behalf of creditors if any. AIR 1967 Kerala 171 (172): 1967 Ker LT 810.

(7) A suit originally laid under O. 21, Rule 63 in an individual capacity can be allowed to be amended so as to bring it in conformity with requirement of Section 53, Transfer of Property Act. AIR 1953 Mad 619 (619). (AIR 1943 Mad 531: ILR (1944) Mad 133, Followed.)

(8) It is only where the allegation is that the sale has been effected with a view to defraud the whole body of creditors, that a representative suit is contemplated. Therefore, it is essential, for the Court to go into the evidence and decide whether there are other creditors also and if there are other creditors also, to give an opportunity to the plaintiff to amend his plaint and convert his suit into a representative suit under Order 1, Rule 8. (1961) 1 Andh WR 68: 1960 Andh LT 863.

(9) Where a suit under Order 21, Rule 63 has been filed in a representative capacity or for the vindication of one's own personal rights can only be determined with reference to the nature of the plaint, the allegations made therein and the precise relief sought for. AIR 1959 Andh Pra 280 (283): (1959) 1 Andh WR 72 (DB).

(10) Creditor in bona fide belief that he is the only creditor bringing a suit in his own capacity — Suit dismissed on objection by defendant — Appellate Court can grant permission to sue in a representative capacity when there is no necessity of any further evidence for granting such permission. AIR 1947 Mad 194 (195).

(11) Persons who become creditors subsequent to the transfer are entitled to be joined as co-plaintiffs and carry on the suit commenced by another creditor under this rule. ILR (1951) 1 Raj 240 (243, 244).

Order 1, Rule 8 (contd.)

5. Suit by a member of a community in his own right.— (1) This rule does not debar any member of a community from maintaining a suit in his own right although the act complained of injures other members of the community as well. AIR 1953 Vindh Pra 4 (6) ** AIR 1957 Andh Pra 964 (965) ** AIR 1951 Mad 498 (499, 500) ** AIR 1942 Cal 360 (364): ILR (1942) 1 Cal 533 (DB) ** AIR 1939 All 586 (588): ILR (1939) All 754 (DB) ** AIR 1938 Lah 369 (421) (FB).

(2) It is the duty of the Court to see that no prejudice and confusion is caused in the mind of the other party as to the capacity in which the suit is being pursued or defended. AIR 1953 Vindh Pra 4 (6).

(3) Every Mahommadan worshipper in a mosque has an individual right to sue any one who interferes with his right. (1910) 32 All 631 (634) (DB) ** (1885) 7 All 178 (182) (FB) ** (1900) 24 Bom 170 (176) (DB).

(4) Individual Mahommadan worshippers can sue to set aside an alienation of endowed property. AIR 1923 Pat 475 (477): 2 Pat 391 (DB) ** AIR 1957 Mad 194 (197) (DB).

(5) Individual Muhammadan worshippers can sue for declaration that certain property is wakf property. AIR 1933 Oudh 261 (263): 8 Luck 482 (DB).

(6) A suit by a Jain for a declaration that a particular temple is a public Jain temple with a consequential relief of injunction restraining the defendants permanently from obstructing the plaintiff from entering and worshipping in the temple is not a suit of a representative character but is one for enforcement of his individual right. AIR 1953 Vindh Pra 4 (6, 7).

(7) Although, where a number of persons have similar but distinct rights any one of them may sue in his own right, yet, the Court may, on grounds of convenience, require the plaint to be amended and converted into a representative action. (1900) 23 Mad 28 (32).

(8) A decree in a suit brought in an individual capacity does not bind members of the class who are not actually parties on record. (1900) 23 Mad 28 (32).

6. Suit to establish or negative a public right.— (1) Where numerous persons, not being the general public (e.g., a particular community), suffer special injury in respect of a public right, any one of such persons may, under this rule, bring a representative suit on behalf of all such persons. AIR 1916 Mad 593 (594, 595) (DB) ** AIR 1942 Cal 360 (364): ILR (1942) 1 Cal 533 (DB) ** AIR 1964 All 437 (439): 1963 All LJ 994 ** AIR 1961 Orissa 105 (107): ILR (1961) Cut 45 (DB).

(2) Where there is no question of a public right at all, no special injury need be proved. Thus, suits may be brought by village communities to establish their rights in connection with village pathways, village wells or ghats or bank of rivers. AIR 1957 Andh Pra 964 (965) ** AIR 1957 Andh Pra 975 (976). (Village pathway.) ** AIR 1925 Cal 1233 (1233) (DB) . (Village ghats.)

(3) A person may sue for a declaration that he is owner of certain land free from any right of public to use it as a highway. In such a case plaintiff may implead any one who formally claims to use the land as a public highway. He need not proceed under Order 1, Rule 8 against all persons who may deny his right. But the decree in such a case will only bind the actual defendants. (1940) 44 Cal WN 1029 (1033) ** AIR 1919 Pat 230 (231).

(4) When the rights of a community are likely to be affected and the suit is not framed as a representative suit impleading the members of the community, then a decree cannot be framed so as to affect the rights of the community. AIR 1969 Pat 233 (235) (DB).

(5) The decision in a case in respect of public right is binding on all persons interested in that right as for purposes of Section 11 they will be deemed to claim under the persons who litigated in the earlier suit in respect of that public right. 1956 All L Jour 225 (226) ** **AIR 1959 SC 31 (38): 1958 Ker LT 721.**

(6) A suit by trustee of the temple for declaration that the temple and its endowments are private and outside the scope of Orissa Hindu Religious Endowments Act 1939 — Public are necessary parties and suit not making them parties under O. 1, R. 8 is not maintainable. (1961) 3 Orissa JD 53 (54) (DB).

7. "Having the same interest."— (1) Community of interest is an essential condition precedent for bringing a representative suit. AIR 1955 Mad 281 (285): ILR (1955) Mad 339 (FB).

(2) The interest need not be a proprietary one. Thus, disciples of a mutt can sue for setting aside an improper alienation of mutt properties and for restoration thereof to the head of the mutt. AIR 1918 Mad 464 (464): 41 Mad 124 ** (1962) 66 Cal WN 912. (What is required under this rule is that the parties should have the same interest; it is not necessary that their interest must arise from the same transaction.) ** AIR 1959 Bom 491 (495): 59 Bom LR 1144.

(3) The expression "same interest" is not confined to joint or concurrent interest. It applies also to cases where the interest is similar though distinct. (1912) 15 Ind Cas 399 (400) (Mad) ** AIR 1916 Pat 26 (27) (DB) ** ILR (1967) 46 Pat 977.

(4) An interest merely as a member of public is not a sufficient interest for purposes of rule. AIR 1917 Cal 678 (678) (DB).

Order 1 Rule 8 — Note 7 (contd.)

(5) The rule is "rather designed to allow one or more persons to represent a class having special interest than to allow such persons to sue on behalf of the general public. (1886) 9 Mad 463 (466) (DB).

(6) A co-sharer is entitled to sue for possession on behalf of other co-sharers. AIR 1952 Trav-Co 258 (259): ILR (1951) Trav-Co 585 (DB) ** ILR (1951) 2 All 328 (358) (DB) ** 1960 MPLJ 962: ILR (1960) Madh Pra 285 (DB).

(7) The defendants in a partition suit may, in certain circumstances, have the same interest in the suit so that Order 1, Rule 8 may apply to such a case. ILR (1952) 2 Raj 900 (904) (DB) ** AIR 1928 Lah 693 (694). (Distinguishing 17 Cal 906 and 16 Bom 608.)

(8) Parties not having same interest in suit must all be on the record. AIR 1940 Cal 236 (241): ILR (1940) 1 Cal 14 ** (1888) 15 Cal 329 (340) (PC).

[See also AIR 1962 Tripura 7 (10). (Since the interests of all the petitioners were separate Order 1, Rule 8 did not apply.)]

(9) In a suit for contribution all co-promisors must be before Court. (1890) 12 All 110 (114) (DB).

(10) Representative suit by some shareholders for avoiding contract of allotment of shares rectification of register of members and for refund of share money cannot be brought under this rule. AIR 1953 Bom 112 (117).

(11) Suit for declaration of right of way over suit land for removal of obstruction and for injunction prohibiting obstruction — It cannot be contended that merely because certain other persons joined with the plaintiff in making an application to the Magistrate they have necessarily the same interest as the plaintiffs. AIR 1949 Cal 209 (212): ILR (1946) 1 Cal 522.

(12) Suit for removal of obstruction from a village road not claimed as public one — Persons responsible for obstruction are alone necessary parties — Suit cannot be dismissed on the ground that other persons not responsible for obstruction have not been impleaded as parties. AIR 1964 Cal 548 (551).

(13) The rule does not require that whole body on whose behalf proceedings are taken should be of same opinion. The true principle underlying the rule is that the suit should, in form, be constituted into a representative one in order to prevent the defendant from being vexed by similar suits by others. If a substantial majority of the members of a body are of one opinion an order may be made by the Court giving permission under this rule, though there is a small or negligible minority holding a different opinion. AIR 1949 Mad 653 (654) ** AIR 1952 Madh B 158 (158, 159).

(14) Under this rule a suit can be brought on behalf of a body against some of its own members. AIR 1929 Mad 633 (634).

(15) A suit between two rival groups of the same caste or body is within the rule. AIR 1935 Mad 542 (543).

(16) Under Order 1, Rule 8 the plaintiff must have himself the same interest as the persons he seeks to represent. AIR 1940 Pat 449 (455, 456): 19 Pat 208 (DB) ** AIR 1939 Mad 428 (429) ** AIR 1969 Orissa 137 (138): 35 Cut LT 206. (Person ceasing to be student of college at the date of suit cannot be said to continue to have same interest as other students of the college.)

(17) A as representing a body has a certain interest in suit in common with all other members of body and has also a special right peculiar to himself in respect of same matter. Two interests may be combined in same suit under Order 1, Rule 1. AIR 1919 Mad 1143 (1144) (DB).

(18) Trustee in whom trust property is vested can alone sue for recovery of possession of property and not worshippers in the temple. AIR 1956 All 207 (210) ** AIR 1954 Orissa 11 (14): ILR (1953) Cut 578 (DB) ** AIR 1923 Mad 276 (277) (DB).

(19) Where permission is granted under Order 1, Rule 8 to some of the tenants to file a suit, the fact that one of the plaintiffs is not a tenant makes no difference as he will be a superfluous or unnecessary plaintiff and can be left out of consideration. AIR 1957 Manipur 25 (32).

7-A. Suits by or against trustees.— (1) Suit by worshippers at a temple for setting aside an alienation of temple property is maintainable. AIR 1920 Mad 665 (665, 666): 43 Mad 410 (DB) ** AIR 1919 Cal 179 (180, 181) (DB) ** AIR 1916 Pat 404 (405) (DB) ** AIR 1923 Mad 276 (277) (DB).

(2) High Court Rules and Orders — Calcutta High Court Original Side Rules, Chapter 13-A — Suit under, against defendant personally and in capacity of shebait — No conflict of interest and duty between defendant's personal capacity vis-a-vis the duty in respect of debutter properties — Defendant raising all possible defence that could have been taken on behalf of deity — Suit as laid held not bad and non-impleading of deity through next friend is not fatal. (1963) 67 Cal WN 533.

(3) Where application under Bombay Public Trusts Act (29 of 1950) for declaring property as a private trust and not a public trust denying the right of worship at the temple situate in the property the applicant must join the members of public who claimed a right of worship in that temple as necessary parties in opposition. Order 1, Rule 8., C. P. C. applies. AIR 1968 Bom 14 (19): 69 Bom LR 31.

(4) Where the ownership of suit items is vested in general body of Hindus some

Order 1, Rule 8 — Note 7-A (contd.)
members of the body are fully competent to file a suit in representative capacity in respect of the suit items. AIR 1967 J and K 52 (58).

(5) Muhammadan Law — Mosque is public trust — De facto manager is competent to sue on behalf of mosque. 1965 Ker LT 12: (1965) 1 Ker LR 106.

(6) Section 92 (2) forbids suits in relation to public, charitable and religious trusts otherwise than under the section, where the relief claimed is covered by the section. AIR 1925 Mad 1070 (1071, 1072) (SB) ** AIR 1916 Pat 404 (405) (DB).

(7) Suit not covered by Section 92 may be brought under Order 1, Rule 8 although it relates to a public trust. AIR 1954 Orissa 11 (14): ILR (1953) Cut 578 (DB) ** AIR 1929 Bom 153 (155, 156) (DB).

(8) Where in a suit challenging the validity of the Union of Churches there was no representation of the members of the congregation who held beliefs opposed to the beliefs of the plaintiffs, the representative character of the defendants was incomplete for the purpose of an effective decision and the suit has to be dismissed. 1963 Ker LT 125 (164) (Mad).

7-B. Suits by or against community.— (1) Where a community is divided into two clear factions, one faction favouring and the other opposing the suit, it cannot be said that the community has the same interest in the suit and a suit cannot be brought under Order 1, Rule 8. AIR 1916 Bom 261 (262): 40 Bom 158 (DB).

(2) Under Order 1, Rule 8 consent of community need not be obtained beforehand for the suit. (1921) 64 Ind Cas 618 (620, 621) (DB) (Mad).

(3) For bringing a suit it is not necessary to hold a meeting of the caste or community. AIR 1929 Mad 44 (46) ** AIR 1921 Mad 682 (683, 684) (DB).

(4) Where a meeting is convened but irregularly held, the consent expressed at such a meeting is vitiated and Order 1, Rule 8 will not apply. In such a case, consent of various members expressed subsequently cannot help plaintiff. AIR 1916 Bom 261 (262): 40 Bom 158 (DB).

(5) Where a meeting is properly held and certain persons are duly appointed to sue on behalf of whole body, fact that some members of body subsequently side with defendants does not take away representative character of suit. AIR 1928 Cal 741 (742) (DB).

(6) Suit to establish rights of sweepers and chamars can be filed only by persons belonging to those two castes and not by outsiders. AIR 1927 All 96 (97).

(7) Order 1, Rule 8 presupposes existence of right of suit in the community. Hence, where there is no right to sue at all in the community, the rule does not apply. AIR 1940 Pat 449 (465): 19 Pat 208 (DB) ** AIR 1918 Mad 628 (631, 632).

8. Matters in respect of which representative suit can be brought. — (1) The procedure under Order 1, Rule 8 is not applicable to actions of debt, to money claims or to liabilities in contract or in tort. AIR 1952 Mad 115 (116) ** AIR 1938 Mad 755 (755, 756): ILR (1938) Mad 1094 (DB).

[See however AIR 1943 Mad 161 (165): ILR (1943) Mad 267 (DB).]

[But see AIR 1957 Madh B 173 (175). (Representative suit on behalf of unincorporated Association for recovery of money is competent.) ** (1965) 78 Mad LW 626. (Suit for recovery of money — Representative suit is maintainable. AIR 1938 Mad 755, **HELD NO LONGER GOOD LAW.**)]

(2) Representative suit against several persons each of whom is in possession of a different parcel of land — Decree for mesne profits for a consolidated sum cannot be passed. AIR 1938 Mad 755 (756): ILR (1938) Mad 1094 (DB).

(3) A representative suit for rendition of accounts can be brought by certain members of an unregistered society. AIR 1952 Mad 115 (116, 117).

(4) A representative suit can be brought for declaration, injunction or possession. AIR 1938 Mad 755 (756): ILR (1938) Mad 1094 (DB).

[See AIR 1940 Pat 247 (248) (DB).]

(5) A representative suit for declaration by some of the ryots of a village that they are entitled to certain permanent, remissions under a contract with the zamindar is maintainable under this rule. Even though the common interest of the plaintiffs and other villagers emanates from a grant, they are not seeking to enforce any liability under the contract but they are only protecting their own interests against the zamindar by asking for a declaration of their right. AIR 1957 Andh Pra 956 (957).

(6) Suit by several workers against employer for declaration that they were entitled to leave with wages.

Held, that question as to how much leave each plaintiff-worker would be entitled to, would vary from worker to worker and there would be as many suits and not one suit and therefore, suit would be barred under Order 1, Rule 8.

Held, further that Order 1, Rule 1 did not also apply and plaintiffs could not join in suit under that provision. 1968 Lab IC 1322 (Guj).

(7) The nature of the claim, whether it is a suit for declaration of a right or an injunction or an action for money on contract or on tort, is not very material in considering whether a suit could be filed under the simplified procedure under this rule. It is the existence of a sufficient community of interest among the persons on whose behalf or against whom the suit is instituted that should be the governing factor in deciding as to whether the procedure provided in this rule could be pro-

Order 1, Rule 8 — Note 8 (contd.)
perly adopted or not. AIR 1955 Mad 281 (287): ILR (1955) Mad 339 (FB).

(8) A suit by some of the share-holders of a company for avoiding contracts of allotment of shares, for rectification of register of members and for refund of share money paid to company cannot be brought under this rule. AIR 1953 Bom 112 (117).

(9) Suit against Municipal Borough on behalf of all the rate payers of the town — All rate payers interested in resisting illegal demand made on basis of revised assessment list.

Held, trial Court was right in according permission to institute representative suit. (1968) 2 Mys LJ 172: 15 Law Rep 516.

9. Representative suit for damages. — (1) Order 1, Rule 8 does not enable a representative action for damages in respect of defamation to be brought on behalf of a number of persons. AIR 1930 Rang 177 (181): 8 Rang 250 (DB).

(2) A suit against some of members of an unregistered society in their representative capacity, for recovery of damages for wrongful dismissal out of the common fund of society and in which all members are interested, will be maintainable. AIR 1945 Bom 465 (469).

(3) A representative suit on behalf of a large body of nanja ayacutdars of a village for recovery of damages caused by reason of the interference by the defendants with their exclusive rights to fish and grass produce is maintainable under this rule. AIR 1955 Mad 281 (287): ILR (1955) Mad 399 (FB). (AIR 1919 Mad 1143; AIR 1938 Mad 755: ILR (1938) Mad 1094 and AIR 1939 Mad 783: 41 Cri L Jour 677, Considered.)

(4) Claim under Fatal Accidents Act made by Executor or Administrator or representative of the deceased is essentially a claim on behalf of all the heirs of the deceased. AIR 1966 Punj 288 (293): 67 Pun LR 386 (FB) ** AIR 1966 Raj 210 (212): 1966 Raj LW 111 (DB). (Section 1-A, Fatal Accidents Act is a clear departure from the rule that a right of suit in a personal cause of action dies with the deceased.)

10. Permission of Court.— (1) Permission of Court is an essential condition for binding persons other than those actually parties to suit and their privies; in absence of permission suit is not a representative one. AIR 1943 Lah 96 (97) (DB) ** AIR 1958 Madh Pra 189 (191) ** AIR 1940 Cal 236 (240): ILR (1940) 1 Cal 14 ** AIR 1928 Pat 205 (208): 7 Pat 197 (DB) ** **AIR 1965 SC 11 (16): (1964) 4 SCR 945.**

(2) Court ought to insist on permission being obtained before a matter is allowed to be fought out in a representative capacity. AIR 1929 All 806 (807) (DB).

(2-A) There is no time limit for making an application under O. 1, Rule 8. AIR 1961 Punj 111 (112). (All members of unregistered body made defendant. Subsequent application under Order 1, Rule 8 made.)

(3) The requirement as to permission under this rule cannot be waived. AIR 1943 Lah 96 (97) (DB).

(4) A representative suit without requisite leave is liable to be dismissed. (1894) 21 Cal 181n (181n) (DB) ** (1882) 8 Cal 32 (41) (DB).

(5) Suit filed in representative capacity — Amendment of plaint — No new cause of action introduced — Amendment sought for, due to subsequent events — Plaintiff's right to s e existing — No fresh leave is required. AIR 1964 Cal 247 (254): 68 Cal WN 302.

(6) An objection on ground of want of permission cannot be raised for first time in appeal. AIR 1952 Kutch 83 (84, 85) ** (1890) 14 Bom 213 (218) (DB) ** AIR 1931 Oudh 375 (377) (DB).

(7) Objection as to want of permission raised before Appellate Court. Suit should not be dismissed but should be remanded for following proper procedure. (1883) 5 All 602 (604) (DB).

(8) Permission under Order 1, Rule 8 given — Successor Judge cannot hold that it was wrongly or improperly given — But he can frame and decide issue whether or not the interest of plaintiff is same as interest of persons on whose behalf suit is filed. (1962) 3 Guj LR 1004.

(9) Suit under Section 64 (2) of Orissa Hindu Religious Endowments Act 1939 — Public not impleaded as parties — Suit not maintainable — Object raised at earliest stage — No effort made to correct omission — Prayer for remand not granted as the public had obtained a valuable right due to the law of limitation. (1961) 3 Orissa JD 53 (54) (DB).

(10) Where all persons jointly interested are made parties to suit, no permission is necessary under this rule. AIR 1946 Mad 25 (30): ILR (1946) Mad 486 (DB).

(11) Where the plaint clearly showed that the suit was of a representative character on behalf of all the creditors but no permission was taken for filing a suit on behalf of all the creditors as required by Order 1, Rule 8, C. P. C. and no notice was given as stated in the rule it was held that failure to take the permission of the Court was a trifling mistake which did not affect the merits of the matter. (1967) 8 Guj LR 766 (767).

(12) Permission obtained in trial Court, enures for Appellate Court also. AIR 1919 Lah 273 (274): 1919 Pun Re No. 46, p. 115 at p. 118 (DB) ** AIR 1927 Cal 608 (610) (DB).

(13) Court should exercise a judicial discretion in granting permission. AIR 1932 Bom 65 (66) (DB) ** (1890) 17 Cal 906 (910) (DB).

(14) In deciding whether leave has to be granted or in considering whether a suit already instituted under this rule is main-

Order 1, Rule 8 —Note 10 (contd.)

tainable the principal consideration that should weigh with a Court is whether it is satisfied that there is sufficient community of interest as between plaintiffs or defendants, as the case may be, to justify the adoption of procedure provided under this rule. AIR 1955 Mad 281 (286, 287): ILR (1955) Mad 339 (FB).

(15) Under Order 1, Rule 8, the Court can permit even a single person to bring a suit on behalf of others. AIR 1957 Manipur 25 (32) ** AIR 1959 Ker 379 (380): 1957 Ker LT 932.

11. Permission when to be granted.— (1) Though proper course is to obtain permission before the suit is instituted it may be granted even after the institution of the suit. AIR 1953 Bom 334 (335): ILR (1953) Bom 710 (DB) ** AIR 1957 Cal 77 (77). (Suit validated from the date of application for permission.) ** (1900) 22 All 269 (270) (DB) ** (1897) 21 Bom 784 (785, 786) (FB) ** AIR 1917 Cal 809 (810, 811): 44 Cal 258 (DB) ** (1902) 25 Mad 399 (401) (DB). (Even if it is refused on previous occasion.)

(2) The permission can be granted even at the appellate stage by allowing amendment of plaint provided it does not change materially the substance of the suit. AIR 1952 Kutch 92 (93) ** AIR 1947 Mad 205 (206) ** AIR 1959 Bom 491 (493): 59 Bom LR 1144.

(3) Permission given after publication of notice — Court must be deemed to have given its permission when it ordered publication of notice — Proceedings not vitiated. AIR 1965 Ker 200 (203): 1965 Ker LT 907. (AIR 1943 Mad 161 and AIR 1952 Kutch 92, Rel. on.)

12. Form of permission.— (1) Permissions need not be express but may be implied from record. ILR (1955) 5 Raj 910 (914) ** AIR 1933 Lah 749 (751): 15 Lah 123 (DB) ** AIR 1927 Cal 608 (611) (DB) ** AIR 1959 Bom 491 (493): 59 Bom LR 1144.

(2) Permission under the rule must be to persons definitely named. (1890) 17 Cal 906 (911) (DB).

13. Who may apply for permission.— (1) The application for permission should be made by the plaintiff when he alleges representative character of plaintiffs or defendants. (1932) 33 Pun LR 221 (222) (DB).

(2) Where a suit against a number of persons is sought to be defended by one of them on behalf of all, the application should generally be made by such defendant. The persons to whom permission has been granted under the rule must act together. If permission is granted to a certain number of persons and some of them do not join in the suit, the remaining persons alone cannot avail themselves of the permission and sue. AIR 1952 Punj 43 (44): ILR (1951) Punj 415. (But Court can allow remaining persons to continue suit.) ** AIR 1925 Cal 547 (548, 551).

(3) There can be no hard and fast rule as to how many persons should represent the public or the class as the case may be. AIR 1933 Pat 302 (302).

(4) Where permission to sue is granted by Court, plaintiffs cannot subsequently contend that suit was not brought by them in a representative capacity. AIR 1951 Mad 296 (300): ILR (1950) Mad 607 (DB).

14. "May be sued."— (1) Where inhabitants of a village claim a right of way over plaintiff's land, plaintiff, with the Court's permission, may sue one or more of them on behalf of all to negative the right. (1888) 15 Cal 460 (465, 466) (FB).

(2) Consent of defendant on record is not necessary to enable Court to permit the plaintiff to sue defendant as representing whole community. (1912) 36 Mad 418 (425) (DB) ** AIR 1927 Cal 608 (610) (DB).

(3) Where plaintiffs sue in a representative capacity it is not incumbent on them to sue the defendants also in a representative capacity. AIR 1942 Cal 261 (263).

14-A. "May defend."— (1) A claim for possession can be defended in a representative capacity under Order 1, Rule 8 only when numerous persons have the same interest in one suit. But where different portions of land are allotted to different persons and ordinarily a separate suit would be necessary against each though it might be permissible to join them all in one suit because common questions of fact or law would arise, that would not do away with the necessity of joining all the persons claiming an interest in the land or lands. AIR 1958 Manipur 38 (40, 41).

15. Notice of suit.— (1) Notice of institution of suit is peremptory. AIR 1922 All 16 (17): 44 All 231 (SB).

(2) Absence of notice cannot be cured under Section 99. ILR (1955) 5 Raj 910 (917).

(3) It is the duty of Court to issue such notice. AIR 1933 PC 183 (190): 60 Ind App 278: 56 Mad 657.

(4) Suit cannot be dismissed for failure of party to move Court to perform duties imposed on it by the section. AIR 1922 All 16 (17): 44 All 231 (SB) ** AIR 1933 Lah 749 (752): 15 Lah 123 (DB).

(5) Notice may be given whenever the defect is pointed out. AIR 1937 Cal 245 (250): ILR (1937) 2 Cal 86 (DB).

(6) Where want of notice is noticed by Appellate Court, suit may be remanded for notice being given. ILR (1955) 5 Raj 910 (918) ** AIR 1952 Ajmer 1 (1). (AIR 1922 All 16: 44 All 231 (FB), Rel. on.)

(7) Recitals in plaint that suit was for plaintiffs and on behalf of other creditors — Express permission of Court not obtained — Notices under Order 1, Rule 8, Civil P. C. not issued — Everybody concerned including Court forgetting about it — These points raised for first time in appeal — Omission could not be condoned

Order 1, Rule 8 — Note 15 (contd.)
under Section 99, Civil P. C. at appellate stage but could be remedied by granting permission to plaintiffs and by issuing notices to creditors if nature of suit is not changed. AIR 1962 Madh Pra 363 (365, 366): 1962 MPLJ 596 (DB).

(8) It is the duty of Court to see carefully that proper notices are issued which would give proper information to the persons interested in the suit. ILR (1952) 2 Raj 900 (908, 909) (DB).

(9) In absence of notice the decree will bind only parties actually on record. AIR 1933 PC 183 (188, 189): 60 Ind App 278: 56 Mad 657. (Reversing AIR 1928 Mad 77: 51 Mad 128 (FB).) ** AIR 1928 Pat 205 (208): 7 Pat 197 (DB) ** (1963) 65 Pun LR 865. (The advantage of the defect can be derived only by the parties who were not served.)

[See however ILR (1955) 5 Raj 910 (912).]

(10) The general rule is that the Court will give notice by personal service to all the persons interested. It is only where personal service is not possible that public advertisement is made. Hence where number of interested persons is determinate and not too large a list of such persons should be given by the plaintiff so that they may be served personally. ILR (1952) 2 Raj 900 (906, 907) (DB).

(11) A notice should specify names of persons to whom permission is given. AIR 1927 Cal 608 (611) (DB). ((1890) 17 Cal 906, Followed.)

(12) Non-specification of names in notice is not necessarily fatal to suit. AIR 1942 Lah 136 (137).

(13) Notice must be given after the permission to sue in a representative capacity has been given. But where notice is given first and then the permission, the proceedings are not vitiated merely because a fresh notice is not given after the permission. AIR 1943 Mad 161 (164): ILR (1943) Mad 267 (DB). (AIR 1933 PC 183: 60 Ind App 278: 56 Mad 657, Explained.)

(14) Suit against Municipal Borough on behalf of all the rate payers of the town — All rate payers interested in resisting illegal demand made on basis of revised assessment list — **Held,** trial Court was right in according permission to institute representative suit — Fact that publication of notice under Rule 8 was made after production of written statement by Borough could not affect maintainability of suit. (1968) 2 Mys LJ 172: 15 Law Rep 516.

16. Title of suit.— (1) Suit may be a representative one though the cause title may not show it. In India the substance and not the form of pleadings should be considered. AIR 1956 Pepsu 69 (71) ** AIR 1942 Cal 343 (345): ILR (1942) 1 Cal 211 (DB) ** AIR 1928 Mad 77 (87): 51 Mad 128 (FB). (**REVERSED** on another point in **AIR 1933 PC 183: 60 Ind App 278: 56 Mad 657.**)

(2) The fact that the relief claimed, if granted, would benefit also persons other than actual plaintiffs would be no criterion to judge representative character of suit. AIR 1949 All 761 (763).

(3) Merely because one of the plaintiffs withdraws from the suit, the character of the suit does not cease to be that of a suit under Order 1, Rule 8 and become a personal suit concerning the remaining plaintiffs alone. AIR 1961 All 266 (274) (DB).

(4) In order to decide the plaintiffs' application under Order 1, Rule 8 the allegations contained in the plaint all to be looked into. AIR 1960 Madh Pra 288 (288, 289): 1959 MPLJ 458 (FB).

17. Addition of parties.— (1) Parties who have obtained permission to sue as representatives have the conduct of suit on behalf of all those they purport to represent. In fact they are the only parties to the suit. AIR 1943 Mad 531 (536): ILR (1944) Mad 133 (DB) ** AIR 1939 Lah 572 (577): ILR (1940) Lah 199 (DB).

(2) Any person on whose behalf a suit is instituted or defended may apply to Court to be added as a party to suit. AIR 1955 Mad 281 (283): ILR (1955) Mad 339 (FB) ** ILR (1953) 2 Cal 171 (174) ** AIR 1943 Lah 96 (97) (DB).

(3) In a representative suit filed under Order 1, Rule 8, two persons K and H gave applications under sub-rule (2) of the rules stating that they wanted to be added as plaintiffs. At that time they were not added as plaintiffs. Subsequently at a late stage two more persons A and B made applications and the Court substituted all four A, B, K, and H as plaintiffs in place of original plaintiffs.

Held, K and H had a right to be made parties to the suit by adding them as parties and they could not be substituted as plaintiffs.

A and B had no right to be substituted as their case did not fall under Order 1, Rule 10 (2). AIR 1968 Guj 265 (266): 9 Guj LR 1050.

(4) Person seeking to be impleaded as party must show that conduct of suit is not in proper hands and that his interests will be seriously affected to his prejudice if he is not joined as a party. ILR (1953) 2 Cal 171 (174) ** (1909) 34 Bom 420 (421).

(5) A person who seeks to be added as a co-plaintiff must accept the plaint as it is. If the object of his being added as a co-plaintiff is to ask Court to have plaint amended by inclusion of certain prayers which in his view could be properly claimed without any suggestion that plaintiffs on record were not properly carrying on the suit, there is no ground for adding him as a co-plaintiff. ILR (1953) 2 Cal 171 (176).

(6) Amendment of a plaint by which a suit in an individual capacity is converted into a representative one does not involve

Order 1, Rule 8 — Note 17 (contd.)
addition of any new parties so as to attract Section 22, Limitation Act. AIR 1943 Mad 531 (537): ILR (1944) Mad 133 (DB). (AIR 1940 Mad 639, **OVERRULED.**)

(7) Where a suit instituted against an unregistered association by its chairman is materially defective for want for leave and the defect is subsequently removed by obtaining leave of Court the suit must be deemed to have been instituted for purposes of limitation when defect was removed. AIR 1953 Bom 334 (336): ILR (1953) Bom 710 (DB).

(8) Plaintiff allowed to sue a number of persons under Order 1, Rule 8 — Omission to mention names of some persons who are interested in suit does not affect maintainability of suit. AIR 1939 Lah 572 (577): ILR (1940) Lah 199.

(9) Plaintiff allowed to sue in a representative capacity. Fact that certain persons are added as co-plaintiffs after publication of notice under Order 1, Rule 8 and after the expiry of limitation will not affect maintainability of suit. ILR (1951) 1 Raj 182 (183, 184) ** AIR 1947 Pat 257 (258) (DB).

(10) Suit between two communities regarding ownership and user of water. Government would not be a necessary party when it does not claim any right in it. Mere fact that Government has from time to time passed certain orders for maintenance of peace and order would not make it incumbent on parties to join Government as a party. AIR 1945 Nag 106 (108): ILR (1945) Nag 273.

(11) Plaint claiming main relief of declaration that plaintiff was entitled to conduct service in plaint church principal question to be decided was whether union of churches into the Church of South India was binding on plaint church, in such a case the church was proper party, and Court ought to have directed plaintiff to implead congregation as a party to suit. AIR 1954 Trav-Co 67 (97): ILR (1954) Trav-Co 494 (DB).

18. Suit in name of wrong plaintiff.— (1) Where, through a bona fide mistake, a representative suit has been instituted in name of a wrong person as plaintiff, Court can allow any other person to be substituted as plaintiff. AIR 1924 Mad 883 (884).

(2) Where a person having no right of suit is wrongly granted leave to bring a representative suit, the order can be challenged in subsequent stage of the suit or in appeal. AIR 1947 Mad 100 (101).

(3) Suit by firm on promissory note executed in favour of one partner personally for debt due to firm — Partner alone entitled to bring suit — Suit by wrong plaintiff firm — The partner in whose favour the promissory note was executed made defendant No. 1 — Relief can be granted to proper plaintiff who was a defendant No. 1 in the suit. (1962) 66 Cal WN 441 (445) (DB).

19. Addition of parties after decree.— (1) Where in a representative suit the plaintiffs on the record neglect to execute the decree in their favour, the Court may add other persons as parties to enable them to execute the decree. AIR 1923 Mad 472 (473) (DB).

20. Decree in a representative suit.— (1) Explanation VI to Section 11 applies to representative suit and a decree passed in such a suit enures to the benefit of, or binds, all the persons so represented in the suit, although they are not actually parties on the record. AIR 1955 Mad 281 (283): ILR (1955) Mad 339 (FB) ** AIR 1956 Trav-Co 266 (268) (DB) ** 1956 All L Jour 225 (226) ** AIR 1926 Bom 179 (183) (DB) ** AIR 1935 Oudh 369 (371): 11 Luck 150 (DB) ** AIR 1960 Punj 26 (27, 28, 29).

[See also AIR 1962 Andh Pra 140 (145): (1961) 2 Andh WR 204 (FB). (If a person is deemed to be a party under O. 1 R. 8 and for purposes of S. 11, Expln. VI leave to appeal can be granted to him by the appellate Court in an appropriate case, if the decision rendered in those proceedings would adversely affect him.)]

(2) A representative suit is not confined to suits brought under Order 1, Rule 8. AIR 1956 Pepsu 69 (71) ** AIR 1917 Mad 457 (460) (DB) ** AIR 1926 Bom 179 (183) (DB).

(3) Representative suit — Decision in, does not bind interests not represented therein — In determining the question about the effect of a decree passed in a representative suit, it is essential to enquire which interests were represented by the plaintiff or defendants. The decree in the suit does not create a bar of res judicata against persons claiming interest not represented in suit. **AIR 1964 SC 107 (114, 115): (1964) 2 SCR 647.**

(4) Where, under the substantive law, certain persons are entitled by virtue of their position to sue on behalf of themselves and others they can bring a representative suit. (1911) 35 Mad 685 (691) (DB). (Manager of joint Hindu family.) ** AIR 1952 Orissa 312 (315) (DB). (Shebait of deity.) ** (1897) 20 Mad 129 (139) (FB). (Karnavan of Malabar Tarwad.)
[See also AIR 1958 Pat 577 (579.)]

(5) A decision in a representative suit operates as 'res judicata' only when it is given on the merits. AIR 1941 Rang 24 (25): 1940 Rang LR 643 (DB).

(6) Decision in representative suit operates as 'res judicata' only so far as the rights litigated are common to the person suing or being sued and those whom he represents. AIR 1926 Pat 321 (324): 5 Pat 539 (DB).

Order 1, Rule 8 — Note 20 (contd.)

(7) Decision in representative suit can bind the persons represented only with respect to their property which the person suing or sued against represented, although the parties on record may be personally liable. AIR 1943 Mad 531 (537): ILR (1944) Mad 133 (DB) ** AIR 1942 Bom 136 (138): ILR (1942) Bom 504.

(8) Decree for injunction passed in representative suit is not binding on persons who were not parties actually on record but against whom a representative suit was filed. To entitle decree-holder to proceed against such persons who are not parties on record the injunction must be revived against them, which must be by a separate suit and in such a suit an opportunity will be afforded to them to raise appropriate defences. Without a revival of the decree for injunction against these other persons no proceedings in pursuance of the decree can be started against them. AIR 1955 Mad 281 (285): ILR (1955) Mad 339 (FB).

[But see AIR 1955 All 385 (386) (DB). (AIR 1942 Lah 136, Rel. on; ('89) 12 Mad 356 and ('10) 33 Mad 483, Distinguished.) ** AIR 1960 Cal 623 (626): 64 Cal WN 780.]

(9) If the alleged common right in a representative suit under this rule is negatived, the suit should be dismissed; the Court cannot, in such a suit, declare the rights of individuals as distinguished from the rights of the class of persons on whose behalf the suit is brought, though it is open to the Court to pass a decree in favour of persons forming a smaller number out of a larger class. AIR 1918 Mad 628 (631) (DB).

(10) Where a suit is not a representative one, Explanation VI to Section 11 does not apply and the decree cannot bind anyone who is not a party to it. AIR 1949 All 761 (762) (DB) ** AIR 1928 PC 16 (20): 55 Ind App 96: 55 Cal 519 ** AIR 1938 All 523 (524) (DB) ** AIR 1962 Mad 189 (191): 1961 Mad WN 676. (Representative suit by creditor of insolvent under Section 53, T. P. Act — No notice to official Receiver — Decision in suit not binding on official Receiver — Subsequent petition under Section 54, Provincial Insolvency Act not barred by res judicata.) ** AIR 1959 Andh Pra 280 (285): (1959) 1 Andh WR 72 (DB). (Suit by a creditor under O. 21, Rule 63 to litigate his own rights — Explanation VI, Section 11, C. P. C. not attracted.)

(11) Where a plaintiff purports to sue in a representative capacity, the decision in the suit will not operate as 'res judicata' against the other members of the group which the plaintiff professes to represent, unless the requirements of this rule are complied with. AIR 1955 Mad 281 (283): ILR (1955) Mad 339 (FB) ** AIR 1949 All 761 (763) (DB) ** AIR 1943 Lah 96 (97) (DB) ** AIR 1940 Cal 236 (240): ILR (1940) 1 Cal 14.

(12) Where neither a proper notice is issued under Order 1, Rule 8 nor is it duly served on the persons concerned the procedure amounts to an irregularity which vitiates the entire proceedings in the lower Court and cannot be condoned under Section 99, C. P. C. AIR 1960 Punj 26 (27, 28, 29).

(13) When the provisions as to notices in Order 1, Rule 8, are not substantially complied with and a decree is passed in favour of the plaintiff, the proper order to be passed on appeal is to set aside the decree and remand the case to be proceeded with according to law after effecting proper service on the defendants in accordance with the provisions of Civil Procedure Code. AIR 1960 Punj 26 (27, 28, 29). (ILR (1955) 55 Raj 910, Foll.)

(14) Where permission is given to sue in a representative capacity the decree in the suit cannot be impeached in a subsequent suit on the ground that there could not be a representative suit in respect of a debt. AIR 1943 Mad 161 (164): ILR (1943) Mad 267 (DB).

(15) Where leave is granted under this rule to sue certain persons as representing a particular group, the fact that subsequently the name of one of them is, on his application, removed from the record as one of representatives does not preclude the Court from passing a decree against the others in their representative capacity. AIR 1943 Mad 161 (164): ILR (1943) Mad 267 (DB).

(16) Representative suit by villagers of K and villagers of J — Some villagers of J made defendants and a list of other villagers attached to the plaint indicating names of persons to whom notices under O. 1, R. 8 were to be sent. Names of some persons were omitted from the list inadvertently. Proclamation of suit was made in the village J — Mere fact that the names of some persons were omitted from the list attached to the plaint did not make the decision not binding on them and did not operate as res judicata. AIR 1964 Punj 227 (229, 230): 1963 Cur LJ 392.

(17) Where the suit related to joint family property and it was established that the defendant was the manager of the family, it would be presumed that he was sued in a representative capacity, even though the plaintiff did not describe the defendant as the manager in the plaint. Such an omission in the pleadings and the decree would not prevent the decree being treated as one against the entire family and binding on other members of the family. ILR (1957) Andh Pra 74 (78).

(18) Suit by reversioner against widow for declaration that alienation by her is not binding upon estate — He has only a

Order 1 Rule 8 — Note 20 (contd.)
contingent reversionary interest at the time and where he sues for the purpose mentioned above he sues in a representative capacity on behalf of the entire body of reversioners. AIR 1967 Pat 157 (158): 1966 BLJR 386.

(19) A decree passed in the presence of defendants against whom permission to sue has been granted under Order 1, Rule 8 in their representative capacity cannot be said to be an 'ex parte' decree merely because persons who were represented were not personally present. An application under Order 9, Rule 13 is not maintainable at the instance of any of the persons who were represented by the defendants on record. 1957 All L Jour 720 (721).

(20) Plaintiffs asking for permission to sue on behalf of a particular class of persons of a certain part of village — Permission accorded to sue on behalf of the class of persons of the entire village — Notices sent to entire body of the class — No prejudice to defendants — Decree will not be set aside. AIR 1961 Punj 325 (325, 326): 63 Pun LR 499.

21. Costs.— (1) In representative suits, as a general rule, costs should be awarded only against parties on record but not against other persons whom parties on record may represent. AIR 1935 Oudh 369 (370): 11 Luck 150 (DB) .

(2) In exceptional cases, costs may be ordered to be paid even by persons who are not parties on record but on whose behalf suit has been brought or defended. The Court may also, in a fit case direct costs to be paid out of any property which may belong to the community represented in the action. In any case, great caution is necessary in making an order as to costs in a representative suit. AIR 1917 Bom 141 (148): 42 Bom 556.

22. Compromise.— (1) In a representative suit under Order 1, Rule 8, the representative is dominus litis until judgment and he can therefore discontinue or compromise the suit. AIR 1952 All 275 (275) ** AIR 1951 Cal 456 (459) ** AIR 1943 Mad 161 (165): ILR (1943) Mad 267 (DB) ** AIR 1961 All 266 (275) (DB). (Once permission is given to certain representatives to litigate on behalf of the public then that right should carry with it the right to compromise.)

(2) Permission of Court is not necessary in order to make compromise binding. (1954) 56 Pun LR 525 (527) ** AIR 1952 All 275 (275) ** AIR 1961 All 266 (275) (DB). (AIR 1915 Mad 561 and AIR 1952 Punj 43, **DISS FROM.**)

[But see AIR 1952 Punj 43 (44): ILR (1951) Punj 415.]

(3) A compromise entered into by some of the proprietors in a representative suit for ejectment would not however bind the other co-sharers in regard to that portion of land which was not the subject-matter of the dispute. (1954) 56 Pun LR 525 (527).

(4) Consent decree has the same force as a decree in invitum and can operate as res judicata under Section 11. No distinction can be made between a consent decree in a representative suit, whether under Order 1, Rule 8 or under Section 92 and a consent decree in a suit between private parties. AIR 1959 Bom 396 (400): 60 Bom LR 1273 (DB).

23. Withdrawal.— See Notes under Order 23, R. 1.

24. Abatement of suits and appeals.— (1) A representative suit does not abate on the death of the person who sues or is sued in a representative capacity. **AIR 1921 PC 123 (124): 48 Cal 493: 17 Nag LR 37: 40 Ind App 12.** (Suit under Section 92 of the Code.) ** AIR 1915 PC 124 (125, 126): 38 Mad 406: 42 Ind App 125.

(2) Representative suit under Order 1, Rule 8 — Death of plaintiff — No abatement — Application by legal representative for substitution as plaintiff — Limitation — Dismissal — Order declaring suit to have abated — Amounts to decree — Legal representative competent to file appeal against decree challenging propriety of order dismissing his application. AIR 1965 Ker 303 (304): 1965 Ker LT 236.

(3) Persons represented in a representative suit are not "legal representatives" of deceased within the meaning of Section 2 (11) of the Code and Order 22 Rules 3 and 4 do not apply to such case. AIR 1929 Mad 451 (451, 452).

(4) Representative suit — Death of plaintiff — Suit can be continued by any one whom the plaintiff represented. **AIR 1915 PC 124 (125, 126): 38 Mad 406: 42 Ind App 125.**

(5) On death of plaintiff application to continue the suit should be made under Order 1, Rule 8, sub-rule (2) or Order 1, Rule 10, sub-rule (2). AIR 1919 Mad 479 (480) (DB) ** AIR 1917 Mad 389 (390): 40 Mad 110 (DB).

(6) Decree in representative suit by A against B — During pendency of appeal by B one of persons represented by A dying — Appeal does not abate. AIR 1919 Lah 273 (274): 1919 Pun Re No. 46 (DB) ** AIR 1930 Lah 18 (19) (DB) ** AIR 1920 Lah 338 (340): 1 Lah 582 (DB).

[See also AIR 1966 Raj 210 (212): 1966 Raj LW 111 (DB). (Case under Sec. 1-A Fatal Accidents Act—Claimant wife dying during pendency of appeal — Appeal does not abate and can be continued by persons interested in the litigations.)]

(7) Non-joinder of legal representative — Suit by firm through its partner — Appeal by defendant — Death of partner — Appeal could not abate though legal representative of deceased partner was not brought on record. AIR 1966 Punj 40 (41, 43): 67 Pun LR 743 (FB).

R. 9. **Misjoinder and nonjoinder.**—No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

[1882 and 1877, S. 31; R. S. C., O. 16, R. 11. See S. 99; O. 1, R. 13; O. 2, Rule 7.]

Order 1, Rule 6 — Note 24 (contd.)

(8) Where the suit as brought is not a representative one, the fact that, in appeal, some respondents are allowed to represent others will not prevent abatement on the death of the persons so represented. AIR 1926 Lah 31 (32) (DB) ** AIR 1932 Lah 334 (337): 13 Lah 92 (DB).

[But see AIR 1931 Lah 610 (612): 13 Lah 195 (DB).]

(9) Suit by several persons against A not brought in representative capacity — Decree — Appeal by A — On A's reqeust only four persons out of several plaintiffs selected to defend appeal — Death of some decree-holders other than those selected — Appeal abates if no legal representative is brought on record — More so when one of selected persons dies. AIR 1926 Lah 31 (32) (DB) ** (1901) Pun LR No. 160, p. 407 (408) (DB).

[But see AIR 1940 Pat 180 (184): 18 Pat 723.]

(10) Suit against B as a trustee representing a temple and C as representing a certain community. Pending suit B died and another trustee was appointed. New trustee should be brought on record, so that idol and temple properties might be represented in suit. AIR 1927 Mad 1105 (1105) (DB).

(11) When one out of several persons, who are permitted to conduct the representative suit dies, it is not necessary that fresh proceedings should be taken in order that a chance may be given to other members of the public to apply to be brought on the record as the representative of the public. AIR 1961 All 266 (275) (DB).

(12) One of representatives dying — Proper procedure is for the remaining person or persons to apply to the Court for directions and it is for the Court to decide whether it will permit the remaining person or persons to whom the original sanction was given to continue to prosecute or defend the suit or appeal or it will give directions to bring on record additional person or persons. AIR 1951 Mad 296 (300): ILR (1950) Mad 607 (DB).

(13) The karnavan of a Malabar tarward may sue on behalf of the tarwad without obtaining leave of Court. Where he unnecessarily obtains such leave and then dies pending suit, succeeding karnavan is entitled, as of right to continue suit and junior members are not entitled to do so in the absence of very special circumstances. AIR 1939 Mad 751 (753) (DB).

(14) A suit by manager of a joint Hindu family to recover family property does not abate on his death and the succeeding karta can continue suit on behalf of family. AIR 1953 Cal 294 (296).

25. Applicability to arbitration proceedings. — (1) Order 1, Rule 8 has no application to private arbitration proceedings. Hence, a reference to arbitration by persons professing to represent a certain community will not be binding on other members of community in absence of any authorization by letter. 1954 All WR (HC) 525 (526) ** AIR 1927 All 128 (130) (DB).

26. Applicability to writ petitions. — (1) Neither the rule nor its principle can be extended to writ petitions. AIR 1956 Mad 626 (626) ** 1957-2 Andh WR 250 (253).

[But see AIR 1953 Cal 289 (292).]

(2) A Rate-payers' Association has no right to apply through its President for an appropriate writ restraining the Municipal Corporation from realising the taxes from its members. AIR 1956 Pat 182 (185) (DB).

(3) Application under Article 226 — Necessary parties — Application to compell Corporation of Calcutta and Commissioner of Police to maintain public street and footpaths for unobstructed user by public and for declaration that latter has no right to permit hawker's corners there — Duty of the Corporation and Commissioner of Police under Calcutta Municipal Act to keep footpaths and public streets clear — Hawkers are not necessary parties to such an application: AIR 1961 Cal 389 (391): 65 Cal WN 339.

27. Revision. — (1) A refusal to entertain an application under Order 1, Rule 8 without proceeding in accordance with the law is revisable under Section 115. AIR 1948 Mad 516 (517) ** AIR 1933 All 154 (155) (DB) ** AIR 1960 Madh Pra 288 (288, 289): 1959 MPLJ 458 (FB).

(2) No revision lies from an order granting an application under sub-rule (2) to be made a party to a suit. AIR 1942 Oudh 340 (342) (DB).

ORDER 1, RULE 9 — SYNOPSIS

1. Scope.
2. Misjoinder of parties.
3. Misjoinder of parties and causes of action — Multifariousness.
4. Nonjoinder of parties.
5. Nonjoinder in mortgage suits — See Order 34, Rule 1.

1. Scope.—(1) The paramount object of Order 1, Rule 9 is to regulate the business and procedure of the Courts so that justice may be done between the parties according to their rights and interests at law and

Order 1 Rule 9 — Note 1 (contd.)
by their contracts. AIR 1948 Bom 211 (214): ILR (1948) Bom 158 (FB).

(2) Order 1, Rules 9 and 10 should be construed together and necessary parties in whose absence Court cannot pass an effective decree may be added under O. 1, R. 10. AIR 1918 Mad 1137 (1139).

(3) Where necessary parties are not added, the suit will be dismissed, not by reason of the non-joinder of parties but by reason of fact that Court cannot under the substantive law grant any relief to the parties actually on record; Order 1, Rule 9 does not affect such cases, and cannot be relied upon to dispense with the joinder of such necessary parties. AIR 1949 Him Pra 4 (5) °° AIR 1948 Bom 211 (213): ILR (1948) Bom 158 (FB) °° AIR 1964 Tripura 19 (20). (Non-joinder of necessary parties — Dismissal of suit — Further suit impleading proper and necessary parties not barred.)

(4) Where a pre-emptor in his suit for pre-emption joins along with him a stranger who has no right to pre-empt, he forfeits his right to pre-empt and if the suit is dismissed, the dismissal is not one for misjoinder or non-joinder. In such a case Order 1, R. 9 or 10 cannot help the plaintiff to cure the defect. AIR 1954 All 94 (96) (DB).

[But see AIR 1966 Punj 36 (39): 67 Pun LR 849 (FB). (Suit for pre-emption—Person having no right of pre-emption made co-plaintiff by pre-emptor — Right of pre-emption is not forfeited.)]

(5) This rule does not apply to cases where there is a misjoinder of causes of action as well as of parties. (1897) 24 Cal 540 (543) (DB) °° (1894) 16 All 279 (282, 283) (DB) °° AIR 1968 Assam 36 (37).

[See however AIR 1956 Pepsu 80 (82): ILR (1956) Patiala 141.]

(6) It has been held that the rule does not apply to the trial of an election petition as it comes into conflict with S. 90 (3), Representation of the People Act as amended in 1956. AIR 1958 All 809 (819) (DB). (AIR 1954 SC 210 and AIR 1957 SC 444 holding to the contrary held not applicable as they were decided under the unamended Act.)

(7) Application for permission to sue as pauper — If application admitted it is converted into a plaint and becomes a suit — Order 1, R. 9 will therefore apply. AIR 1966 Pat 130 (133): 1965 BLJR 564 (DB).

(8) Where a suit or appeal abates against one of the defendants or respondents by reason of his death, in determining the question whether the suit or appeal can proceed against the remaining defendants or respondents, the principle underlying this rule may be applied. AIR 1962 SC 89 (91, 92): (1962) 2 SCR 636. (Acquisition of land jointly owned by two brothers — Award of compensation jointly in favour of both — Appeal by State — Abatement against one respondent — Appeal held could not proceed against other) °° AIR 1965 SC 1531 (1534, 1535): (1965) 2 SCR 830. (Joint and indivisible decree in favour of two plaintiffs — Defendant preferring appeal — One plaintiff dying — His heirs and legal representatives not impleaded in time — Suit against them abates and appeal against other plaintiff respondent becomes incompetent. AIR 1962 SC 80, Rel. on.) °° (1967) 8 Guj LR 728 (828) °° (1966) 68 Pun LR (D) 340 (341) (DB) °° AIR 1963 All 496 (497, 501): 1963 All LJ 546. (Suit for ejectment of trespassers A and B not alleged to have common cause against plaintiff — Death of A just before passing of decree dismissing suit — Appeal by plaintiff — Abatement of appeal against A — Appeal can proceed against B only. AIR 1960 All 379, OVERRULED.) °° AIR 1963 Orissa 140 (142): ILR (1963) Cut 313. (Suit for ejectment against joint trespassers — Death of one of defendants — Suit abates as whole — Suit for damages in tort — Suit does not abate.)

(9) Order 1, Rule 9 is subject to statutory provision or to any special or local law or any special form of procedure prescribed by any other law. Consequently if any law prescribed that a certain person must be impleaded as a defendant, even though no relief is sought against him, the failure to implead him will be fatal to the suit notwithstanding the provision of O. 1, R. 9. AIR 1963 All 549 (550): 1963 All LJ 389 (FB) °° (1966) 32 Cut LT 1028: ILR (1966) Cut 275. (Co-trustees ceasing to have concern in administration of trust — Suit not bad for non-joinder of them.) °° AIR 1964 Andh Pra 412 (415). (Order 31, Rule 2 requires all trustees to be impleaded in suit — Order 1, Rule 9 should be read subject thereto.) °° AIR 1959 All 579 (519): 1958 All LJ 437. (Trusts Act, S. 48 — It is not open to one of trustees only to maintain suit.)

[See also AIR 1969 Mad 108 (112): 81 Mad LW 342 (DB). (Plaintiff filing suit against 'A' and 'B' — 'A' is one of the trustees of a temple — B is tenant of property which A claims as temple property and which plaintiff claims it in his own right — 'A' is sued in his personal capacity — No necessity to join other trustees as parties.)

2. Misjoinder of parties.— (1) A misjoinder of parties is not fatal to a suit. AIR 1933 Cal 477 (479) (DB) *° AIR 1930 All 180 (183) (DB) °° AIR 1937 Lah 116 (117) (DB).

(2) In case of misjoinder of parties Court has power under Order 1, Rule 10 (2) to strike out the names of persons improperly joined, and to allow the suit to be proceeded with. There is no misjoinder of plaintiffs, where one of the plaintiffs is entitled to all the estate sued for and the name of another person is added as a co-plaintiff

Order 1, Rule 9 — Note 2 (contd.)

merely as a matter of extra caution. (1885) 9 Bom 536 (548) (DB).

3. Misjoinder of parties and causes of action — Multifariousness.— (1) Though O. 1, R. 9 does not apply to misjoinder of parties and of causes of action the suit should not be dismissed; the plaintiff should be given an opportunity to amend the plaint and to make his election and confine the suit to one set of defendants. AIR 1956 Pepsu 80 (82): ILR (1956) Patiala 141 °° AIR 1950 Mad 760 (761) *° AIR 1948 All 60 (62) °° AIR 1942 Cal 69 (70): ILR (1942) 1 Cal 235 (DB).

[See also AIR 1959 Punj 367 (369): 61 Pun LR 280. (Applications under Displaced Persons (Debts Adjustment) Act against three separate judgment-debtors two of whom resided outside jurisdiction — Application held bad for multifariousness.)

(2) Multifariousness — Dismissal of suit for failure of plaintiff to rectify defect — Dismissal of suit is not a matter of penalty but is on merits due to difficulty in granting relief to plaintiff on plaint as it stands. AIR 1956 Pat 223 (226, 227) (DB).

(3) Lands settled by Government with A on annual patta — These lands parcelled out by A into small plots and handed over to different persons — This creation of rights in third parties being contrary to terms of patta, Government cancelling A's patta and granting it to B — Suit by B for declaration and possession in respect of piece of such lands and not relating to separate plots in separate possession of other defendants — A, under whom other defendants derived their rights, made pro forma defendant — Suit could not be defeated by reason of misjoinder or non-joinder of parties and causes of action. AIR 1968 Assam 36 (37).

(4) Relief available to plaintiff under Sections 12 and 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act also available under Section 55 (1) (f) of the T. P. Act — It can be asked in one suit brought against owners and tenant — Suit is not bad for multifariousness. AIR 1963 Mys 159 (161): 1962 Mys LJ (Supp) 247.

(5) Where suit is allowed to proceed and results in a decree the defect of multifariousness is considered to have been waived and is irrelevant at the execution stage. AIR 1940 Pat 145 (147).

(6) Where no prejudice has resulted because of misjoinder of parties and causes of action, the defect is curable under Section 99. ILR (1959) 9 Raj 271 (276) (DB).

(7) The question of misjoinder of parties and causes of action is to be decided by the trial Court upon the allegations in the plaint and not with reference either to the defences of defendants or any evidence led by parties. AIR 1956 Pepsu 80 (81): ILR (1956) Patiala 141.

4. Nonjoinder of parties.— (1) Order 1, Rule 9 applies to nonjoinder of parties. Failure to join any parties does not per se entail dismissal of a suit. AIR 1953 Cal 625 (629) °° AIR 1948 Nag 56 (59): ILR (1947) Nag 412 *° AIR 1939 All 235 (235, 236) (DB) °° AIR 1963 Raj 198 (201): 1963 Raj LW 304 °° AIR 1962 Cal 283 (284). 65 Cal W N 1128 (DB).

(2) In case of non-joinder of necessary parties suit has to be dismissed because in their absence the Court cannot pass an effective decree at all. AIR 1955 Andhra 107 (108): ILR (1955) Andhra 249 *° AIR 1954 All 385 (390) (DB) °° AIR 1945 Pat 189 (190, 191): 23 Pat 961 (DB) °° AIR 1969 Mys 158 (159). (Negligence of driver of bus of company A — Driver selected for appointment by company B under agreement between A and B companies — Suit for recovery of compensation against company A — Not invalid for non-joinder of B.) *° 1968 Pat LJR 433: 1969 BLJR 264. (Partition suit — Plaintiff's title and possession disputed by defendants — Intervener claiming title and possession with himself — Intervener, held, ought to be impleaded — Question of title has to be gone into.) °° AIR 1968 Bom 44 (49): 69 Bom LR 111. (Suit by auction purchaser against obstructor—Persons who were likely to obstruct claim of purchaser but had in fact not obstructed claim are not necessary parties.) °° (1968) 34 Cut LT 1360. (Service tenure of joint family — State Government conferring occupancy right on members other than successors under S. 7 (g), Orissa Merged States (Laws) Act (4 of 1950) — Successors challenging order — Government is not necessary party.) °° AIR 1966 Him Pra 40 (45). (Herbs seized at the instance of police in Z State by police in H State from places in H — Supreme Court issuing writ for restoration of herbs against H — Herbs decayed in H — Liability for decay of herbs rested with H State — Z is not a necessary party.) °° ILR (1966) Cut 139 (143). (Dispute as to possession — Suit against trespasser by person in possession — Owner of disputed land not necessary party.) °° ILR (1965) Cut 486 (492): 32 Cut LT 148. (Suit by reversioner against widow challenging alienation and for declaration of his reversionary rights — Co-widow held necessary party.) *° AIR 1964 Cal 548 (551). (Suit for removal of obstruction from village road not claimed as public road — Persons responsible for obstruction alone are necessary parties — Suit cannot be dismissed on ground that other persons not responsible for obstruction have not been impleaded as parties.) °° AIR 1964 Cal 500 (503): 68 Cal WN 958. (Amendment of Constitution requiring ratification by State Legislatures challenged — Ground that resolutions passed by States did not amount to ratification — Union and ratifying States are necessary parties.) °° 1963 Ker LT 125 (1964) (Mad) °° AIR 1963 Ori 186 (187, 188): ILR (1963) Cut 841. (Grant by Collector

Order 1, Rule 9 — Note 4 (contd.)
of plots in favour of ex-landlords in exchange — Villagers challenging validity of such grant — Government is necessary party.) °° AIR 1963 Raj 198 (201). (Necessary party and proper party — Who is, stated.) °° AIR 1962 Cal 283 (284): 65 Cal WN 1128 (DB).

[See also 1968 Pat LJR 200 (DB). (Suit on mortgage by eldest son of deceased mortgagor said to be owner of impartible estate — Other heirs impleaded as defendants — Second party — Suit held not bad for non-joinder of any of them as plaintiff to suit.) °° 1962 BLJR 260. (Bihar Panchayat Election Rules (1959), Rule 24 — Candidate withdrawing his candidature under Rule 24 — He is not necessary party to election petition.)

(3) If non-joinder is only of proper (as contrasted with necessary) parties, it can never be in itself fatal to the suit. **AIR 1954 SC 210 (213): 1954 SCR 892** *° AIR 1955 Andhra 107 (109): ILR (1955) Andhra 249 °° AIR 1954 All 385 (390) (DB) *° 1968 Ker LT 568: 1968 Ker LR 273 (280). (Suit for partition of tarwad properties — Some properties claimed by one member exclusively — All major members of tarwad parties to the suit — Minor not impleaded — Minors are not necessary parties — Non-impleadment is not fatal.) °° AIR 1966 Cal 447 (454): ILR (1966) 2 Cal 205 (DB). (Suit for rent — Suit against heir of lessee — Non-joinder of other heirs — Suit is still maintainable.)

[See (1964) 68 Cal WN 532 (533, 534). (Shebait, who had renounced his shebaitship in favour of plaintiff-shebaits, not joined as plaintiff.)]

(4) In a case of non-joinder of proper party the Court can, under this rule, deal with the matters in controversy in so far as the parties actually before the Court are concerned. ILR (1955) Trav-Co 489 (494, 496) (DB) °° AIR 1941 Pat 495 (497) °° AIR 1935 All 110 (115, 116): 57 All 445 (DB) °° AIR 1965 All 77 (78). (Suit against trespassers dismissed against all but one for default of prosecution — Decree passed against remaining trespasser will be effective decree against him.) °° AIR 1964 Pat 548 (553): ILR 42 Pat 415 °° AIR 1964 Pat 321 (325) (DB) *° ILR (1963) Andh Pra 396. (Suit for declaration by students as to age — Registrar of University impleaded as defendant — Declaration obtained held would not be effective against D. P. I. or Secretary, Secondary Education Board who were not made parties to suit.) °° AIR 1961 Raj 196 (201). (Question of title in suit for specific performance or suit for refund of earnest money or for breach of warranty of title — Question to be decided as between parties on record.) °° AIR 1960 Madh Pra 249 (250) *° AIR 1952 Pat 161 (162) (DB).

[See AIR 1964 Cal 196 (209) (DB). (Suit by plaintiff company — Cause of action arising partly within Dominion of India and partly within Dominion of Pakistan — Joint liability of both the Dominions — Indian Court could not compel Government of Pakistan to submit to its jurisdiction — It was held permissible for plaintiff to press its claim only against Union of India.)]

[See also AIR 1965 Pat 510 (512): ILR 44 Pat 561 (DB). (Suit for possession and mesne profits against several defendants having distinct and separate interest in suit lands — Decree for possession — Costs awarded jointly against defendants and plaintiff allowed to withdraw amount deposited as past mesne profits — Appeal by some defendants only — Appeal held could proceed in absence of other defendants.)]

(5) In case of non-joinder of necessary party Court cannot immediately proceed to dismiss suit without giving an opportunity to plaintiff to amend plaint by adding the absent parties. AIR 1942 Oudh 335 (337): 17 Luck 102 (DB) °° AIR 1940 Pat 119 (121) (DB) *° (1898) 21 Mad 373 (382).

(6) If, on being required to add a necessary party the plaintiff refuses to do so, the suit is liable to be dismissed. AIR 1950 All 598 (603): ILR (1951) 2 All 475 (FB) °° AIR 1941 Nag 5 (8): ILR (1941) Nag 615 (DB) °° AIR 1931 PC 229 (231) *° AIR 1929 Cal 591 (592) (DB) °° 1964 Ker LJ 124 (125) °* AIR 1960 Madh Pra 249 (250): 1960 MPLJ 659.

(7) Mortgage in favour of A and B. A alone brought a suit on mortgage. Pending suit B died and his right under mortgage also devolved on A.

Held, that although A alone had no right to sue when he instituted the suit as he acquired the full and exclusive right before the date on which decree was passed, non-joinder of B did not affect validity of the decree. AIR 1939 Nag 242 (244): ILR (1939) Nag 515 (DB) °° AIR 1940 Mad 412 (415).

(8) A defendant who raises the plea of non-joinder of parties must specifically state who are the persons who ought to have been impleaded, to enable Court to decide how far their absence would affect the decision in the suit. AIR 1956 Cal 625 (629) *° AIR 1937 Pat 414 (416).

(9) Plea of non-joinder of party cannot be allowed for first time in second appeal. AIR 1962 Ker 36 (37): 1960 Ker LT 1080 °° ILR (1966) Cut 116 (124). (Plea of non-joinder not raised in written statement or at trial — Cannot be raised for the first time in appeal.) °° AIR 1964 Pat 548 (553): ILR 42 Pat 415. (Non-joinder held did not make suit defective especially when no issue was raised in that respect in trial Court.) *° AIR 1962 Mad 423 (425): 1962 Mad WN 355.

5. Non-joinder in mortgage suits.— See Order 34, Rule 1.

R. 10. Suit in name of wrong plaintiff.—(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

Court may strike out or add parties.

(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

ORDER 1, RULE 10 — SYNOPSIS

I. Sub-rule (1)

1. SCOPE OF SUB-RULE (1).
2. BONA FIDE MISTAKE.
3. "NECESSARY FOR DETERMINATION OF REAL MATTER IN DISPUTE."
4. "UPON SUCH TERMS."
5. "AT ANY STAGE OF THE SUIT."

II. Sub-rules (2) to (5)

6. SCOPE AND APPLICABILITY OF SUB-RULE (2).
7. ADDITION OF PARTIES — GENERAL.
   8. "Either upon or without the application of either party."
   9. "Who ought to have been joined."
   10. "Whose presence before the Court may be necessary."
   11. Partnership suits.
   12. Partition suits.
   13. Pre-emption suits.
   14. Suits by co-owners.
   15. Suits by joint promisees.
   16. Suits for rent.
   17. Suits on torts.
   18. Mortgage suits. See O. 34, R. 1.
   19. Suits on negotiable instruments.
   20. Suits for specific performance.
   21. Government.
   22. Suits by or against corporations. See O. 29, R. 1.
   23. Miscellaneous.
24. ADDITION INTRODUCING NEW CAUSE OF ACTION.
   25. Addition altering nature of suit.
   26. "Questions involved in the suit."
   27. Improper addition of plaintiff or defendant.
28. PARTIES MAY BE ADDED AT ANY STAGE OF THE PROCEEDINGS.
29. STRIKING OUT NAME OF PARTY IMPROPERLY JOINED.
30. TRANSPOSITION OF PARTIES.
   31. Transposing of defendant as plaintiff.
   32. Transposing of plaintiff as defendant.
33. MISDESCRIPTION OF PARTIES
34. CONSENT OF ADDED PARTY — SUB-RULE (3).
35. AMENDMENT OF PLAINT — SUB-RULE (4).
36. SUIT BY OR AGAINST A DEAD PERSON.
37. SUB-SECTION (5).
38. APPEAL.
39. REVISION.

1. Scope of sub-rule (1).— (1) The words "if the suit is brought in the name of the wrong person as plaintiff" do not exclude altogether persons who may institute the suit without any right to do so. AIR 1954 Madh B 156 (157) °° (07) 30 Mad 419 (420) (DB).

(2) Unless the two conditions of sub-rule are satisfied a defendant is entitled to dismissal of a suit brought by an unauthorised person and the defect cannot be cured by addition or substitution of persons who might have brought the suit. AIR 1957 Cal 688 (690). (Suit by non-resident firm is nullity — Addition or substitution of partners cannot be made under Order 1, Rule 10.) °° ('89) 11 All 104 (107, 108) (DB) °° ('96) 20 Bom 537 (539) (DB) °° ('81) 6 Cal 827 (831) (DB).

[But see ('99) 23 Bom 375 (380) (DB).]

(3) A substitute for plaintiff can be added only to enforce the right pleaded. AIR 1941 Nag 178 (179) °° ('01) 25 Bom 433 (463, 466) (DB).

(4) A person who has a different cause of action inconsistent with that of the original plaintiff cannot be added. AIR 1915 Low Bur 45 (46): 8 Low Bur Rul 302 (DB).

Where defendant added, plaint to be amended.

(4) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the [a]Indian Limitation Act, 1877, Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

[1882 and 1877, Ss. 27, 32. 33; R. S.C., O. 16, Rr 2, 11, 39; See O. 41, R. 20]

(a) See now the Indian Limitation Act, 1963 (XXXVI of 1963), S. 21.

HIGH COURT AMENDMENT

Mysore

In Order 1, R. 10, add the following as sub-rule (6).—

"(6) The Court may on the application of any party and after notice to the other parties affected by the application and on such terms and conditions as it may impose transpose a plaintiff to the position of a defendant or subject to the provisions of sub-rule (3), a defendant to the position of a plaintiff" [30-3-1967].

Order 1, Rule 10 — Note 1 (contd.)

(5) Sub-rule (1) does not apply to cases of necessary parties. ('07) 1 Sind LR 191 (196) (DB).

(5a) Addition of parties some as plaintiffs and some as defendants not permitted under Order 1, Rule 10 (1) — Provision allows addition of parties as plaintiffs only. **AIR 1967 SC 278 (281): (1966) Supp SCR 188: 69 Bom LR 20.**

(6) Sub-rule (1) does not apply to cases in which a suit has been instituted against a wrong person as defendant. ('04) 27 Mad 315 (325) (DB).

(7) The rule applies to suits on mortgages. AIR 1939 PC 170 (173): ILR (1939) Bom 503: 66 Ind App 210.

(8) Rule applies to an enquiry in election disputes under the Madras Village Panchayats Act 10 of 1950. AIR 1954 Andhra 36 (37).

(9) The provisions of Order 1, Rules 9 and 10 do not apply to the trial of an election petition under the Representation of the People Act. AIR 1958 All 809 (818) (DB). **(AIR 1957 SC 444 and AIR 1954 SC 210,** Rel. on.) °° **AIR 1958 SC 687 (697): 1959 SCR 583** °° AIR 1958 Mad 171 (176): ILR (1958) Mad 279 (DB) *° AIR 1965 SC 1243 (1247, 1248): (1965) 1 SCR 393. (Election petition — Joinder of party under Order 1, R. 10 — Limitation — Joinder under Order 1, Rule 10 (2) — Discretion of Tribunal — No interference by Supreme Court.) °° AIR 1969 Andh Pra 68 (75). (Election Petition — Necessary parties — Provisions of Civil P. C. apply when there is no express provision in the Act — Consequences of non-compliance with S. 82 (b) of the Representation of the People Act are provided in the Act — Court cannot invoke powers under Order 1 to avoid these consequences.) °° AIR 1969 Mad 116 (117, 118): (1967) 2 Mad LJ 433 *° (1966) 7 Law Rep 564: (1966) 2 Mys LJ 259. (In election petition under Mysore Municipalities Act when rejection of certain votes by the Returning Officer is challenged, it is enough to make the returned candidate as a party.) °° AIR 1964 Punj 213 (216): ILR (1964) 1 Punj 435 °° AIR 1963 Cal 218 (224, 225): 66 Cal WN 917 (DB). (Election petition parties — Returning officer can be a proper party when allegation of bad faith, negligence and impropriety are made against the returning Officer.) °° AIR 1959 All 54 (56): 1958 All LJ 687 (DB). (Election petition — Substitution of parties — Election Tribunal has to rely upon Section 110 (3) (c) of the Representation of the People Act and cannot rely upon any provisions of the Civil P. C.)

(10) Non-impleading of necessary party to election petition — Petition is liable to be dismissed — Delay cannot be condoned. AIR 1969 Andh Pra 151 (154).

(11) Although, where the person originally suing as plaintiff is not entitled by himself to maintain the suit, the proper course under this rule is to add the other persons as plaintiffs, yet, where they are actually added as defendants there is nothing to prevent the Court from passing a decree in such suit in favour of any of the parties that may be found entitled to it. The principle is that when once all the parties are before the Court, the Court can make the appropriate order and should give judgment in favour of all the persons who may be entitled to relief, whether they be joined as plaintiffs or defendants. **AIR 1939 PC 170 (173): ILR (1939) Bom 503: 66 Ind App 210.**

(12) Rule-making authority has power to frame rules prescribing the period for limitation for filing appeal and also the manner including array of parties. AIR 1969 All 119 (122).

(13) Applicability — Plaintiff's pleader expressing willingness to continue suit against only a particular defendant on Court

Order 1, Rule 10 — Note 1 (contd.)

holding suit bad for multifariousness — No application to withdraw suit — Order to strike off names of other defendants falls under Order 1, Rule 10 — Benefit under Section 14, Limitation Act can be claimed. AIR 1959 Andh Pra 349 (352): (1958) 2 Andh WR 460 ((DB).

(14) Suit cannot be restored against defendants who have been exonerated. AIR 1960 Andh Pra 114 (115) °° 1962 Raj LW 588.

(15) O. 1, R. 10 does not apply to proceedings under Himachal Pradesh Act 15 of 1954 — Application under S. 11, Himachal Pradesh Act 15 of of 1954 must be in the form prescribed by rules — Rule 3 is mandatory — Application under Order 1, Rule 10, Civil P. C., for being impleaded as co-applicant — Cannot be treated as application under Section 11. AIR 1966 Him Pra 36 (39).

(16) Third parties — Intervention by — Court has power to hear in an appropriate case somebody else in an election petition. AIR 1968 J and K 13 (15): 1968 Kash LJ 23.

(17) Jurisdiction of Court to implead additional parties — Suit for eviction of tenants — Tenants denying title of plaintiffs and pleading that one X was owner of lands to whom they were executing muchalikas — Question whether X was owner — Revenue Court has no jurisdiction to decide — Consequently, it had no power to implead X as party. (1963) 2 Mad LJ 251.

(18) The provisions of Order 1, Rule 10 are capable of both narrower and a wider interpretation. While a necessary party i.e. a party without whom a legal decree cannot be passed in the suit, has every right to get impleaded, even a proper party may in certain circumstances seek such a relief. The Court must primarily consider whether the presence of the proposed party would advance the total and satisfactory adjudication of the subject-matter in controversy. In such cases the Court has a wider discretion to implead a party if it considers the presence of such a party essential or even desirable in the interests of justice. In a suit for dissolution of partnership and accounts in which one of the partners is the head of a Hindu joint family, the son of such a partner may be impleaded as a party in that suit. He will, however, not be able to get any right inter se between him and his father adjudicated in that suit but he can be impleaded so as to enable him to protect the interest of the family assets. (1967) 1 MLJ 36: 79 Mad LW 626.

(19) 'Person interested' — Meaning. (1968) 38 Com Cas 329 (Mad).

(20) Reference under Section 146, Criminal P. C. — Powers of Civil Court — Extent of — Third person claiming to be in possession of disputed land applying for being added as party to reference — Civil Court is competent to allow such application. 1962 (2) Cri LJ 708 (Mys).

(21) Provisions of, attracted to case of reference under Section 30, L. A. Act, by virtue of Section 53 of the L. A. Act, when the dispute under reference does not change. AIR 1967 Pat 243 (245): ILR 46 Pat 580 (DB).

(22) Order impleading or adding parties does not affect decision of case on merits within the meaning of Section 105. (1967) 9 Law Rep 400 (Mys).

(23) Leave refused to one of respondents to file Letters Patent Appeal — Transposition of that respondent as appellant by other respondent — Permissibility. ('64) 66 Pun LR 985.

(24) Suit filed against dead persons — Principle, that such a suit cannot be entertained at all and even application for its amendment or for bringing on record legal representatives cannot be made, is not applicable to appeal. (1967) 69 Pun LR 956 (DB).

(25) Appeal filed in name of dead person — Court has no power to permit legal representatives to be substituted as appellants. AIR 1961 Punj 57 (60): 62 Pun LR 776 (DB).

(26) Applicability — Proceedings under Sections 110-B and 110-C, Motor Vehicles Act — Substitution of parties — Procedure embodied in Order 1, Rule 10 of Civil P. C. can be followed. AIR 1964 Punj 235 (239): 66 Pun LR 156 (DB).

(27) In case of an accident due to negligence of a driver of a vehicle belonging to transport company it is not necessary to implead the driver. AIR 1966 Punj 288 (292): 67 Pun LR 386 (FB).

(28) Accident to motor vehicle resulting in injury to plaintiff — Suit for damages against owner of vehicle — Though insurer need not be added as a defendant, a notice under Section 96 (2) is necessary to such insurer. AIR 1961 Punj 190 (193): 63 Pun LR 331.

(29) Parties to divorce petition — Divorce petition filed by wife against her husband — Adultress joined as co-respondent — She is neither necessary nor proper party under Rules 11 and 12 (a) of Rules framed under Act — Her application to remove her name from divorce petition must succeed. AIR 1966 Punj 337 (338): 68 Pun LR (D) 16.

(30) Suit against two defendants — One of them dying before institution of suit — Suit not void ab initio or does not abate under O. 22, R. 4 — Proper procedure is to amend plaint or add legal representatives as parties before the suit gets barred by limitation. 1963 Raj LW 313: ILR (1963) 13 Raj 826. ((AIR 1953 Trav-Co 473, Dist.)

(31) Application under Section 5 (1) of Rajasthan Relief of Agricultural Indebtedness Act pending before Civil Judge — Petitioner applying to Debt Relief Court under Section 6 of the Act — Debt Relief Court admitting application and giving notice to Civil Judge — Civil Judge has no

Order 1, Rule 10 — Note 1 (contd.)

option but to stay proceedings under Section 6 (3) only. 1964 Raj LW 400.

(32) Custodian is a proper though not a necessary party to a suit for ejectment of a lessee who is an allottee of half share in a property declared to be evacuee property. AIR 1959 All 574 (576): 1958 All LJ 550.

(33) A School Board of an authorised Municipality constituted under Bombay Primary Education Act 1947 is not a corporate body and cannot be sued. The authorised Municipality is alone the corporate body which can be sued. ILR (1963) Mys 499 (DB).

2. Bona fide mistake.— (1) First condition for applicability of sub-rule is, that the action was commenced in name of original plaintiff by a bona fide mistake. ('55) 1955 Andh WR 322 (324) °° ('06) 33 Cal 657 (660) °* (1907) Pun Re No. 149, p. 692 (694) (DB) °° AIR 1936 Mad 960 (960) °* AIR 1965 All 586 (589). (Question of bona fide mistake or misapprehension is essentially a question of fact and evidence.)

(2) The mistake may be one of fact or of law. ('10) 8 Ind Cas 87 (89) (DB) (Cal) °° AIR 1921 Sind 59 (61): 16 Sind LR 71.

(3) If mistake is not deliberate but one honestly made it is a bona fide mistake. AIR 1954 Madh B 156 (157) °* ('53) ILR (1953) 3 Raj 391 (399) °° AIR 1916 Cal 337 (338) (DB) °* AIR 1932 Nag 20 (20, 21): 27 Nag LR 335.

(4) If the point is doubtful it is a bona fide mistake. AIR 1920 Lah 488 (489).

(5) A mistake is bona fide if Court of first instance and Appellate Court take different views on a point on which plaintiff's right of action depends. ('10) 8 Ind Cas 87 (89) (DB) (Cal) °° AIR 1923 Mad 180 (180) (DB).

(6) A mistake is not bona fide if it is persisted in after objection. ('53) ILR (1953) 3 Raj 391 (400).

(7) Where, to his own knowledge, original plaintiff has no right to sue on date of plaint, the mistake is not bona fide. ('55) 1955 Andh WR 322 (324) °* AIR 1942 Mad 708 (708).

(8) A, agent of B, files a suit in his own name by a bona fide mistake, Court can substitute name of principle B for that of original plaintiff A. AIR 1927 Bom 424 (426).

(9) A, the administratrix of estate of B, sued on a mortgage bond in favour of B, in the bona fide belief that her powers as administratrix had not come to an end. Person entitled to sue substituted for A. AIR 1916 Cal 337 (338, 339) (DB).

(10-11) Suit filed by receiver for benefit of estate after cessation of receivership — Mistake, however foolish or careless was held to be without doubt bona fide. (1963) 2 Andh WR 138.

(12) Bona fides depend on the circumstances of each case — Suit for partition instituted in the name of wrong plaintiff — Mistake arising because of the view which plaintiff had as to how a particular document was to be interpreted which view was supported by two courts of law also.

Held, the mistake was bona fide one. (1962) 2 Mad LJ 423: 1962 Mad WN 544.

(13) If a suit is brought on behalf of a person by his next friend describing the plaintiff to be a minor although in fact he was a major and an application is made for the rectification of the mistake, it is obvious that the interests of justice require, unless it could be said that the conduct of the next friend was not bona fide, that permission should be accorded for the rectification. The Court can treat the reference to the next friend as a mere surplusage and allow the plaintiff who was a major at the time of the institution of the suit to continue the suit in his own name. ('62) 40 Mys LJ 1068.

(14) Joinder of parties in appeal — Error in certified copy of judgment of trial Court — Names of parties in memorandum of appeal mechanically copied out from those mentioned in copy of judgment of trial Court.

Held, mistake being bona fide and honest could be corrected by allowing additions of party even after period of limitation was over. (1968) 70 Pun LR 883.

3. "Necessary for determination of real matter in dispute."— (1) The substitution or addition should be necessary for determination of real matter in dispute. ('01) 25 Bom 433 (464) °° ('11) 11 Ind Cas 223 (225) (All).

4. "Upon such terms."— (1) Court may order payment of costs up to the time of amendment. AIR 1928 Bom 191 (193).

5. "At any stage of the suit."— (1) Party can be added before decree is actually drawn up. ('21) 61 Ind Cas 378 (379) (DB) (Pat).

[See however AIR 1943 All 74 (77): ILR (1943) All 112 (DB).]

(2) Party can be added even in second appeal. ('97) 20 Mad 467 (469) (DB).

(3) 'At any stage' — Addition of parties can be made only after filing of written statement, unless defendants prefer to remain ex parte. AIR 1966 Orissa 62 (63): 32 Cut LT 836.

6. Scope and applicability of sub-r. (2).— (1) Sub-rule (2) gives a wide discretion to Court to meet every case of defect of parties. ('97) 24 Cal 34 (37) (DB) °* AIR 1957 Mad 699 (700) °° AIR 1934 Pat 425 (426).

(2) Court has no power to join a person as a party if he could not have been originally impleaded under Order 1, R. 1 or Rule 3. AIR 1927 Mad 834 (835).

(3) Addition of parties — Proper party — Meaning of — Court has no jurisdiction

Order 1, Rule 10 — Note 6 (contd.)

to add party unless it is necessary or proper party — Tests to be followed in adding parties. AIR 1968 Mad 287 (289): (1968) I Mad LJ 15.

(4) Under sub-rule (2) presence of person added must be necessary to effectually and completely adjudicate upon and settle all points involved in suit. ('54) 1954-2 Mad LJ 580 (581) °° AIR 1950 Mad 91 (92) °° ('46) ILR (1946) 1 Cal 656 (660, 661) °° (1964) 1 Ker LR 177: 1964 Ker LT 484. (An order for addition of parties should not be made merely with a view to avoid multiplicity of suits if otherwise their presence is not necessary for determination of the real question involved in the suit.)

(5) Discretion under sub-rule (2) should be exercised in a reasonable manner so as not to cause inconvenience or embarrassment. AIR 1956 Cal 263 (264, 265) (DB) °° AIR 1954 Ajmer 10 (2) (10) °° AIR 1953 Him Pra 123 (124) °* AIR 1941 Nag 178 (179) °° AIR 1939 Bom 188 (193): ILR (1939) Bom 232 (DB) °* (1968) 34 Cut LT 1410 *° 1968 Pat LJR 232. (Eviction suit against tenant — Other parties added to avoid future objections — Plaintiff applying to delete some defendants against whom he had no claims — Trial Court refusing prayer — **Held** Trial Court failed to exercise jurisdiction.) °* AIR 1959 Madh Pra 359 (363): 1959 MPLJ 841 (DB). (It is true that the Court has discretion to add parties to a suit; but this power has to be exercised in exceptional cases.)

(6) Before the powers conferred by this sub-rule can be exercised there must be a properly constituted suit before Court. AIR 1954 Nag 29 (30) °° AIR 1966 Ker 150 (163): 1966 Ker LT 199. (Partition suit — Deficit court-fee — Court granting time to pay — Default — One of defendants applying to be transposed as plaintiff and offering to pay court-fee — Court has jurisdiction to allow application — Plaint, though imperfect is still there for purposes of order for transposition.)

(7) Sub-rule (2) does not deal with deletion of reliefs. AIR 1919 Mad 871 (873): 42 Mad 219 (DB).

(8) Sub-rule (2) does not deal with substitution of parties. AIR 1958 Cal 681 (681, 682): ILR (1956) 1 Cal 276 °° 1955 Andh WR 322 (325).

(9) The sub-rule does not apply to the case of a suit withdrawn or abandoned at the last hearing. AIR 1953 Hyd 170 (171): ILR (1953) Hyd 178 (DB).

(10) The sub-rule applies to proceedings under Land Acquisition Act, 1894. ('03) 25 All 133 (134) (DB) °° AIR 1958 Andh Pra 226 (230): ILR (1957) Andh Pra 816 (DB).

(11) Addition of parties — A person may not be added as defendant merely because he would be incidentally affected by the judgment. AIR 1969 Punj 57 (59): 70 Pun LR 451

(12) Proceedings under Provincial Insolvency Act, 1920, sub-rule (2) applies. ('55) 1955 Andh WR 322 (323, 324) °* AIR 1951 Mad 665 (666, 667): ILR (1951) Mad 463.

[But see (1966) 1 Andh WR 177 °° AIR 1957 Andh Pra 603 (604).]

(13) Sub-rule (2) applies to suits under Section 92 of the Code. AIR 1918 Mad 1071 (1072) (DB).

(14) The sub-rule applies to suits under Order 34 of the Code. AIR 1936 Pat 153 (154) (DB) *° AIR 1939 PC 170 (173): ILR (1939) Bom 503: 66 Ind App 210.

(15) Non-addition of proper parties to an election petition can be remedied under this rule. **AIR 1954 SC 210 (213): 1954 SCR 892.**

(16) Legal representatives of a deceased defendant in their individual capacity can be added under sub-rule (2). AIR 1917 Mad 849 (849).

[See **AIR 1940 PC 215 (218): 67 Ind App 406.**]

(17) The sub-rule does not enable a Court to adjudicate in a suit a general question which is of interest to a whole community, by adopting the expedient of joining a member of that community, to the suit as a co-plaintiff. AIR 1930 Sind 73 (74).

(18) Application by assignee of plaintiff's interest pending suit to be brought on record falls under Order 22, Rule 10 and not under Order 1, Rule 10 (2). AIR 1946 Lah 263 (264) °° AIR 1944 Mad 165 (166).

(19) Order 1, Rule 10 can be called into play in suits or appeals and not in revision petitions — The addition of parties in a civil revision petition can be ordered only in exercise of the inherent powers of a Court under Section 151. AIR 1954 Andhra 36 (37). °* AIR 1969 Pat 215 (216, 217): 1969 Pat LJR 26. (Second appeal — One of the defendants joining as appellant along with three plaintiff appellants — Memorandum of appeal accompanied by application for transposition — It implies he is willing to adopt the plaint — Appeal by him held maintainable though there was no decree against him.) °° AIR 1965 Pat 510 (512): ILR 44 Pat 561. (Suit for possession and mesne profits against several defendants having Separate and distinct interest in suit lands — Decree for possession with costs jointly against defendants — Plaintiff allowed to withdraw amount of mesne profits — Appeal by some of the defendants only competent.)

(20) In interpreting Order 1, Rule 10 (2), the constructions should be liberal and an attempt should always be made to make parties all persons who may be necessary in order that there might be a final and complete adjudication of points involved in the suit or proceeding. But it is also well settled that a party should not be added to a proceeding so as to introduce quite a new cause of action. (1963) 67 Cal WN 732.

Order 1, Rule 10 — Note 6 (contd.)

(21) Court's power to add party — Extent — Suit dismissed against one of several defendants for non-service of summons on him — Court may subsequently add such defendant as party to suit — No question arises of inconsistent decree, earlier order dismissing suit not being a decree — Order of dismissal does not operate as res judicata — Plaintiff's right to institute fresh suit against such defendant reserved by Order 9, Rule 5 (2) — Fresh suit need not necessarily be by presentation of plaint — Though court has power to add such defendant as party. **Held** on facts power should not be exercised in this case. AIR 1966 Cal 60 (63) .

(22) Power under Rule 10 (2) not to be invoked merely to permit party to obtain academic decision. 1962 Jab LJ 293: 1962 MPLJ 137.

(23) Before a Court impleads a particular person as a party to a suit, it is its duty to find even at that stage whether that party is a necessary party or a proper party. It will be only abdicating its duty if it were to reserve that question to a later stage impleading the person as a party and exposing him to all the travails of a litigation. AIR 1963 Mad 480 (480): (1964) 1 Mad LJ 160.

(24) Expression 'all the questions involved in the suit' — Expression must be given wider interpretation — Stranger to a suit who has direct interest, legal or equitable in subject-matter of dispute can be impleaded as a party. AIR 1968 Mad 142 (146): (1966) 2 Mad LJ 298.

(25) Order 1, Rule 10 (2) does not deal with substitution of parties. (1968) 70 Pun LR 968: 1968 Cur LJ 793.

7. Addition of parties — General.— (1) Where a person is neither a necessary nor a proper party, the Court has no jurisdiction to add him as a party under this subrule. AIR 1953 Bom 109 (110): ILR (1953) Bom 296 (DB) *° AIR 1951 Mad 665 (667): ILR (1951) Mad 463 °° (1968) 81 Mad LW 266.

(2) The question of addition of parties under this rule is generally not one of initial jurisdiction of the Court but of a judicial discretion which has to be exercised in view of all the facts and circumstances of the case. ('58) AIR 1958 SC 886 (895) °° (1961) 65 Cal WN 1126. (Eviction proceedings under S. 5, Calcutta Thika Tenancy Act — Application by third party for impleading him as defendant — Refusal by Court to exercise discretion under O. 1, R. 10, C. P. Code suo motu — High Court cannot compel the Court to implead him as party.)

[See also (1968) 2 Mys LJ 243.]

(3) An order of Court is necessary before a person is validly added as a party; the mere fact that the decree includes his name would not amount to an order of joinder of parties under O. 1, R. 10, sub-rule (2). ('27) AIR 1927 All 465 (466): 49 All 664.

(4) Question of joinder of parties is not a matter of substantive right but is merely one of procedure. ('09) 34 Bom 13 (20).

(5) Discretion under this sub-rule will ordinarily be exercised in favour of a person who applies in proper time. ('82) 8 Cal 170 (173).

(6) Even in absence of application Court should not, as a rule, dismiss a suit for non-joinder of a necessary or proper party but should add him as a party of its own motion or direct plaintiff to apply for that purpose. ('21) AIR 1921 Oudh 148 (149) °° ('05) 27 All 75 (78) (DB) *° ('21) AIR 1921 Mad 557 (558): 44 Mad 43 (DB) °° (1967) ILR 46 Pat 767 (DB).

(7) Application for addition made at a late stage — Court will not exercise its discretion under sub-r. (2). ('34) AIR 1934 Lah 36 (36) °° AIR 1960 J and K 67 (71).

(8) Discretion under sub-rule (2) will not be exercised where person sought to be added is only a proper party and plaintiff opposes such application. ('55) 68 Mad LW 371 (373).

(9) Discretion will not be exercised where the addition involves a trial de novo. AIR 1954 All 385 (390) (DB) *° AIR 1953 Orissa 39 (41) (DB) °° AIR 1931 PC 229 (231).

(10) Pending appeal trial Court cannot add parties. ('11) 12 Ind Cas 69 (69) (DB) (Mad).

(11) Court of Appeal has same powers as original Court in the matter of addition of parties to suit, or respondents to appeal. AIR 1955 Pepsu 62 (64): ILR (1955) Patiala 271 (DB) °° AIR 1934 Bom 356 (359) (DB) °° ('58) 62 Cal WN 290 (292) (DB) *° ('38) 31 Mad 236 (250): 35 Ind App 176 (PC) °° ('13) 21 Ind Cas 928 (930) (PC) °° AIR 1921 Mad 172 (174): 44 Mad Mad 605 (FB).

[See however AIR 1944 Lah 76 (86, 87): ILR (1945) Lah 18 (FB).]

(12) Where appellate Court finds it necessary to have certain persons before it, proper course is not to return plaint for amendment, but to add them as parties and remand case for trial. AIR 1916 Cal 283 (284): 43 Cal 938 (DB) *° AIR 1916 Mad 957 (958) (DB) °° AIR 1918 Pat 525 (526): 3 Pat LJ 409 (DB) °° AIR 1959 Punj 277 (287): 61 Pun LR 326 (FB). (Appeal — Joinder of parties — Powers of Court — S. 107 (2) read with O. 1, R. 10 enables the appellate Court to add parties in appeals in suitable cases, but this power must be exercised within the period of limitation.) *° 1966 BLJR 706: ILR 45 Pat 314. (Co-plaintiff, a minor suing without next friend — Attaining majority before Court deciding that he was minor — No next friend necessary to be brought on record — Minor co-plaintiff attaining majority when suit before Appellate Court to amend plaint.) °° AIR 1965 Madh Pra 275 (284, 285): 1967 MPLJ 711 (DB).

(13) Appellate Court may remand case to lower Court directing it to add necessary parties, and then try the case. AIR 1949

Order 1, Rule 10 — Note 7 (contd.)

Lah 248 (249) °° AIR 1940 All 399 (401) *° ('90) 14 Bom 299 (305) (DB).

(14) Where a person applies to be added as a party appellant, the test is whether he can urge any of the grounds upon which the validity of the Court's order is called in question by the appellant already on record; if he cannot, he ought not to be added. AIR 1918 Cal 608 (609) (DB) °° AIR 1960 J and K 67 (69, 70). (Power of Court — Tests as to when new party may be added laid down.) °° AIR 1960 Madh Pra 84 (84): 1959 MPLJ 1162. (Joinder of person as defendant — Wishes of plaintiff in this respect is not test — True test laid down.)

(15) Court will not exercise its discretion in favour of a party who has resisted the objection as to non-joinder in lower Court. AIR 1950 All 598 (603): ILR (1951) 2 All 475 (FB) °° AIR 1931 PC 229 (231) °° AIR 1960 SC 100 (113, 114): (1960) 1 SCR 773. (Suit under S. 5 (3), Charitable and Religious Trusts Act — Addition of deity as party at late stage of appeal under Art. 133 of the Constitution not allowed.) *° AIR 1960 J and K 67 (69).

(16) High Court has, in second appeal, no power to add parties after it has remanded case to lower Court. AIR 1926 Rang 9 (10): 3 Rang 474 (DB).

(17) Apart from this rule, Court has power to add parties on general principles where such addition is necessary. AIR 1954 All 11 (12) (DB).

[See however AIR 1941 FC 16 (21, 22): 1940 F C R 110.]

(18) Suit against A and B as heirs of C deceased — C found living — Amendment of plaint by substituting C as sole defendant in place of A and B — Substitution cannot be ordered under inherent powers of Court. AIR 1958 Cal 681 (682): ILR (1956) 1 Cal 276,.

(19) Although it might be more satisfactory to add certain persons as plaintiffs and not as defendants, yet, where all the necessary parties are before the Court, whether as plaintiffs or defendants, the Court can grant the appropriate relief. AIR 1939 PC 170 (173): ILR (1939) Bom 503: 66 Ind App 210.

(20) Where a suit on behalf of a Hindu widow for recovery of certain properties is sought to be withdrawn, the next reversioner has a right ex debito justitiae to be added as a plaintiff and given an opportunity of continuing the suit. AIR 1935 PC 185 (187): 57 All 678: 62 Ind App 257.

(21) It is not open to the applicant under this rule to ask the Court to convert his application into one for resorting to third party procedure. ('55) 68 Mad LW 371 (376). (Application sought to be converted into an application under O. 8A (Madras) Civil P. C.)

(22) Before, directing a party to be impleaded, a Court can properly demand that it should be prima facie satisfied about the bona fide of the applicant, about the plausibility of his claim, and about the genuineness of his interest in the litigation. AIR 1960 J and K 67 (71).

(23) Legal representative of a deceased defendant not impleaded in the first appellate Court's decree though a necessary party — Such legal representative impleaded in revision against order of remand by first appellate Court — Second appeal without impleading such representative incompetent. AIR 1964 Orissa 211 (212): 29 Cut LT 663 (DB).

(24) Application to implead additional parties and for permission to sue defendants on record in another capacity — Parties on record can object — Notice to all parties concerned, including those on record is essential — Procedure to be followed. ('63) 76 Mad LW 796.

(25) Addition of parties — Principles of — Suit for recovery of money between two subsidiary companies — Holding company cannot intervene or choose to join either of subsidiaries. AIR 1969 Cal 238 (243, 247).

8. "Either upon or without the application of either party." — (1) It is not generally the province of the Court to force the plaintiff in a case to implead particular persons as parties. ('81) 8 Cal 42 (49): 8 Ind App 135 (141) (PC) °° AIR 1969 Punj 57 (59): 70 Pun LR 451 °° AIR 1962 Pat 357 (358, 359).

(2) Court will not, as a rule, act except on the application of the parties. AIR 1916 Pat 411 (414) °° AIR 1937 Rang 175 (178).

(3) Court will not act unless application contains definite allegations of fact upon which a liability is imputed to the person sought to be impleaded. ('12) 15 Oudh Cas 304 (308) (DB).

(4) Court can act suo motu in proper cases. AIR 1955 Nag 78 (79): ILR (1955) Nag 437 (DB).

(5) Court can act on application of person seeking to be made a party. ('86) 13 Cal 90 (94) (DB) °° ('82) 5 Mad 52 (53) (DB) °° AIR 1937 Oudh 229 (232): 13 Luck 255 (DB) *° AIR 1937 Nag 121 (122): ILR (1937) Nag 366 (DB).

(6) Where a person applies to be made a party, what the Court ought to see is whether the suit cannot be determined owing to his absence, or whether a third person will be prejudiced by his not being joined as a party. AIR 1929 Mad 291 (293) (DB).

(7) Where a person applies under this rule to be made a party to a suit, the Court ought not to dismiss the suit first on some ground and then dismiss the application on the ground that there is nothing pending before the Court to which the petitioner can be added as a party. AIR 1941 Mad 79 (81) (DB).

(8) An application of a person to be added as a co-plaintiff cannot be treated as an application under O. 22, R. 10. AIR 1917 Cal 627 (628) (DB).

Order 1 Rule 10 (contd.)

9. "Who ought to have been joined." — (1) Persons who ought to be joined as parties are called necessary parties, i.e., persons in whose absence no effective decree at all can be passed. AIR 1955 Andhra 107 (108): ILR (1955) Andhra 249 ** AIR 1958 Manipur 29 (30) ** AIR 1955 Raj 11 (14): ILR (1955) 5 Raj 95 *** AIR 1949 Mad 161 (162) ** AIR 1947 Cal 73 (74) (DB) *** AIR 1961 Cal 81 (85, 86): 64 Cal WN 788 (SB). (Application for setting aside auction sale — Auction purchaser is not a necessary party.) ** AIR 1960 Andh Pra 98 (99): (1959) 2 Andh WR 294 (FB).

(2) Where several persons have a joint right of action, such as co-trustees, all must join in suing. AIR 1957 Cal 117 (118) (DB). (Co-shebaits.) *** ILR (1951) 2 Cal 151 (154) ** AIR 1922 Mad 317 (318) (DB).

(3) Suit to set aside order for rateable distribution. All persons interested in distribution are necessary parties. AIR 1943 Lah 252 (253) ** ('86) 13 Cal 159 (162) (DB). [See however AIR 1920 Cal 525 (526) (DB).]

(4) A receiver appointed after the institution of the suit is a necessary party. ('10) 6 Ind Cas 214 (216, 217) (DB) (Cal).

(5) Receiver is not a necessary party where no attempt is made to interfere with his rights in respect of property entrusted to his care. AIR 1935 Cal 15 (16).

(6) Official Assignee is not a necessary party in a suit filed prior to adjudication to recover a money debt from an insolvent. ('95) 22 Cal 259 (267) *** AIR 1914 Sind 114 (115): 8 Sind LR 325.

(7) Suit to obtain declaration that plaintiffs possess some rights in shamilat. All proprietors are necessary parties. AIR 1934 Lah 366 (368): 15 Lah 807 (DB).

(8) Where A sued B for arrears of rent of a house but did not implead G who had already purchased the house and had got his title declared against A in a Civil Court, it was held that G was a necessary party. AIR 1929 Oudh 148 (148).

(9) Where in a suit to eject the defendant from a site, the latter pleaded that the site belonged to the Municipal Council and that he was in occupation with its permission, it was held that a person having a right to defend is a necessary party and that therefore the Municipal Council was a necessary party. AIR 1933 Mad 664 (667) ** ILR (1964) Cut 510. (Trespassers in possession of date of suit are necessary parties — Abatement of decree for reason of death of one of trespassers — Decree is nullity against all.) ** (1963) 2 Mad LJ 251 *** AIR 1960 Bom 238 (239): 60 Bom LR 1150. (Ejectment suit — Tenant claiming that he was let in possession by third party — Latter, not a necessary party.)

(10) Sale of property by A to B — C claiming property as his own challenging the sale made by A as one without title — A is necessary party to suit because the foundation of B's right to the property depends upon the right of A to sell it and that right is really the one under dispute in the suit. AIR 1954 Raj 287 (288): ILR (1955) 5 Raj 77 (DB) ** **AIR 1965 SC 271 (275): (1964) 6 SCR 1.** (Property purchased by wife with money gifted by husband — Suit by daughter to recover property from executor under will of father — Brothers not impleaded in suit — Suit is incompetent for non-joinder of necessary parties.)

(11) Suit for recovery of money — Person who is not the legal representative of the deceased but is only an assignee of some insured amount from him is not a necessary party and cannot be added on the ground that in the event of a decree being passed the plaintiff may be in a better position to realise that amount. ('54) 1954-2 Mad L Jour 580 (581).

(12) Suit for recovery of arrears of vero — Plaint asking for joint decree against whole body of defendants whose interest in the land was joint and indivisible — **Held**, that all the defendants were necessary parties to the suit. AIR 1953 Sau 159 (160) (DB).

(13) A creditor of the landlord who does not raise a plea that the latter has secreted any property is not a necessary party to the proceedings under S. 11, U. P. Encumbered Estates Act, as his absence does not in any way prevent the passing of an effective decree as regards title to the property. **AIR 1953 SC 521 (526): 1954 SCR 506: ILR (1954) 1 All 168.**

(14) Suit for ejectment of lessee — Person who claims to be real owner and against whom no relief has been claimed by lessor is not a necessary party. AIR 1955 Nag 234 (236): ILR (1956) Nag 274 (DB) *** (1968) 1 Mad LJ 15. (Impleading a third party to the suit — Governing principle — Avoidance of multiplicity of suits — The proposed party to have a defined, subsisting, direct and substantive interest in the litigation — Adding of a party not a ruse to ventilate the inexpedient and unnecessary grievances of parties.)

(15) The plaintiff in a running down case is not bound to implead the insurer who becomes liable not under any decree but by reason of the statutory provisions of the Motor Vehicles Act. AIR 1953 Bom 109 (110): ILR (1953) Bom 296 (DB).

(16) In a suit relating to property, in order that a person may be added as a party he should have direct interest as distinguished from a commercial interest in the subject-matter of the litigation. But where the subject-matter of a litigation is a declaration as regards status or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party, it would be in a better position effectually and complete to adjudicate upon the controversy. **AIR 1958 SC 886 (895)** ** AIR 1962 Madh

Order 1 ,Rule 10 — Note 9 (contd.)
Pra 31 (32): 1961 Jab LJ 480 ** AIR 1962 Madh Pra 12 (14): 1962 MPLJ 123 (DB).

(17) Person only indirectly or remotely interested is not a necessary party. AIR 1954 Mad 686 (690) °° AIR 1941 FC 16 (28): ILR (1941) Kar FC 72: 1940 FC 110 °° AIR 1922 Pat 243 (248): 1 Pat 475 (DB) °° AIR 1968 Bom 44 (49): 69 Bom LR 111. (Parties to suit — Suit by auction purchaser against obstructor — Persons who were also likely to obstruct claim of purchaser but had not in fact obstructed are not necessary parties.) °° (1968) 70 Punj LR 118 °° AIR 1967 Mad 344 (345): (1967) 1 Mad LJ 275 °° AIR 1960 Ker 342 (343): 1960 Ker LT 526 (DB). (Surety for raising attachment before judgment — Application by, for being added as defendant on ground of collusion between plaintiff and defendant — Cannot be allowed either under O. 1, R. 10 (2) or S. 151.)

(18) All persons interested in right of easement are not necessary parties to suit where the cause of action on the pleadings is against those persons only who are alleged to have interfered with plaintiff's right. AIR 1924 Cal 1050 (1050, 1051) (DB) °° AIR 1928 Cal 23 (24) (DB) °° AIR 1924 Pat 303 (304) °° 79 Mad LW 705: (1967) 1 Mad LJ 177. (Suit for declaration of right of drainage of irrigation water — Only one of several servient owners disputing right — Others may be proper parties but not necessary parties.)
[See however ('10) 5 Ind Cas 23 (23) (DB) (Cal).]

(19) Where a plaintiff sues for a declaration of his right of easement in respect of a certain pathway, every owner of the servient tenement who denies the plaintiff's right or is concerned in the obstruction of the pathway is a necessary party and any decree obtained in the absence of any such person is infructuous. AIR 1936 Cal 534 (535) °° AIR 1965 Mys 124 (128).

(20) A suit by an occupier of house who is not the owner, for an injunction to restrain the obstruction to the easement of light and air cannot be dismissed on ground that the owner of the house in his occupation is not jointed as a party. The owner may be proper party but is not a necessary party. AIR 1958 Assam 83 (84).

(21) Whether an idol is a necessary party to a suit or not would depend on facts and circumstances of each case. Thus, in a suit for removal of a shebait by a person interested in the endowment the idol is not a necessary party. AIR 1957 All 743 (744, 745) °° AIR 1957 Trav-Co 263 (263).

(22) In a suit between co-shebaits for framing a scheme for private debutter, the deity is not a necessary party unless of course its interests are likely to be affected by the scheme proposed. AIR 1957 Cal 342 (344). (AIR 1937 Cal 338, Rel. on.)

(23) In a suit for perpetual injunction against the mutwalli of a mosque restraining him from committing trespass or interference the fact that the mutawalli is holding land on behalf of the mosque would not make the mosque a necessary party. AIR 1957 J & K 48 (2) (49).

(24) As to necessary parties in various proceedings see the following cases—

(a) General

Necessary and proper parties who are — Persons who under law have to be impleaded though no relief is sought against them are necessary parties — Failure to implead such persons is fatal to the suit. AIR 1963 All 549 (550): 1963 All LJ 389 (FB) °° 1968 Ker LT 692: 1968 Ker LR 457. (Suit for declaration of title and recovery of possession — Person claiming to be in possession is a proper party.) °° (1968) 34 Cut LT 956: ILR (1968) Cut 358 °° (1966) 1 Andh LT 286. (In enquiry proceedings for grant of Succession certificate Court has to summarily dispose of the question whether applicants for addition as parties are necessary parties, without going into merits of their claims.) °° ('64) 30 Cut LT 284. (Suit against one only of co-sharers joint in properties — Suit fails for non-joinder of other co-sharers.) °° AIR 1963 Raj 198 (201): 1963 Raj LW 304 °° ('62) 64 Punj LR 677 °° 1959 (2) Andh WR 487 °° AIR 1959 Cal 519 (524) (DB).

(aa) Execution proceedings. AIR 1969 Orissa 16 (17): 34 Cut LT 1246. (Suit under O. 21, R. 63 — Judgment-debtors are not necessary parties but made parties — They are bound by the decision.) °° (1966) 1 An WR 453: (1966) 1 ITJ 774. (Execution proceedings — Application by Income-tax Department for getting itself impleaded for recovery of arrears of income-tax due from judgment-debtor — Arrears of income-tax though a Crown-debt is not a charge within the meaning of the rule — Rule applies only to a case of mortgage or charge.) °° (1964) 2 Andh WR 130.

(b) Writ Petition. **AIR 1963 SC 786 (788): (1963) Supp 1 SCR 676.** (In a writ of certiorari not only authority whose order is sought to be quashed but also parties in whose favour the said order is passed are necessary parties.) °° AIR 1968 All 276 (279): 1968 Lab IC 1027: 1968 SLR 830. (Order challenging seniority of a Government servant — Government servants superseded are necessary parties — Their non-joinder is fatal.) °° 1965 Raj LW 282 °° (1964) 1 Mys LJ 147 °° (1963) Cal LJ 20 (DB) °° AIR 1961 Cal 389 (391, 392): 65 Cal WN 339).

Order 1, Rule 10 — Note 9 (contd.)

(Application under Art. 226 of the Constitution to compel Corporation of Calcutta and Commissioner of Police to maintain public streets and foot paths for unobstructed user by public and for declaration that latter has no right to permit hawker's corners there — Hawkers are not necessary parties.)

(c) Suit by or against trust: 1968 Raj LW 337. (Suit under, for decision of question whether wakf was Shia wakf or Sunni wakf — Two sects of Muslims viz., Shias and Sunnis of the place are not necessary parties to the suit. **AIR 1966 SC 1544,** Applied. If, however, Court finds their presence necessary in order to enable it effectually and completely to adjudicate upon and settle all questions in suit, it can have recourse to provisions of O. 1, R. 8, Civil P. C.) °° 1968 Raj LW 324. (Suit by one set of Khadims against another claiming their rights to receive certain income — Dargah Committee not a necessary party.) *° AIR 1967 Mad 303 (305): (1967) 1 Mad LJ 29. (Suit against secretary of a charitable trust registered under Societies Registration Act — Amendment sought by way of addition of Society as party defendant — As Society was a necessary party application for amendment was maintainable.) °° 1963 Raj LW 18: ILR (1963) 13 Raj 47. (Suit by plaintiff for declaration that he was hereditary pujari of temple — Right claimed independently and not through members of community who were de facto managers — Members of community are not necessary parties.) °° ILR (1962) Cut 171. (Orissa Hindu Religious Endowments Act (4 of 1939), Section 64 (2) — Suit under — Public is necessary party — Failure to implead — Suit is not maintainable — High Court in appeal can remand case for removal of defects.) *° AIR 1960 Cal 741 (748). (Idol — Suit on behalf of, to set aside alienation of debutter property — Right of stranger — Stranger can, with leave of the Court, sue on behalf of the idol to set aside the alienation.) °° (1959) 63 Cal WN 58: ILR (1959) 2 Cal 386. (Public charity — Advocate General is a necessary party.)

(d) Suit by or against joint Hindu family: AIR 1959 Mad 100 (104, 105): (1959) 1 Mad LJ 269. (Necessary party — Hindu Women's Rights to Property Act (1937), Section 3 — Suit by widow for partition — Adopted son is a necessary party.) °° AIR 1964 Ker 144 (148): ILR (1963) 2 Ker 238. (A divided member of a family can maintain a suit on behalf of family to set aside an alienation made before partition.) *° AIR 1963 Madh Pra 89 (93, 94): 1962 MPLJ 1163 (DB). (Necessary parties — Suit in tort by Hindu joint family firm — Manager of joint family business and eldest member of family on record as plaintiffs — Family is effectively represented — Omission to implead all coparceners not fatal to the suit — Plaint need not disclose capacity of plaintiff.) °° AIR 1959 Mad 349 (350): (1959) 1 Mad LJ 120. (Suit by co-widow after commencement of Hindu Succession Act for ejectment of trespasser — Other co-widows need not be impleaded as they are not necessary parties.) °° AIR 1956 Madh Bha 58 (59): Madh BLJ 1955 HCR 1718 (DB). (Suit by managers of joint Hindu family business — It is not necessary to make other members parties to suit.)

(e) Arbitration proceedings: (1968) 70 Punj LR 98: 1968 Cur LJ 10 *° (1963) 1 Mys LJ 465. (Application for setting aside award—Allegation of miscondct against arbitrator — Arbitrator, though not a necessary party, is proper party.)

(f) Election petitions. 1962 BLJR 260. (Panchayat elections — Persons withdrawing is not necessary party.)

(25) Liability of insurer to indemnify the person or persons specified in policy — Transfer of insured car along with policy — Transfer impliedly assented to by insurer — Transferee would be entitled to claim indemnity under policy — Suit by third party for damages against transferee and insurance company — Transferor not necessary party — Liability of transferee and insurance company. AIR 1963 Madh Pra 164 (171): 1963 MPLJ 162.

(26) Collector illegally dispossessing petitioners from lands under instructions of Rehabilitation Department — Collector not bound by instructions and could not override statutory provisions — Rehabilitation Department not a necessary party in suit by petitioner. (1968) 70 Punj LR 625.

(27) Suit for damages for breach of contract for sale — Where husband is a vendor and the wife has not given her consent, she is not a necessary party AIR 1968 Goa 98 (99).

(28) Necessary party — Suit by 'A' against defendant — Licensor — Licensee not made party to suit — **Held,** licensee was not a necessary party to suit as the licence created no interest or right in the property. AIR 1967 Guj 16 (19) °° AIR 1968 Andh Pra 113 (114): (1968) 1 Andh LT 89. (Order directing pari passu distribution of assets

Order 1, Rule 10 — Note 9 (contd.)
amongst all decree-holders — Revision — One of decree-holders not made party — Held, revision must fail.)

(29) Necessary parties—Authorities where orders are sought to be quashed and also persons interested in maintaining legality or regularity of proceedings are necessary parties. AIR 1968 Andh Pra 74 (80): (1968) 1 Andh LT 32 (DB).

(30) Right of insolvent to sue for contribution — Vests in the official liquidator — Insolvent is incompetent to bring a suit on such right — Consequently question of adding the official liquidator as party does not arise. AIR 1969 Andh Pra 23 (24).

(31) Proceedings under — Bargadars are neither necessary nor proper parties to such proceedings or appeal arising therefrom. ('63) 67 Cal WN 719 °° 1966 All LJ 135. (U. P. Zamindary Abolition and Land Reforms Act (1 of 1951) — Co-sirdar depositing 10 times the rent to the State Government and becoming Bhumidar of his share — Transfer by such Bhumidar — Suit by Transferee for partition — Such transferor is not a necessary party.) *° (1962) 2 Mad LJ 142.

(32) Claim against Co-operative Society — Members of Managing Committee impleaded as defendants — Society has got to be added. AIR 1961 Ker 258 (259): 1960 Ker LT 1288.

(33) Claim suit — Judgment-debtor is necessarp party. AIR 1963 Ker 236 (240): 1963 Ker LT 681.

[See however AIR 1964 Raj 69 (70): 1963 Raj LW 403. (Suit by decree-holder against a successful claimant — Parties to — Judgment-debtor is not a necessary party.)]

(34) Suit for possession of plaintiff's share in leasehold right against landlord — Allegation that surrender deed executed by plaintiff's guardian was void — Suit instituted within three years after attainment of majority by plaintiff — Persons in actual possession are necessary parties. AIR 1963 Ker 344 (345).

(35) Non-joinder of necessary parties — Reversal of decree obtained by one defendant under Order 41, Rule 4 — Second appeal — Necessary parties — All defendants to original suit in whose absence reversal is obtained are necessary parties — Effect of non-joinder is fatal. AIR 1966 Ker 317 (318): 1966 Ker LT 1154 (DB).

(36) Suit by benamidar not in representative capacity — Real owner cannot be brought on record as his legal representative. AIR 1961 Mad 376 (377): (1961) 2 Mad LJ 10.

10. "Whose presence before the Court may be necessary."— (1) A person is a proper party if his presence before Court is necessary to enable it to effectually and completely adjudicate upon and settle all questions involved in suit. AIR 1956 Hyd 172 (173): ILR (1956) Hyd 545 °° AIR 1958 Andh Pra 195 (199) °° AIR 1955 Andhra 107 (108): ILR (1955) Andhra 249 °° AIR 1941 FC 16 (28): ILR (1941) Kar FC 72: 1940 FCR 110 °° (1968) 34 Cut LT 1410.

(2) "Proper party" means party who may be interested in result of suit and who may have a right to seek assistance of Court in coming to a decision on point in issue. AIR 1953 Hyd 170 (172): ILR (1953) Hyd 178 (DB) °° AIR 1925 Cal 1257 (1258) (DB).

(3) It is not necessary that any relief should be asked against a proper party. ('55) 68 Mad LW 371 (373): ('90) 13 Mad 32 (33) (DB) *° 1961 Jab LJ 399.

(4) Object of adding proper party is to avoid needless multiplicity of suits, and to protect his interests or the interests of a party already on record. AIR 1956 Hyd 172 (173): ILR (1956) Hyd 545 °° ('87) 11 Bom 425 (428) (DB).

(5) To justify addition of a defendant it is not necessary that he should be interested in all reliefs claimed in suit or in all questions arising between plaintiff and other defendants. AIR 1936 Mad 449 (454) (DB).

(6) It is not necessary to justify addition of a party that his presence should be necessary for determination of questions as between parties already on record. The rule will enable Court to add a party even for purpose of having a final determination (of any of the questions involved in the suit) as between a party on record and party sought to be added. AIR 1950 Pat 281 (282) °° AIR 1940 Mad 225 (227) *° ('82) 5 Mad 52 (53, 54) (DB).

(7) Although under Order 2, Rule 3, defendants cannot be added unless the cause of action is the same against all of them, they can be added under this rule read with Order 1, Rule 3, although the causes of action are different. ('55) 68 Mad LW 371 (373) °° AIR 1949 Kutch 16 (16, 17).

(8) In a suit to revoke a deed of settlement and recover possession of property, a purchaser of a portion of that property from the plaintiff would be proper though not a necessary party to the suit. ('56) 1956 Andh LT 184 (185).

(9) In exercising their powers under this rule, Courts ought to see that they do not load the record with parties who are shown to have no interest in the suit and that the trial of the suit is not embarrassed by the simultaneous investigation of totally unconnected controversies. AIR 1957 Mad 699 (700) *° ('58) ILR (1958) Cut 466 (467) °° 68 Mad LW 371 (373).

(10) In a suit by A against B to compel the registration of a document, third parties cannot be added and permitted to plead that the document ought not to be registered. AIR 1929 Bom 353 (354): 53 Bom 598.

(11) A person claiming under a title quite distinct from that under which any of the parties to the suit claim, is not a proper party. AIR 1932 Mad 688 (689) °° ('58) 1958 BLJR 541 (545).

Order 1, Rule 10 — Note 10 (contd.)

(12) Party not necessary party to litigation — Death of such party — No question of substitution in his place arises. AIR 1963 All 126 (127). (AIR 1953 SC 521 and AIR 1947 All 18 (FB), Rel. on; AIR 1954 Raj 287, DISSENT. FROM.)

(13) Suit for declaration that properties do not belong to assessee and are not liable to be attached for income-tax arrears — Income-tax commissioner neither necessary nor proper party to suit — If all, Union of India can be added as party. ILR (1962) 2 Ker 699: 1963 Ker LT 203.

(14) Although a son in a suit brought against the father for the recovery of a debt contracted by him is not a necessary party, it would be proper to make the son a party to the suit in order that the question of his liability for the debt of his father might be decided in his presence. He can be made a party at his own request and it is not necessary that he could be made a party only at the instance of the plaintiff. ('62) 40 Mys LJ 676. (AIR 1953 SC 487, Rel. on.)

11. Partnership suits.— (1) Suit for dissolution of partnership and accounts — All the partners should be on the record. AIR 1943 Lah 252 (253) ** AIR 1930 Mad 714 (716) (DB) ** AIR 1969 Guj 205 (211). (All partners are necessary parties and in case one of the partners is dead, his legal representatives are necessary parties.)

(2) Receiver of a deceased partner's estate will be a necessary party. ('10) 7 Ind Cas 75 (76) (DB) (Cal.)

(3) Money suit against partners of dissolved firm — Receiver is not a necessary party. AIR 1968 Andh Pra 330 (332): (1967) 1 Andh WR 445. ((1911) 10 Ind Cas 673 (Mad) and AIR 1925 Bom 523, Rel. on.)

(4) Suit for dissolution of firm — Sub-partner not necessary party. AIR 1917 Mad 267 (268).

(5) A person who is not in the partnership as a member of the firm but is a member of a superior partnership in which he is on one side and the whole firm as a unit on the other, is not a necessary party to a suit for dissolution of the firm. AIR 1927 PC 70 (71).

(6) Partners who have retired are not parties whom it is necessary to implead in a suit for rendition of accounts brought by one of the remaining partners. AIR 1955 Him Pra 54 (55).

(7) An ex-partner claiming share in profit made by partnership subsequent to his leaving it, under an agreement made at the time of his ceasing to have connection with partnership, is not a necessary party to the suit for dissolution. AIR 1954 Ajmer 10 (10).

(8) A dormant partner is not a necessary party in an action on a contract entered into with the firm or with one of its members. AIR 1916 Mad 926 (926).

(9) Suit for damages for breach of contract instituted by four different individuals described in plaint as partners of a partnership firm — Partnership registered at date subsequent to the agreement concerned — Agreement not with all four persons but with two only — Held that all four had collectively no right to file suit; but it being not a suit by a firm but by different individuals, if two of them had any rights under the agreement although the suit by other two plaintiffs may fail, if remaining two, who were parties to agreement establish their rights, they may be entitled to decree — The suit was therefore maintainable. (1958) 60 Bom LR 721.

(10) Suit brought in the name of firm carrying on business outside India — There is misdescription which can be corrected — Section 153 and Order 6, Rule 17 though not Order 1, Rule 10, give ample power to court to allow such amendment — There is no adding of new party for purposes of Limitation Act. AIR 1960 Cal 15 (22). (AIR 1957 Cal 688, REVERSED.)

(11) Partition suit — Death of defendant — Abatement — Court can implead legal representatives under inherent powers. AIR 1960 Cal 291 (293).

(12) Suit for accounts of dissolved partnership — Withdrawal of suit by plaintiff — No transposition of parties possible as there was no finding of Court that there was accounting relationship. AIR 1969 Ker 78 (79): 1968 Ker LT 578.

(13) Suit for recovery of debt — Suit brought by partner — Representatives of deceased partner are necessary parties — Order 30, Rule 4, C. P. Code does not apply. AIR 1961 Madh Pra 314 (315): 1961 MPLJ 538.

(14) Addition of party — Scope of rule — Suit for dissolution of partnership and accounts in which one partner is head of joint Hindu family — Son of such partner is proper party and could be impleaded — Hindu Law — Joint family. (1967) 1 MLJ 36: 79 Mad LW 626.

(15) Suit by firm — Plaintiff suing through mistake as owner of firm — Suit maintainable — Mistake can be set right. AIR 1969 Mys 111 (114): (1968) 1 Mys LJ 466.

(16) Presidency Towns Insolvency Act (1909), Sections 17 and 46 (3) — Debts provable in insolvency — Suit for accounts of dissolved partnership and recovery of money — One of the defendants partner an undischarged insolvent — Absence of leave of insolvency Court — Suit is not maintainable. AIR 1961 Raj 81 (85): 1962 Raj LW 135.

(17) Suit for dissolution of partnership and accounts — Working partner impleaded as defendant after expiry of limitation — Whole suit is barred. AIR 1960 Mad 134 (135): (1959) 2 Mad LJ 429. (AIR 1937 All 502, No followed.)

12. Partition suits.— (1) All persons interested in properties are necessary parties to

Order 1, Rule 10 — Note 12 (contd.)
a suit for partition. AIR 1956 Bom 625 (628) ** AIR 1955 Mad 300 (302, 303): ILR (1956) Mad 61 ** AIR 1950 Pat 1 (6) (DB).

(2) Suit for partition of joint family property — Persons entitled to a share as also those who have a right to maintenance or to a marriage provision are necessary parties. AIR 1953 Hyd 187 (188): ILR (1953) Hyd 202 (DB) ** AIR 1958 Madh Pra 6 (6, 7).

(3) Persons having an inferior degree of interest to that of the plaintiff are not necessary parties in a suit for partition. ('08) 7 Cal L Jour 449 (452) (DB).

(4) In a suit for partition by sons against father, grandsons are not necessary though proper parties. AIR 1922 Pat 96 (96): 1 Pat 361 (DB) ** AIR 1933 Lah 465 (466).

(5) Partition claimed between branches of family — Other members of a branch though not necessary parties are yet proper parties. AIR 1959 Bom 260 (262): 60 Bom LR 1171 ** AIR 1960 J and K 150 152). (Necessary parties — One of the defendants stating that certain item of the properties included in the partition suit was self-acquired property of his son — Latter should be made a party to the suit as Court would not be able to determine the controversy in regard to that item in his absence.)

(6) Partition suit by official receiver for share of insolvent who is head of one branch of joint family — Sons of insolvent are not necessary parties. AIR 1953 Nag 351 (353).

(7) Partition suit — Mortgagees of family properties not necessary parties but may be proper parties. AIR 1917 Cal 184 (185): 44 Cal 28 ** AIR 1934 Mad 485 (488, 491) ** AIR 1968 Mad 142 (146): (1966) 2 Mad LJ 298.

(8) Creditors of defendants are not necessary parties to a suit for partition. They may all be proper parties if their presence is necessary to enable the Court to adjudicate upon and settle all matters in dispute effectually and completely. ('53) ILR (1953) Hyd 265 (270) (DB) ** AIR 1956 Mad 288 (288) ** AIR 1953 Nag 351 (353).

(9) Generally it may be enough if a mortgagee is heard at that stage at which the allotment is effected and need not be impleaded as a party; but that if pending the suit, the mortgaged property is sold in enforcement of the mortgage, the purchaser would be a necessary party to the suit for partition. AIR 1940 PC 11 (14): 67 Ind App 11. (('94) 21 Cal 904, Approved.)

(10) Persons not claiming any kind of interest in properties are not to be added as parties in a partition suit. AIR 1955 Nag 241 (243): ILR (1955) Nag 656 (DB) ** AIR 1953 Hyd 170 (172): ILR (1953 Hyd 178 (DB) ** AIR 1952 Cal 738 (740) (DB). ** AIR 1960 J and K 150 (151, 152). (Branches represented by different heads having no interest in the property of which partition has been sought. Sons and grandsons of the different branches need not be impleaded. AIR 1933 Lah 465 and AIR 1922 Pat 96 and AIR 1956 Mad 89, Rel. on; AIR 1958 Madh Pra 6 and AIR 1951 Pepsu 68 and AIR 1940 All 399, Dist.)

(11) Third party can be added as defendant after preliminary decree in partition suit AIR 1964 Andh Pra 260 (261): (1964) 1 Andh WR 131.

[See however AIR 1966 Orissa 160 (162, 163): ILR (1965) Cut 799 ** 1959 Ker LR 221. (Partition suit — Preliminary decree — Persons claiming to be in possession in their own independent right of property awaiting decision under preliminary decree — Persons cannot be added as parties at final decree stage.)]

(12) Alienees pendente lite can be made parties under O. 1, R. 10 (2) in a suit for partition. AIR 1966 Andh Pra 361 (367): (1966) 2 Andh WR 121.

(13) Suit for partition — Alienees of joint family properties may be made parties at instance of parties other than plaintiff as their presence may be necessary to enable Court to effectually and completely dispose of subject-matter in suit, viz. a just and equitable partition of family properties. AIR 1968 Mad 142 (146): (1966) 2 Mad LJ 298.

(14) Where partition is claimed as between branches of the family the heads of the branches alone need to be made parties. But when the other members of a branch have joined in the institution of and have been made eo nomine parties to the suit, the Court cannot remove them from the suit on the ground that they need not have been joined in the suit. They may not be necessary but are indeed proper parties to the suit. Where all the plaintiffs have together prayed for their share in the family property and when the Court can pass such a decree in their favour there is no power in the Court to remove the minor plaintiffs from the suit. AIR 1959 Bom 260 (262): 60 Bom LR 1171.

(15) Where in a partition suit the defence is that the business is a partnership set and it is found true, the dismissal of suit on this ground does not affect right of parties to partnership deed who are not parties to suit. AIR 1959 Cal 380 (385).

(16) Powers of Court — Partition suit — Defendant asking for further partition and for addition of parties — Court can order addition subject to condition as to costs in case property not forming part of subject-matter of suit or that unnecessary party has been added. AIR 1960 Mys 320 (320, 321): 38 Mys LJ 924.

(17) Partition suit — Plaintiff's title and possession disputed by defendants — Intervener claiming title and possession with himself — Intervener, held, ought to be impleaded — Question of title has to be gone into. 1968 PLJR 433: 1969 BLJR 264.

Order 1, Rule 10 (contd.)

13. Pre-emption suits. — (1) In a suit for pre-emption in respect of a joint purchase by several co-vendees, all of them are necessary parties. ('82) 4 All 145 (146) (DB).

(2) If plaintiff who is entitled to pre-empt joins along with him a stranger who has no right to pre-empt, plaintiff forfeits his right of pre-emption and defect cannot be cured by striking off name of stranger. AIR 1954 All 94 (96) (DB) •• ILR (1952) 2 Raj 147 (152) (DB).

(3) A second vendee is a necessary party. ('13) 35 All 385 (386) (DB).

(4) Vendor not necessary party. ('43) AIR 1943 Lah 252 (253) •• ('03) 1903 All WN 239 (239) (DB).

[See however ('50) ILR (1950) All 353 (357).]

(5) Mortgagee from vendee not necessary party. ('12) 13 Ind Cas 647 (647, 648) (Lah).

(6) Suit for pre-emption against benami vendee — Real purchaser may be proper party. ('09) 4 Ind Cas 488 (489) (All).

(7) Where in a suit for pre-emption, the plaintiff alleges that a lease executed by vendor is bogus and does not affect his right of pre-emption the lessee would be a necessary party. AIR 1947 Nag 229 (230): ILR (1947) Nag 124.

(8) A rival pre-emptor is a necessary party to a suit for pre-emption. AIR 1948 Nag 32 (34): ILR (1947) Nag 288.

(9) Pre-emption suit against benamidars — Real purchaser is a necessary party to the suit — Pre-emptor can succeed only if he has superior rights even as against the real purchaser. ILR (1966) 2 Punj 894: 68 Punj LR 611.

(10) Suit for pre-emption — Person having no right of pre-emption made co-plaintiff by pre-emptor — Right of pre-emption is not forfeited. AIR 1966 Punj 36 (39): 67 Punj LR 849 (FB).

14. Suits by co-owners. — (1) All co-owners are necessary parties to a suit to recover joint property. AIR 1914 Cal 215 (216) (DB) •• (1900) 23 Mad 239 (254, 255) (SB).

(2) One member of a joint Hindu family cannot sue for recovery of property belonging to the family without impleading other members as parties to suit. ('86) 8 All 264 (265) (DB) •• ('13) 20 Ind Cas 262 (263) (DB) (Cal) •• AIR 1959 Cal 368 (373) (DB). (Suit by karta of Mitakshara joint family as sole plaintiff — Subsequent partition — Death of Karta — Application for substitution of karta of disrupted branches — Application having been made after the suit had been abated, was not maintainable.)

(3) In a suit by manager for recovery of family property it is not necessary to add the other members as parties. AIR 1951 Mys 38 (40, 43): ILR (1951) Mys 259 (FB) •• AIR 1953 Pat 326 (327, 328) (DB) •• AIR 1949 All 49 (49) (DB) •• AIR 1949 Pat 86 (87, 88): 26 Pat 40 (DB).

(4) Suit by a member on contract entered into in individual capacity — Other members need not be added. AIR 1915 Mad 387 (389, 390) (DB) •• ('10) 32 All 183 (186) •• AIR 1922 Bom 354 (355): 46 Bom 1022 (DB).

(5) One of several co-owners can maintain an action in ejectment against a trespasser without impleading other co-owners, though it may be desirable to add them as proper parties. AIR 1956 Bom 264 (264) (DB) •• AIR 1957 Raj 302 (304): ILR (1957) 7 Raj 607 •• AIR 1956 Madh B 35 (37) •• ('54) ILR (1954) 4 Raj 191 (199) (DB) •• AIR 1953 All 331 (332) •• AIR 1943 Oudh 315 (315) •• AIR 1929 Bom 244 (244) (DB) •• 1968 Cur LJ 38 •• AIR 1967 Mys 143 (145): (1966) 2 Mys LJ 148 •• (1963) 2 Mys LJ 31.

(6) Suit by co-owner for recovery of joint property. Persons in possession of property are all necessary parties. ('07) 31 Bom 250 (253) (DB) •• AIR 1928 Cal 138 (141) (DB) •• AIR 1924 Pat 172 (173).

(7) An action in ejectment against a tenant must be brought by all the co-sharers. AIR 1956 Bom 264 (265) (DB) •• 1955 All L Jour 458 (461) •• ('08) 35 Cal 807 (811) (DB).

(8) Where contract of lease has been made only by a co-sharer who sues for ejectment other co-sharers are not necessary parties. AIR 1952 Assam 27 (28) (DB).

[See ('57) AIR 1957 All 369 (371).]

(9) A person who has made a settlement of a plot or holding not claimed by anybody else could bring a suit to terminate tenancy or evict the tenant without making any other person, who is alleged by the tenant to be a co-owner of the plot, a party to the suit. ILR (1954) 6 Assam 187 (188, 189).

(10) Tenant by sufferance — One co-sharer landlord can alone sue for ejectment. AIR 1956 Madh B 35 (37).

(11) An assignee pendente lite of the property is not a necessary party to a suit for possession. AIR 1956 Assam 116 (117): ILR (1956) 8 Assam 137 •• ('09) 36 Cal 675 (688) (DB). (May be added as proper party.)

(12) In an ejectment suit by a landlord against his tenant the Court should not bring on record person from whom plaintiff holds land nor persons claiming to hold it from a third party nor such third party. ('97) 20 Mad 375 (378) (DB) •• ('97) 21 Bom 229 (233) (DB) •• ('12) 17 Ind Cas 603 (604) (DB) (Cal).

(13) One of the two joint owners of property can file petition for eviction of tenant — Other co-owner's opposition thereto notwithstanding — Unwilling co-owner need be joined as a respondent to the petition. (1967) 2 Andh WR 200.

(14) A co-sharer's suit for possession — Suit must either be for benefit of entire body of co-sharers or for possession of plaintiff's share. AIR 1968 Orissa 230 (233).

Order 1, Rule 10 (contd.)

15. Suits by joint promisees. —(1) All co-promisees are necessary parties to a suit to enforce the promise. AIR 1951 Nag 448 (450): ILR (1951) Nag 480 (DB) °° AIR 1957 Andh Pra 688 (690) (DB). (Co-promisee refusing to join as plaintiff should be added as defendant.) °° ('89) 1889 Pun Re No. 156, page 518 (528) (FB) °° ('13) 36 Mad 544 (546) (FB) °° ('62) 66 Cal WN 441 °° AIR 1961 Andh Pra 257 (258, 259): ILR (1961) 1 Andh Pra 288 (DB). (Where a document evidencing a loan is executed in favour of two of the three members of a joint Hindu family, the suit filed by the promisees in their own names without impleading the third member is maintainable.)

(2) Where a sole obligee dies leaving several co-heirs, one of them alone cannot maintain a suit without impleading others. ('84) 7 All 313 (315) (FB) °° AIR 1960 Cal 187 (189). (On the death of the original promisee his heirs do not themselves become several joint promisees.)

(3) Where several persons are jointly and severally liable for a single liability, all of them are not necessary parties to a suit against some of them only; but they may be added as proper parties in order to prevent multiplicity of suits. AIR 1914 Lah 500 (501): 1914 Pun Re No. 107.

16. Suits for rent. — (1) In rent suits only those persons who are liable to pay rent should be impleaded as "defendants". ('92) 16 Bom 568 (576) °° AIR 1966 Cal 447 (454): ILR (1966) 2 Cal 205 (DB). (Suit for rent — Suit against heir of lessee — Non-joinder of other heirs — Suit is still maintainable.)

(2) A tenant cannot ordinarily insist on impleading a third party in a rent suit, so as to raise questions of title and thus convert a simple rent suit into a complicated title suit, nor can such party be allowed to come in on his own application. AIR 1958 J & K 39 (39) (DB) °° AIR 1955 Bhopal 22 (23) °° ('95) 21 Bom 229 (233) (DB) °° ('27) AIR 1927 Cal 340 (342) (DB) °° AIR 1969 Raj 131 (135): 1969 Raj LW 121. (Landlord and tenant — Defendant inducted into possession of suit property by plaintiff — No question of third party setting up title to suit property can arise.) °° ILR (1966) Cut 456: 32 Cut LT 823.

(3) Transferee from tenant with landlord's consent may be impleaded as a proper party. AIR 1930 Pat 323 (324): 10 Pat 90 (DB).

(4) A suit for arrears of rent in respect of property over which a receiver has been appointed is not maintainable against the receiver alone without impleading the owner who is a necessary party. AIR 1946 Cal 127 (128, 129): ILR (1946) 1 Cal 220.

(5) Suit against some of the heirs of the tenant alone for rent without impleading the others is not bad, though of course they may be added as proper parties. AIR 1925 Cal 1056 (1058, 1059): 53 Cal 197 (FB) °° ('18) AIR 1918 Cal 433, (433, 434) (DB).

(6) Apart from question of joinder of parties one of several joint lessors cannot sue for recovery of his share of rent. AIR 1956 Madh B 35 (37) °° ('82) 5 All 40 (41) (DB).

(7) One co-sharer may sue for whole rent if other co-sharers who refuse to be joined as plaintiffs are added as defendants. ('07) 35 Cal 331 (344): 35 Ind App 73 (PC).

(8) One co-sharer cannot sue for enhancement of his share of rent. ('79) 5 Cal 574 (577) °° ('10) 38 Cal 270 (276, 277): 38 Ind App 1 (PC).

(9) One co-sharer can sue for his share of rent on proof of special arrangement to that effect. AIR 1953 Mad 854 (854, 855) °° ('53) AIR 1953 Nag 25 (28) °° ('08) 35 Cal 331 (334): 35 Ind App 73 (PC).

(10) A person who is a necessary party to a suit for rent is also a necessary party to the appeal against the decree in such suit. AIR 1922 Pat 4 (4).

(11) Where in a rent suit the intervener alleging purchase of the holding claims that he should be added as a party to the suit, the Court must add the intervener as a party even though the statutory recognition as transferee has taken place after the institution of the suit. ('37) AIR 1937 Pat 49 (50).

(12) Where property is given to trustees for applying its income towards the worship of a certain deity, the deity is not a necessary party to a suit by the trustee for recovery of rent of the property from the tenants. ('43) AIR 1943 Cal 319 (326): ILR (1943) 1 Cal 274 (DB).

(13) Person against whom no relief is claimed cannot be impleaded as party — Suit for rent — Third party raising question of title — He cannot be impleaded unless his interests are jeopardised. 1963 All WR (HC) 780 °° AIR 1969 Orissa 116 (117): 35 Cut LT 150. (Rent suit — Third party claiming to be owner of property in question — Such party seeking to be impleaded — Title suit of such party in respect of same property pending — Addition of such party wrong and material irregularity.) °° AIR 1969 Raj 131 (136): 1969 Raj LW 121. (Suit for ejectment — Application by third party to be impleaded, made at very late stage causing doubts, about his bona fides — Multiplicity of enquiries can be avoided by a separate suit — High Court will not interfere in rejection of his application by lower Court.)

(14) Scope and applicability — Suit to recover rent and for ejectment of tenant — Suit decreed and tenant ejected — Premises let out to a new tenant during pendency of appeal by tenant — New tenant is neither a necessary nor a proper party — Landlord/Respondent is the only proper party. 1967 Raj LW 234: ILR (1967) 17 Raj 621.

(15) Suit for ejectment — Application, at very late stage, by third party claiming title, to be impleaded as party — Question generally of judicial discretion. AIR 1969 Raj 131 (132, 134): 1969 Raj LW 121.

Order 1, Rule 10 (contd.)

17. Suits on torts. — (1) All persons jointly injured need not be impleaded as parties to a suit on tort. ('97) 25 Cal 285 (289) (DB).

(2) In a suit for damages for false imprisonment, joinder of any person as a pro forma defendant is improper. ('50) 54 Cal WN (2 D R) 71 (87) (DB).

(3) Suit for damages for injuries caused by defendant's car having dashed against plaintiff — Insurance company with whom car has been insured against third party risk should not be impleaded as a supplemental defendant as its addition as a proper party would cause inconvenience or embarrassment by simultaneous investigation of totally unconnected controversies between the assured and the insurer. ('55) 68 Mad LW 371 (373, 376).

[But see AIR 1957 Mad 236 (238) ** AIR 1951 Nag 280 (281): ILR (1950) Nag 955.]

(4) Joint tort-feasors — Suit against one alone is maintainable — Failure to implead other — Effect — Suit cannot fail. AIR 1964 Assam 85 (87, 88): ILR (1963) 15 Assam 474 (DB).

18. Mortgage suits. — See Order 34, Rule 1.

19. Suits on negotiable instruments.— (1) A suit on a negotiable instrument must be instituted in the name of a person who, on the face of the instrument, is entitled thereto or by a holder deriving title from him. AIR 1949 Nag 21 (24, 25): ILR (1948) Nag 299 (DB) ** AIR 1922 Bom 281 (283): 46 Bom 358.

(2) A suit by the beneficial or true owner without impleading the holder, who is alive, either as a plaintiff or defendant cannot be entertained. AIR 1956 Raj 174 (178): ILR (1956) 6 Raj 698 (DB).

(3) In a suit on a promissory note by endorsee person who is not only the promisee under the note but also the endorser of it to the plaintiff is a necessary party. AIR 1954 Mad 960 (960, 961).

(4) Suit on promissory note by endorsee — Endorser seeking to be joined as co-plaintiff alleging that he endorsed the pro-note to plaintiff merely for collection — **Held,** that he was a proper party and might be added as a defendant. AIR 1934 Sind 182 (183).

(5) A person who has acquired an interest, by assignment, to the extent of one-half in a promissory note is necessary party. AIR 1942 Oudh 202 (202).

(6) In a suit for money on the basis of a promissory note against the representatives of the deceased executant, the estate is not sufficiently represented by the impleading of the Receiver holding possession of the deceased's estate alone as party defendant. AIR 1958 Ker 243 (244) (DB).

(7) Suit on pro-note by holder in due course against the maker — Third party procedure not applicable against original payee — Original payee is however, a proper party. AIR 1962 Mad 202 (205): (1962) 1 Mad LJ 246.

20. Suits for specific performance. — (1) A person who is a stranger to contract is not a proper party to a suit for its specific performance. AIR 1950 Mad 91 (92) ** AIR 1943 Bom 27 (29) ** AIR 1929 Cal 667 (668) (DB).

(2) Where A enters into a contract with B for sale of land, and subsequently sells the same land along with his son C to D, C will be a proper party in a suit by B against A for specific performance of contract. AIR 1929 Cal 667 (669) (DB) ** AIR 1960 Pat 235 (236).

(3) Transferee from vendor after contract of sale may be added as a party. ('94) 18 Mad 415 (417) (DB) ** ('96) 22 Bom 46 (49) (DB).

(4) Single contract to convey land to several persons — Some of joint contractees cannot sue to enforce specific performance. ('97) 24 Cal 832 (833) (DB).

(5) Persons in possession of property adversely to vendor and a creditor who had attached the property were necessary parties to a suit for specific performance of an agreement of sale. AIR 1943 Bom 27 (29).

(6) In a suit for specific performance of an agreement to sell, a person who alleges a prior agreement for sale in his favour is not a necessary party to suit. ('46) ILR (1946) 1 Cal 656 (663).

(7) Specific Relief Act (1963), S. 19 (b) — Suit for specific performance of agreement for sale of land against vendors A, B, C — Application by D for being impleaded as defendant on allegation that he was in possession of suit land as possessory mortgagee and also under agreement for sale prior to suit agreement — **Held,** D should not be added as defendant — Suit was not for possession and any decree passed in suit would not affect right, if any, of D to possession — On the other hand addition of D would radically transform character of suit, complicate issues and compel plaintiff to amend plaint to resist rival title asserted by D. (1968) 2 Mys LJ 243: 15 Law Rep 727. (AIR 1948 Nag 181 and AIR 1964 Tripura 16, Foll.; AIR 1943 Bom 27, **DISTING.**)

(8) Suit for specific performance not falling under S. 27 (b) or (c) of Specific Relief Act — Execution of sale-deed only asked as relief — Person claiming title anterior to sale contract are neither necessary nor proper parties. AIR 1964 Tripura 16 (17).

21. Government. — (1) Where any act of the Government is questioned or the proprietary right or right to revenue of the Government is likely to be affected, the Government is a necessary party to the

Order 1, Rule 10 — Note 21 (contd.)

suit. AIR 1956 Trav-Co 181 (182): ILR (1956) Trav-Co 62 (FB) °° AIR 1956 Tripura 22 (24) °° ('54) AIR 1954 Pepsu 33 (34): ILR (1953) Patiala 375 (DB) °° AIR 1950 Orissa 257 (260) °° AIR 1943 Cal 114 (117): ILR (1943) 1 Cal 22 (DB) °° AIR 1968 Ker 35 (38): 1968 Lab IC 139: 1967 Ker LT 331. (Challenge to vires of rules framed by Government — Necessary party.) °° 1967 All WR (HC) 269: (1967) All LJ 465.

(2) Suit by wife of deceased assessee against income-tax officer alone to obtain a declaration that property attached for recovery of dues from her husband was her own and therefore was not liable to be attached and sold — Held that plaintiff was not obliged to go beyond the records of the certificate on which the income-tax officer only was shown as certificate holder and implead Government and that therefore Government was not a necessary party. AIR 1955 Pat 404 (408) (DB).

(3) Mere fact that validity of a Provincial Act is questioned in a suit does not render the Provincial Government a necessary party. AIR 1950 Pat 527 (529) (DB).

[But see AIR 1965 All 86 (91): (1964) 15 STC 505 (DB).]

(4) Where there is no challenge to the validity of any provision of an Act but there is only the question of interpretation of a section, the State is not a necessary party. AIR 1955 Bom 101 (103): ILR (1954) Bom 1187 (DB).

(5) Where in a suit between private parties the validity of an Act of the Provincial Legislature is questioned and this affects the scope of the executive authority of the Provincial Government, the Provincial Government would be a proper party and the Advocate-General of the Province may be impleaded as representing the Provincial Government. AIR 1941 FC 16 (22): 1940 FCR 110: ILR (1941) Kar FC 72.

(6) Where the Government has no interest of any kind in the suit, it is neither a necessary nor a proper party. AIR 1947 Cal 332 (338) (DB) °° AIR 1954 Pat 596 (608) (DB) °° ('53) ILR (1953) 3 Raj 525 (534) °° AIR 1951 Bom 385 (386): ILR (1951) Bom 670 (DB) °° AIR 1936 PC 150 (152): 60 Bom 634: 63 Ind App 248 °° AIR 1967 Madh Pra 120 (122): 1966 MPLJ 1062. (Necessary party — Revenue sales for realisation of Government dues — Suit filed to set aside such sale — Government is necessary party to such suit.) °° AIR 1962 Cal 625 (630): 66 Cal WN 774 °° AIR 1961 J and K 66 (69). (Sale by lessee of land from Government — Land resumed by State for breach of condition — Suit by vendee for damages against vendor — State is not a necessary party.) °° AIR 1961 J and K 42 (45) (Suit for declaration that certain alienations made by Mahant of a religious endowment were void — Prayer for directing defendant to render accounts regarding compensation received from Collector in land acquisition proceedings — No allegations against State — Nor any relief claimed against it — State held was not necessary party.)

(7) In a suit where a claim to property is asserted against a Municipality, the question whether the Government is a necessary party or not would depend on the facts of each case. AIR 1937 Mad 641 (641) °° AIR 1955 Andhra 107 (109): ILR (1955) Andhra 249.

(8) Land Acquisition Act, S. 18 — Reference under — Subsequent devolution of interest of petitioner on Government — Government applying for reference under S. 30 — No contention that in the circumstances Government may be considered as having been brought on record not raised in lower Court or High Court — Contention not allowed to be raised for the first time in appeal before Supreme Court. AIR 1966 SC 237 (243): (1965) 3 SCR 576.

(9) More often than not no question of valuation is involved in apportionment cases and strictly speaking an apportionment case started on the Collector's reference u/s. 30 of the Land Acquisition Act. In such cases, the State is not a necessary party and any decision given in the case is binding upon the State even if the State is not a party thereto. But where without any dispute, the liability of the State to pay compensation to any person is enlarged or enhanced, the State is a necessary party. Where the judgment of the Court is inextricably bound up with the liability of the State to pay compensation to the party that liability cannot be revived, enlarged or enhanced by a compromise to which the State is not a party. The decree based on such a compromise cannot be enforced against the State. AIR 1960 Cal 506 (507, 508): 64 Cal WN 514 (DB).

(10) Suit for determining compensation payable under S. 228 (4), M. P. Land Revenue Code — Government not necessary party — Suit not bad for non-joinder. 1962 MPLJ 198: 1962 Jab L 1071.

(11) Industrial disputes — Reference made by State Government for adjudication — Award of adjudicator published in Gazette — Civil suit to set aside award — State Government is not necessary party. (1965) 10 FLR 219: (1965) 2 Lab LJ 593 (All).

(12) Rival claims under S. 170 of U. P. Zamindari Abolition Act — Government not necessary party. AIR 1967 All 481 (483): 1967 All LJ 92.

(13) Suit on contract or actionable wrong — Suit filed in 1958 against State of Bombay pending in 1960 — State of Maharashtra is a necessary party. AIR 1965 Guj 173 (176): ILR (1964) Guj 1116 (DB).

(14) Suit against Government — Co-operative bank impleaded in order to effectively and finally determine plaintiff's claim —

Order 1, Rule 10 — Note 21 (contd.)

Bank held proper and not necessary party — Suit could not be dismissed for want of notice under S. 77 of M. B. Co-operative Societies Act. 1965 Jab LJ 734.

(15) Necessary party — Tests — Suit for ejectment of tenant — Defence that accommodation having been transferred to State Government it was necessary party to suit — Plaintiff not making Government party — Government also not applying for joining — Plaintiff getting benefit under S. 23 M. P. Accommodation Control Act — Government held was not necessary party. 1968 MPLJ 176: 1968 Jab LJ 469.

(16) Suit by intermediary for ejectment — Estate vesting in State by virtue of Orissa Estates Abolition Act, 1952 — State made party — State can continue suit — Though it is not a case under O. 22, R. 10, the Court can make State a party under O. 1, R. 10 read with S. 151, for ends of justice. ('63) 29 Cut LT 256.

(17) Grant by Collector of Gochar plots in favour of ex-landlords in exchange — Suit by villagers challenging validity of grant — Government is necessary party. AIR 1963 Orissa 186 (188): ILR (1963) Cut 841.

(18) Suit for declaration of title to evacuee property — Union of India added subsequently by amendment of plaint as defendant proper party — Absence of notice under S. 80 on Union of India — Though suit may fail against Union of India it cannot affect maintainability of suit against other defendants on that ground. AIR 1963 Pat 11 (16): 1963 BLJR 11.

(19) Suit against Government and its officers — Statutory notice under S. 80 given to Government — Individual notices to officers not given — Though suit would be dismissed against the officers it was maintainable against the Government. AIR 1962 Raj 36 (39): 1962 Raj LW 49 °° AIR 1963 Raj 57 (59): 1963 Raj LW 128.

(20) Contract Act, S. 72 — Suit under, by postal employee for recovering excess payment made to a cash certificate holder — Government even though it has penalised the employee by cutting the excess payment from the employee's salary is not a necessary party. AIR 1963 Raj 198 (201): 1963 Raj LW 304.

22. Suits by or against corporations. — See O. 29, R. 1.

23. Miscellaneous. — (1) Suits to obtain registration — Registering Officer not necessary party. ('84) 8 Bom 269 (271) (DB).

(2) Suit for money against undischarged insolvent — Official Assignee not necessary party. ('94) 22 Cal 259 (263, 264).

(3) Joint family carrying on a family trading business adjudicated insolvent — Widow who had a right of maintenance sued Official Assignee to enforce her right in property in his hands by challenging necessity for incurring debts — Creditors are necessary parties. AIR 1933 Lah 901 (904): 15 Lah 9 (DB).

(4) A sued B, his father, and C, a judgment-creditor of B, for a declaration that the decree obtained by C against B is not binding on A. A decree is passed in favour of A. Before that date, however, B is adjudicated insolvent, C appeals from the decree. The Official Assignee is a necessary party to the proceedings in appeal. AIR 1932 All 382 (383): 54 All 532 (DB).

(5) Real owner may properly be added as a party to the suit by benamidar. AIR 1941 Nag 178 (179) °° AIR 1918 PC 140 (143): 46 Ind App 1.

(6) Parties and representatives — Benemidar can represent real owner. AIR 1969 SC 316 (318): (1969) 1 SCJ 373.

(7) In a suit involving a question as to validity of adoption, adopted son is a necessary party. ('35) 39 Cal WN 1264 (1269).

(8) The judgment-debtor is a proper party to a suit by an assignee of a decree for a declaration of the validity of the assignment. ('02) 29 Mad 264 (265) (DB).

(9) Suit to set aside rent sale — Receiver at whose instance sale is effected is not a necessary party. AIR 1914 Mad 272 (273, 274): 38 Mad 837 (DB).

(10) In a suit by a remote reversioner to set aside a sale by a Hindu widow, the nearer reversioners may be impleaded as proper parties. ('94) 18 Mad 53 (58) (DB).

(11) Where the question is whether the plaintiff or defendant is the real purchaser, a third party claiming adversely to both of them cannot be impleaded in the suit. ('27) AIR 1927 Mad 834 (835).

(12) All attaching creditors are necessary parties in a suit for declaration against one of them that the property is not liable to attachment. ('99) 27 Cal 493 (498) (DB).

(13) Lessee's interest sold in execution of money decree — Suit by landlord to evict purchaser — Lessee is not a necessary party — Nor is the transferee from defendant a necessary party since he would be bound by the decree against the defendant on the ground of lis pendens. AIR 1956 Assam 116 (117): ILR (1956) 8 Assam 137.

(14) Suit by certificate debtor challenging certificate proceedings and sale — Ground of suit not the absence of service of notice but the fraud committed by co-certificate debtor on certificate officer and himself — As suit seeks no relief against certificate holder he is not a necessary party. AIR 1956 Pat 161 (165) (DB).

(15) Suit for cancellation of improper alienations of tarwad properties — No necessity for impleading all members of the tarwad as in partition suit — If alienees and karnavan are made parties that is sufficient. ILR (1955) Trav-Co 635 (639, 640) (DB).

(16) Suit for restitution of conjugal rights — Any person, be it the father or the mother or any relation of the wife or a stranger who by words and conduct prevents the wife from allowing her to live with her husband

Order 1, Rule 10 — Note 23 (contd.)

could be made a party to the suit. ('54) ILR (1954) Madh B 274 (277).

(17) In a proceeding to enforce an award at the instance of a party to the award no person can be impleaded except one who is eo nomine a party to that reference and arbitration. ('58) 1958-1 Mad L Jour 94 (95). (AIR 1950 Mad 488, Rel. on.)

(18) Suit under S. 5 (3), Charitable and Religious Trusts Act — Deity should be joined as party — Effect of non-joinder — Addition at late stage of appeal under Article 133 of the Constitution not allowed. **AIR 1960 SC 100 (113, 114): (1960) 1 SCR 773** °° AIR 1964 Andh Pra 305 (306): (1964) 1 Andh WR 218 (DB).

(19) U. P. Consolidation of Holdings Act (V of 1954) — Failure to implead necessary parties to appeal — Defect is fatal — Court is not bound to have necessary parties brought on record. 1966 All WR (HC) 138 °° 1966 All WR (HC) 51.

(20) Suit involving trust regarding debts of author of trust instituted in 1947 — U. P. Act 1 of 1951 and U. P. Act 15 of 1953 passed during pendency of appeal — Held, arguments based on the two Acts could not be entertained — Trustees whether necessary parties to suit. ILR (1964) 2 All 191.

(21) One of two trustees filing suit — Plaint not a nullity — Defect can be removed by amendment of plaint. AIR 1959 All 579 (579): 1958 All LJ 437.

(22) Interpleader suit — Amendment seeking inclusion of certain property as suit property and addition of certain parties — Validity of order allowing amendment — Interference under Art. 227 held not called for. AIR 1961 All 559 (561).

(23) Suit under S. 59, U. P. Tenancy Act or appeal arising out of it — Zamindar, after abolition of Zamindari, is neither a necessary nor proper party. AIR 1963 All 549 (551, 552, 554): 1963 All LJ 389 (FB).

(24) Suit for a declaration that tenancy of plaintiffs in certain premises subsists and that creation of tenancy in favour of second defendant by landlord first defendant in breach of terms of partnership between plaintiffs and second defendant is nullity. Joint tenant with the plaintiff is a necessary party to the suit. The well settled practice in Calcutta High Court was to give a decree for joint possession together with the trespasser and leaving it to the plaintiff to work out his further rights by a suit for partition. 68 Cal WN 786: 1963 Cal LJ 75.

(25) Suit for title and possession of land — Defendants pleading that two other persons were in occupation of part of such land — Proof of such persons being necessary parties to suit — Onus is on defendants. (1967) 71 Cal WN 302.

(26) Suit on contract — Defendant alleging fraud and collusion between plaintiff and broker — No claim against broker — Plaintiff cannot be compelled to make broker, party to suit — Defendant cannot agitate claim against broker in the suit — In the absence of broker, point of conspiracy can be agitated — Plaintiff may be compelled to call broker as witness — If so advised defendant may apply for broker to be made party. AIR 1963 Cal 405 (408) (DB).

(27) Administration suit — Person claiming adverse title to estate of deceased is neither a necessary party nor a proper party — Plaintiff can implead him as a party if he wants to do so — But to allow such person to come in as a defendant to get his claim adjudicated, when the plaintiff does not want to implead him, will only embarrass the trial of the suit. AIR 1962 Mad 346 (347): (1962) 1 Mad LJ 380.

(28) Watan land validly alienated with Government sanction — Not liable to be resumed or granted — Suit for possession — Illegal order of regrant by Assistant Commissioner — State is not a necessary party. (1966) 2 Mys LJ 230: (1966) 7 Law Rep 395.

(29) Application to sue in forma pauperis — Sale of property by applicant more than two months before presentation of application challenged as fictitious — Enquiry into nature of sale — Purchaser not a necessary party to such enquiry. AIR 1962 All 436 (438): 1962 All LJ 28 (DB).

(30) Specific Relief Act (1877), S. 55 (2) — Suit by vendee for return of earnest on ground of want of marketable title in defendant vendor — Question of marketable title can be decided in absence of party in whom title is alleged to exist. AIR 1961 Raj 196 (201): 1960 Raj LW 571.

24. Addition introducing new cause of action. — (1) Court will not give leave to add a party where the result would be to introduce a new cause of action with which the plaintiff has nothing to do. ('96) 18 All 306 (308) (DB) °° ('63) 67 Cal WN 732 °° AIR 1960 J and K 67 (71).

[See also AIR 1956 Cal 263 (265) (DB)]

(2) In a suit for a decree in terms of an award to which the defendant consents, a creditor of the defendant who impugns the award as fraudulent should not be added as party. ('97) 22 Bom 727 (729) (DB).

25. Addition altering nature of suit. — (1) Parties should not be added so as to convert a suit of one character into a suit of a different character. ('52) AIR 1952 Ajmer 59 (59) °° ('48) AIR 1948 Oudh 44 (45) °° ('41) AIR 1941 Nag 178 (179) °° ('21) AIR 1921 Mad 98 (101, 102) (DB) °° ('35) AIR 1935 Sind 194 (195) °° AIR 1960 Ker 284 (285): 1960 Ker LT 262. (Suit for arrears of rent — Person claiming to be in possession as owner of half share in suit property seeking to be added as party — His prayer should not be granted as that would convert the suit into a title to decide upon the title of defendants.)

[See also ('57) AIR 1957 Punj 106 (107): ILR (1957) Punj 1019.]

Order 1, Rule 10 — Note 25 (contd.)

(2) A sub-tenant to whom the tenant has sub-let illegally, although not a necessary party to the suit by the landlord for possession brought against the tenant after a notice to quit has been given to him, is yet a proper party and therefore his joinder cannot alter the nature of the suit. ('53) AIR 1953 SC 73 (75): 1953 SCR 226.

26. "Question involved in the suit."— (1) The expression "questions involved in the suit" does not mean all claims which may possibly be put forward by anybody to the property involved in the suit. AIR 1918 Mad 1137 (1139).

(2) 'Questions involved in suit' means questions as between parties to litigation, i.e., questions with regard to the right set up and the relief claimed on one side and denied or withheld on the other. AIR 1926 Mad 836 (838): 50 Mad 34 °° AIR 1962 Pat 357 (359). ('All questions involved in the suit' can only be questions as between the parties.)

(3) Questions which may arise between co-plaintiffs and co-defendants inter se are not questions involved in suit. ('87) 9 All 447 (449) (DB) °° AIR 1922 Bom 454 (455) (DB).

(4) The words "questions involved in the suit" are not restricted to questions which are involved in suit as originally framed between parties to suit; where several disputes arise out of one subject-matter all parties interested in such dispute should be brought before Court and all questions in controversy between them should be completely settled. AIR 1958 Andh Pra 195 (200) °° 1956 Andh LT 917 (919) °° AIR 1940 Mad 69 (70). (AIR 1929 Mad 443, Rel. on; AIR 1932 Cal 448: 59 Cal 329, Not followed.) °° (1968) 34 Cut LT 1410.

(5) The expression "questions involved in the suit" embraces all questions included in the suit for purposes of decision. Where the question which arises for decision in the suit is whether the plaintiff is the legally married wife of the defendant, until the Court pronounces a final judgment it remains open and it cannot be said that the allegations made by the plaintiff having been unreservedly accepted by the defendant, there are no questions involved in the suit. ('58) AIR 1958 Andh Pra 195 (200).

(6) Question involved in the proceeding — Person seeking protection of his properties from inclusion in insolvents' properties is not a necessary party to insolvency petition. (1966) 1 Andh WR 177.

27. Improper addition of plaintiff or defendant. — (1) Person claiming under a title quite distinct from that under which the parties to the suit claim is an improper party, as his joinder as party will result in misjoinder of plaintiffs and causes of action, or a misjoinder of defendants and causes of action. ('96) 18 All 306 (308) (DB).

(2) Where a person's right to join as a co-plaintiff is denied by plaintiff on record his joinder as co-plaintiff is improper, though he may be made a defendant. AIR 1953 Bom 202 (203): ILR (1953) Bom 424.

(3) Person objecting to be joined as plaintiff — His joinder as plaintiff is improper — He may be added as defendant. AIR 1940 Mad 69 (70).

28. Parties may be added at any stage of the proceedings. — (1) A party can be added at any stage of suit. AIR 1958 Andh Pra 195 (200). (Even before issues are framed.) °° AIR 1958 Assam 56 (59) (DB) °° AIR 1955 Nag 78 (79): ILR (1955) Nag 437 (DB) °° AIR 1929 Bom 337 (339) (DB) °° AIR 1952 Trav-Co 408 (409) (DB). (Even after restoration of suit under O. 9, R. 13.)

(2) Where a final decree has been passed and drawn up Court cannot add party. AIR 1914 PC 129 (131): 41 Ind App 251 °° ('88) 10 All 97 (105) (DB).

[But see AIR 1933 Bom 200 (202) (DB). (In the course of execution proceedings.)]

(3) Court has no power to add party after an appeal has been filed against preliminary decree. ('11) 12 Ind Cas 69 (69) (DB) (Mad).

(4) Court cannot add party after a suit has been terminated by a lawful compromise. AIR 1926 Mad 341 (341).

[See however AIR 1960 Andh Pra 32 (33): (1958) 2 Andh WR 291. (The mere filing of a compromise petition does not bring about a termination of litigation till a compromise decree is passed so as to exclude maintainability of application under O. 1, R. 10 — AIR 1926 Mad 341 and AIR 1935 Mad 394, **DISSENTED FROM.**)]

(5) A Court has power to act under this rule after a preliminary decree and before a final decree and add a party and thus reopen the proceedings. AIR 1924 Mad 648 (649) (DB) °° ('11) 35 Bom 393 (395) (DB) °° AIR 1952 Cal 102 (103) (DB) °° AIR 1927 All 465 (466): 49 All 664 (DB). (Per Iqbal Ahmed J.) °° AIR 1942 Pat 185 (187) °° AIR 1954 Trav-Co 399 (400): ILR (1954) Trav-Co. 752.

[But see AIR 1935 Nag 64 (64) °° AIR 1924 Oudh 33 (33, 34): 26 Oudh Cas 317.)]

(6) Powers of Court — Execution appeal pending before Supreme Court — Subject-matter of appeal mortgaged by judgment-debtor — Mortgagee obtaining mortgage decree and executing same subsequent to execution appeal — Auction purchaser can be brought on record of appeal. AIR 1961 SC 137 (141): (1961) 1 SCR 680 °° AIR 1922 Mad 317 (319) (DB).

(7) In a representative suit persons represented by actual party are really parties to suit and their being brought on record after decree in place of actual party does not affect the rule that a Court cannot implead a new party after decree. AIR 1923 Mad 472 (472) (DB).

Order 1, Rule 10 — Note 28 (contd.)

(8) Suit instituted after obtaining leave under clause 12 of Letters Patent (Cal) — Leave under Cl. 12 to amend plaint by adding parties can be granted. AIR 1962 Cal 8 (10): ILR (1962) 2 Cal 40.

(9) Representative suit — Person at a late stage in proceeding applying for addition contending that his presence was necessary — This application should not be allowed. AIR 1968 Guj 265 (266): 9 Guj LR 1050.

29. Striking out name of party improperly joined.—(1) In case of an improper joinder of plaintiffs Court can ask them to elect one among themselves to proceed with suit and to amend the plaint by striking off the others. ('07) 34 Cal 662 (670, 671) °° ('93) 15 All 380 (382) (DB) °° ('02) 26 Bom 259 (266) (DB).

(2) Party introduced having no connection with relief claimed in plaint — It is a case of improper joinder. AIR 1957 Andh Pra 939 (940).

(3) In case of improper joinder of defendants proper course is to strike out names of such defendants and not to dismiss the suit as against them. AIR 1955 Nag 234 (236): ILR (1956) Nag 274 (DB) °° AIR 1930 Mad 817 (820): 54 Mad 81 (FB).

[See also AIR 1959 Andh Pra 349 (352) (DB).]

(4) Parties whose names are struck out cease to be parties to suit and must be treated as persons who have been dismissed from suit and not as persons against whom suit has been dismissed. AIR 1933 Mad 435 (436) (DB).

[But see AIR 1934 Rang 154 (155).]

(5) Where, in a suit as framed, a certain person appears properly on record as a plaintiff, the mere fact that after trial it is found that he is not entitled to maintain suit does no justify his name being struck out under this rule. The proper course in such a case is to dismiss his claim. AIR 1938 Lah 799 (800).

(6) Court cannot pass a decree against one of defendants after striking out names of the rest when the suit is not bad for misjoinder of defendants but is only bad on account of misjoinder of causes of action. AIR 1952 Cal 222 (225): ILR (1950) 1 Cal 108.

(7) Where plaintiff states that he has no claim against some of defendants, proper course is to strike out names of such defendants and not to dismiss suit as against them. AIR 1918 Mad 123 (125): 41 Mad 418 (FB).

[See however AIR 1944 Lah 273 (276). (Effect of striking out is same as that of dismissal.)]

(8) A suit comes to an end so far as the party struck out is concerned. AIR 1942 Pat 270 (271) (DB) °° AIR 1926 PC 88 (91).

(9) A Court of Appeal has a power of striking out parties. ('09) 36 Cal 675 (689) (DB).

(10) Lower Court cannot strike out name of a party added by Appellate Court. AIR 1930 All 303 (304) (DB).

(11) Defendant improperly added by lower Court. Appellate Court should strike out his name and dismiss suit against him with costs both in the lower Court and before itself and not merely dismiss the appeal preferred by such defendant. AIR 1919 Cal 1019 (1019) (DB).

(12) Suit dismissed against defendant improperly joined. It will amount to a striking off his name under this rule even though the striking out was not formally done, and he ceases to be a party to the suit. AIR 1927 Rang 137 (138): 5 Rang 110 (DB).

(13) Where plaintiff gives up a defendant properly made a party, but his name is not formally struck out, he nevertheless continues to be a party to suit within meaning of Section 47 of the Code. AIR 1918 Mad 123 (125): 41 Mad 418 (FB).

(14) A party who ought not to have been impleaded and who is not affected by decree passed, is not competent to figure as an appellant and where he so figures, his name should be struck out. AIR 1917 Pat 585 (588) (DB).

(15) Appeal against order impleading a party dismissed. Impropriety of addition cannot again be questioned in appeal from the decree itself. AIR 1914 Oudh 52 (58) (DB).

(16) Where, on application of plaintiff, order striking out names of certain defendants is made and no terms are inserted in the order, the effect is the same as if the suit were withdrawn against those defendants and a fresh suit against them would be barred under Order 23, Rule 1. AIR 1939 PC 110 (112): 66 Ind App 198.

(17) When the names of parties are struck off as improperly added, the Court can order the costs of such parties to be paid by the party at whose instance they were joined. AIR 1937 Lah 67 (68).

(18) Partition suit — Persons entitled to maintenance impleaded as defendants — Order removing their names is not a decree and is not appealable. AIR 1964 Madh Pra 234 (235, 236): 1964 Jab LJ 343 (DB).

(19) Order refusing to strike off party — When can be revised by High Court. (1963) 1 Mys LJ 465.

30. Transposition of parties.— (1) Wherever ends of substantial justice require a transfer of parties from one side to the other should always be granted if the refusal to do so would prejudicially affect the applicant by driving him to another suit. AIR 1952 J and K 33 (34): 11 J and K LR 51 °° AIR 1931 PC 162 (165): 58 Ind App 228 °° AIR 1925 Cal 421 (422) (DB) °° AIR 1939 Pat 397 (398) (DB) °° AIR 1960 Andh Pra 572 (575): (1960) 1 Andh WR 456 (DB). (There is no distinction between an administration suit instituted by a creditor and an administration suit instituted by a legatee. The plaintiff who is the dominus litis is entitled to withdraw his suit on the payment of his legacy amount.)

Order 1, Rule 10 — Note 30 (contd.)

(2) Where the plaintiff wishes to withdraw his suit for partnership accounts, but defendants wish to continue the suit, the plaintiff should be transferred as defendant and the defendants as plaintiffs and the suit continued. AIR 1926 All 582 (583) (DB) ** AIR 1914 Mad 369 (370) (DB) ** AIR 1916 Cal 80 (82) (DB).

(3) Suit for dissolution of partnership and accounts — Death of sole plaintiff — Legal representatives not brought on record — Court ordered transposition of defendant as plaintiff in order to avoid abatement of suit. AIR 1942 Bom 35 (36): ILR (1942) Bom 35.

(4) Suit by minor for share of his family assets in partnership after dissolution, against partners and his brothers, one of whom was manager of family and partner in firm — Suit for dissolution of partnership virtually conducted by defendant brothers on behalf of minor plaintiff — Defendant brothers held could be transposed as plaintiffs. AIR 1940 Mad 308 (311) (DB).

(5) Court has no jurisdiction after it passes a decree in terms of compromise entered into between plaintiff and some of defendants to transpose remaining defendants as plaintiffs and the plaintiff as defendant. AIR 1952 J and K 33 (34): 11 J and K LR 51.

(6) Appellate Court has power to transpose a respondent as an appellant in order to further the ends of justice. AIR 1958 SC 394 (398): 1958 SCR 1287. (Transposition of appellant as respondent — Inherent powers.) ** AIR 1949 Pat 309 (310): 27 Pat 956 (DB).

(7) It is no valid objection to an application for transposing a party that the pecuniary jurisdiction of Court would be affected by such transfer; if it is exceeded Court can afterwards return plaint to be presented to proper Court. AIR 1926 Pat 28 (29).

(8) Application for leave to sue in forma pauperis — Nature of — Application by defendant to be transposed as applicant — Order 1, Rule 10 applies — Application cannot be rejected on ground that claim made by original applicant is personal to himself. AIR 1962 SC 941 (945): 1962 Supp (2) SCR 675.

(9) Application to transpose applicant (one of the respondents) as supplemental appellant in second appeal — It is wholesome practice to give notice of such interlocutory applications at least to parties who have entered appearance. AIR 1961 Ker 290 (291): (1961) Ker LT 196.

31. Transposing of defendant as plaintiff. — (1) No question of limitation is involved where a party is transposed from array of defendants to that of plaintiffs. AIR 1944 Nag 298 (303): ILR (1944) Nag 885 (DB).

(2) The transposition of a defendant as a co-plaintiff should always be allowed "where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings." AIR 1931 PC 162 (165): 58 Ind App 228 ** AIR 1965 SC 1812 (1817): (1965) 3 SCR 283.

(3) Plaintiff having no subsisting interest in cause of action Court can transpose one of defendants who is entitled to maintain suit as an assignee of plaintiff as an additional plaintiff. AIR 1945 Bom 11 (14, 15).

[See also AIR 1958 Andh Pra 494 (496, 497) (DB).]

(4) A sues B, the mortgagor, and C the subsequent mortgagee for foreclosure. A preliminary decree is passed, and thereafter, C pays off the amount due thereunder before the passing of the final decree and applies to be transposed as a plaintiff. The Court has power to so transpose him and pass a final decree for foreclosure in his favour. AIR 1928 Nag 145 (146): 24 Nag LR 119.

(5) Where one of two co-trustees sues a third person for recovery of trust property and impleads the other trustee as a defendant and pending suit the plaintiff dies, the other trustee defendant can be transposed as a plaintiff and the suit proceeded with. AIR 1921 Mad 124 (124) (DB).

(6) Where A, alleging that he was appointed trustee by C, a deceased person, sues B for moneys due by B to C, and makes C's widow D also defendant to the suit and it is found that A was not the trustee for that amount, it being C's absolute property the proper course is to transpose D as a plaintiff and proceed with the suit. AIR 1927 Oudh 484 (485): 3 Luck 241 (DB).

(7) Where A sues B and C on a promissory note executed by B to C, on ground that C was really a benamidar for A, and finding that such a suit is not maintainable by A under the Negotiable Instruments Act, C applies to be transposed as a plaintiff the application should be allowed. AIR 1932 Pat 346 (348, 349): 11 Pat 616 (DB). (DISSENTING FROM AIR 1928 Pat 24.)

(8) Transposition of a defendant as a plaintiff should not be granted if it results in changing character of the suit. AIR 1922 Cal 459 (460, 461) (DB) ** AIR 1935 Mad 95 (96) ** AIR 1939 Mad 467 (468) (DB) ** AIR 1964 Pat 508 (509) ** AIR 1960 J and K 57 (59).

(9) Transposition should not be ordered where it would deprive the plaintiff already on record of his power to sue and ask for a determination of the claim advanced by him. AIR 1953 Sau 100 (100, 101) ** AIR 1921 All 184 (185) (DB).

(10) Where A and B are disputing the title to a property setting up rival claims, it is not open to a third person C who claims as against both A and B to insist on his title being investigated and it would

Order 1, Rule 10 — Note 31 (contd.)

not be proper for the Court to transpose him as a co-plaintiff. AIR 1947 Mad 395 (397).

(11) Court has inherent power to order transposition of a defendant as a plaintiff apart from Order 1, Rule 10. AIR 1937 Mad 563 (565).

(12) When a pro forma defendant becomes on his own application a co-plaintiff, he must be taken to adopt only those statements in the plaint which are essential to support the cause of action stated in the plaint and not any other statements. (1937) 41 Cal WN 501 (502).

(13) Where a suit for recovery of possession of properties on the death of the last holder issueless is brought by a stranger to the family, and she is not the next, or even a reversioner of the last male-holder then on her death her suit must come to an end, because the admitted legal representative, even if he is a party to the suit as a defendant, cannot continue it in place of the original plaintiff after her death. There is, therefore, no question in such a case of adding the defendant as a co-plaintiff after the death of the plaintiff. AIR 1957 Pat 79 (83).

(14) Substitution of parties — Partition suit — Plaintiff's claim based on a transfer from one of the defendants — Claim not sustained — Transposition of the defendant as plaintiff proper. (1962) 2 Mad LJ 423: 1962 Mad WN 544.

(15) Transposing of defendant as plaintiff — Suit under Order 21, Rule 63 by decree-holder for establishing title of defendant 1 (judgment-debtor) as against that of defendant 2 (successful claimant) — Defendant 1 satisfying debt and requesting transposition as co-plaintiff — Order of transposition valid. AIR 1964 Mys 157 (158, 159): (1963) 2 Mys LJ 528.

(16) Amendment of plaint — Transposition of some defendants as plaintiffs so that the relief sought enures to the benefit of all co-sharers is proper — Amendment enables the Court to effectually and completely adjudicate all questions involved in the suit. AIR 1968 Orissa 230 (233).

32. Transposing of plaintiff as defendant. — (1) One of plaintiffs can be transposed as a defendant, if his original joinder was improper. AIR 1925 Cal 328 (328, 329) (DB) °° AIR 1940 Mad 69 (70).

(2) Court has, apart from Order 1, R. 10, inherent power to transpose one of plaintiffs as a defendant. AIR 1924 Cal 251 (252): 50 Cal 353 (DB).

33. Misdescription of parties.— (1) Misdescription of parties can be corrected by Court at any time. AIR 1956 Vindh Pra 16 (17) °° AIR 1955 Mad 294 (299): ILR (1955) Mad 1293 (DB) °° AIR 1953 Cal 381 (382) °° AIR 1953 Pat 144 (144): 31 Pat 770 (DB) °° AIR 1933 Bom 304 (305) (DB) °° 1962 Jab LJ 584 °° AIR 1960 Cal 15 (22) (DB). (Per Bachawat J. — The misdescription of the plaintiff and any consequent defects in the signature, verification and presentation of the plaint may be treated as technical defects or irregularities of procedure.)

[See also AIR 1957 Assam 22 (25): ILR (1957) 9 Assam 25.]

(2) Where relief is originally claimed by or against a party (such as an idol, a minor, or a corporation) who has to be represented by some person, the proper representation of that party is a question of the description of the party, and not one of addition of new parties. ('11) 33 All 735 (737) (FB) °° AIR 1955 Mad 294 (299): ILR (1955) Mad 1293 (DB) °° AIR 1954 Ajmer 74 (75).

(3) Where one person sues or is sued, and another person is sought to be substituted in his place the case is not one of misdescription of parties, and the amendment can be allowed only if there is no question of limitation. AIR 1958 J and K 20 (21) (DB) °° 32 Pat 803 (856) °° AIR 1914 Mad 636 (637) (DB).

(4) Joint family firm — Suit by, in firm name — Amendment seeking addition of individual partners — Can be allowed as the case is one of misdescription. 1957 Jab LJ 238 (242).

(5) Where a party is wrongly described and Court orders amendment giving a correct description, and in spite of it the amendment is not carried out, Court can strike out name of such party. AIR 1924 Oudh 428 (429) °° AIR 1961 SC 325 (328): (1961) 1 SCR 982. (Suit in name of firm by partners doing business outside India — It is only misdescription of plaintiff — Plaint can be amended by substituting partners' names under Section 153 — Order 1, Rule 10, has no application.)

(6) Expression "wrong person" cannot be confined to a person wrongly described. It is wide enough to include a person whose name ought not to have been there as a plaintiff because he had no right to file the suit. (1963) 2 Andh WR 138.

(7) Suit brought in name of firm carrying on business outside India — There is misdescription which can be corrected by Court though not under O. 1, R. 10 but under Section 153 and Order 6, Rule 17. AIR 1961 Andh Pra 239 (241): (1960) 2 Andh WR 268.

(8) Suit against unincorporated and unregistered club in the name of the club — Not a case of misdescription. AIR 1964 Cal 57 (58, 59): 67 Cal WN 903.

(9) Misdescription of parties — Sales tax case against Chief Commissioner of Delhi — After formation of Delhi State Lt. Governor taking place of Chief Commissioner during pendency of proceedings — Omission to move the Court for amendment so as to have the Lt. Governor substituted in place of Chief Commissioner — Held, indi-

Order 1, Rule 10 — Note 33 (contd.)
cative of want of care and attention. AIR 1969 Delhi 1 (3) (DB).

(10) Suit filed on behalf of joint Hindu family firm — Amendment of plaint seeking to convert it as a suit filed by an alleged registered firm — It cannot be regarded as an amendment coming under the head of misdescription. AIR 1959 Madh Pra 425 (426): 1959 MPLJ 987.

[See also AIR 1960 Cal 327 (331).]

(11) 'Misdescription' — Claim against Tea Garden by Manager — Manager discharged and proprietor made party — Effect — Limitation — Correction of name does not attract limitation. AIR 1959 Tripura 16 (18).

34. Consent of added party — Sub-rule (3). — (1) No person can be added as a plaintiff without his express consent. 1911 Pun Re No. 46 (DB) °° (12) 14 Ind Cas 35 (37) (All).

(2) The prohibition contained in the sub-rule is general and applies to addition of a plaintiff by transposition from the array of defendants except where the defendant sought to be added as plaintiff by transposition ought to have been originally a plaintiff. AIR 1953 Trav-Co 306 (314): ILR (1953) Trav-Co 265 (FB).

[But see AIR 1956 Raj 45 (47).]

(3) A person can be made a defendant against plaintiff's consent even though he may thereby be in a position to counter-claim against the plaintiff. AIR 1929 Mad 443 (447).

35. Amendment of plaint — Sub-rule (4). —(1) The amendment referred to in this sub-rule is such amendment as is necessitated by addition of a defendant and not such as would add to or alter nature of suit as originally brought. ('02) 24 All 553 (555) (DB) °° 1958 BLJR 528 (530) °° AIR 1968 Orissa 234 (236): 34 Cut LT 823.

(2) A case of misdescription is also one for amendment of the plaint. ('97) 21 Bom 205 (209, 210).

(3) As soon as a Court finds the plaint defective for want of necessary parties, it should stay its hands from going into and pronouncing judgment upon merits of case. ILR (1954) Patiala 527 (541).

(4) Amendment as per order of Court not made — Proper course is to reject plaint. 1890 Pun Re No. 36, 99 (101) (DB) °° ('87) 14 Cal 435 (439) (DB).

(5) If parties proceed with trial without amendment, and if they are not prejudiced the trial is not bad. AIR 1915 Mad 335 (335) (DB).

(6) Order for demolition of premises passed by M, Commissioner of corporation — Suit for permanent injunction filed against the then Commissioner of corporation and the corporation — M sought to be impleaded — Held amendment sought being only formal and Section 80 notice having already been served on him there would be no objection to the amendment. AIR 1965 Cal 442 (443): 69 Cal WN 584 (DB).

(7) Joint pleading — One alone cannot apply for amendment — He must file separate plaint. AIR 1961 Ker 153 (153): 1960 Ker LT 1102.

(8) Suit against dead person — Amendment of plaint — Application for amendment of plaint made under Order 30, R. 10 — Allegations should be enquired into before suit is dismissed. 1961 Jab LJ 559.

(9) Amendment seeking substitution of the plaintiff for another after the period of limitation cannot be allowed. AIR 1959 Madh Pra 425 (426): 1959 MPLJ 987.

(10) Suit filed on behalf of joint Hindu family firm — Application to convert it as one on behalf of an alleged registered firm — Case is not one of substitution of one plaintiff for another. AIR 1959 Madh Pra 425 (426): 1959 MPLJ 987.

(11) Addition of parties — Suit for declaration that certain head of bullocks belonged to the plaintiff and not to the defendants — Plaintiff seeking to implead two persons so that such a declaration may be had before such persons also, thus avoiding future litigations and complications — Names of such persons also mentioned in the plaint — Amendment sought held, did not alter the nature of the suit — Further held, that it was for the lower Court to feel satisfied as to whether or not it should exercise its powers under Order 1, Rule 10 — Such exercise of discretion could not be interfered with in revision since it could not be said that the order relating to addition of parties was a matter concerning the jurisdiction of the Court. AIR 1967 Pat 326 (327).

(12) It is a duty of the court to see that the defendants are made aware of any amendment in the plaint, whether the amendment be in regard to the addition of parties or in regard to the contents thereof. AIR 1969 Pat 228 (232) (DB).

36. Suit by or against a dead person. — (1) Suit by or against dead person is a nullity and plaint cannot be amended by bringing his legal representatives on record. AIR 1953 Bom 356 (356) °° AIR 1947 Nag 73 (74, 75): ILR (1947) Nag 39 °° AIR 1946 Sind 20 (23) °° AIR 1923 Lah 652 (652) (DB) °° AIR 1927 Cal 880 (881) (DB) °° ('08) 31 Mad 86 (88) (DB).

[See however AIR 1955 Mad 644 (646).]
[But see AIR 1938 Nag 458 (459), (Where the mistake is bona fide the legal representative of deceased can be substituted.)]

(2) One of several plaintiffs or several defendants dead at time of institution — Suit cannot be said to be void ab initio. AIR 1947 Nag 73 (74, 75): ILR (1947) Nag 39 °° AIR 1934 All 25 (26) (DB) °° AIR 1928 Lah 359 (360) (DB). (Proper procedure is to strike out dead person's name and proceed with suit.)

(3) Where one of several plaintiffs or defendants was dead at time of institution

Order 1, Rule 10 — Note 36 (contd.)

of suit and such person was a necessary party the plaint can be amended by adding his legal representatives as parties. AIR 1947 Nag 73 (74, 75): ILR (1947) Nag 39 °° AIR 1927 Cal 880 (881) (DB) °° AIR 1928 Lah 359 (360) (DB).

[See however AIR 1953 Trav-Co 479 (475): ILR (1952) Trav-Co 595 (DB).]

37. Sub-section (5).— (1) Under sub-clause (5) of this rule, a person will be deemed to have been made a party and proceedings begin against him only on the service of summons on him. **AIR 1914 PC 129 (131): 41 Ind App 251** °° AIR 1925 Pat 37 (37): 3 Pat 230 (DB) °° (1967) 2 Andh WR 442.

(2) A suit as against any person added as defendant will be barred unless the service is within the period of limitation. ('15) 30 Ind Cas 795 (796) (DB) (UPBR) °° AIR 1925 Pat 37 (38): 3 Pat 230 (DB) °° AIR 1966 J and K 64 (67): 1964 Kash LJ 212. (Addition of necessary plaintiff after expiry of limitation — Effect — Suit by minor under guardianship of his father as proprietor and manager of firm — Amendment of plaint introducing other partners of firm after limitation — Suit held liable to be dismissed.) °° AIR 1960 Ker 75 (77): 1959 Ker LT 966. (Suit against junior member of Hindu joint family — Father added as defendant after period of limitation — Suit is barred.)

(3) Since sub-section (5) is expressly made subject to Section 22, Limitation Act, the suit as against a newly added defendant must be deemed to have been instituted when he is made a party so far as regards the question of limitation. ('11) 12 Ind Cas 586 (587) (DB) (Bom) °° **AIR 1967 SC 278 (281): (1966) Supp SCR 188: 69 Bom LR 20** °° AIR 1964 Mad 386 (387): (1964) 2 Mad LJ 138. (Suit for specific performance of agreement to sell immovable property — Transferee from defendant impleaded as party after expiry of three years from date of agreement — Suit is barred by limitation as against the transferee defendant.) °° AIR 1963 Punj 196 (198): (1963) 1 Com LJ 365 °° AIR 1960 J and K 141 (145).

(4) When a person is added as a party on an application made for the purpose, such addition must be deemed to have effect from the date of the application and not merely from the date of the order on the application. AIR 1927 Mad 468 (469): 50 Mad 372 (DB). (**DISSENTING FROM** AIR 1925 Mad 487.) °° AIR 1930 Sind 259 (260): 25 Sind LR 107 (DB) °° 1967 BLJR 732.

[See also ('93) 17 Bom 29 (32) (DB). (Same principle will apply where addition is made in appeal.)]

(5) A party once discharged and subsequently reinstated is a party only from the date of reinstatement. AIR 1942 Pat 270 (271) (DB) °° **AIR 1926 PC 88 (91).**

(6) Addition of parties — Section 22 of Limitation Act, 1908, gets attracted — Provision allows addition of parties as plaintiffs only. **AIR 1967 SC 278 (281): (1966) Supp SCR 188: 69 Bom LR 20. (AIR 1960 Bom 411, REVERSED.)**

(7) The question of limitation does not arise when a person is added as a party merely to enable the Court to adjudicate effectually and completely upon questions involved in the suit, without any relief being claimed against him. Order 1, R. 10 (2) provides for the addition of necessary parties and of proper parties. In adding necessary parties, Section 22 of the Limitation Act has to be taken into account. But in adding proper parties, against whom no relief is sought, the provisions of Section 22 of Limitation Act do not apply. AIR 1963 Madh Pra 51 (52, 53): 1962 MPLJ 1102 (DB) °° **AIR 1961 SC 1277 (1282): (1961) 3 SCR** 896: 64 Bom LR 82. (In a suit by the manager of a joint Hindu family for enforcement of a mortgage, persons interested in mortgage security are not necessary but proper parties.) °° AIR 1960 Andh Pra 98 (99): (1959) 2 Andh WR 294 (FB). °° (1968) 80 Mad LW 419: (1968) 1 Mad LJ 190.

(8) Abatement of suit — Death of plaintiff — Heirs to be substituted already on the record — Application for substitution within prescribed time is not necessary — Suit, therefore does not abate for want of substitution within time. AIR 1964 Pat 438 (439).

(9) Misdescription of defendant — Correction of bona fide error amounting to substitution — Limitation cannot be saved. 1962 Raj LW 610: ILR (1962) 12 Raj 856.

(10) Application for filing of award — Transposition of one of the respondents as applicant — The original applicant desirous of raising the same objections to validity of award as were raised by the respondent transposed as applicant, is subject to bar of limitation. AIR 1961 Punj 355 (358): 63 Pun LR 506.

(11) Appeal from preliminary decree in partition suit — Death of one of the appellants pending appeal — Legal representatives not brought on record within time — Appeal abates against heirs of deceased. AIR 1961 Pat 178 (186, 187): ILR 39 Pat 909.

(12) See also Notes under S. 22, Limitation Act.

38. Appeal.— (1) An order under O. 1, Rule 10 is not appealable. AIR 1958 Ker 304 (304): ILR (1958) Ker 23 (DB) °° AIR 1918 Pat 488 (488) (DB) °° AIR 1928 All 120 (123) (DB) °° AIR 1939 Oudh 102 (103): 14 Luck 447 (DB).

(2) An order adding or refusing to add a party or an order striking out the name of a party as having been improperly or unnecessarily joined is not appealable. AIR 1917 Cal 627 (628) (DB). (Addition of party.) °° ('94) 21 Cal 539 (541) (DB). (Refusal to add party.) °° AIR 1923 Mad 690 (691).

R. 11. Conduct of suit.—The Court may give the conduct of the suit to such person as it deems proper.

[1882 and 1877, S. 32; R. S. C., O. 16, R. 39.]

Order 1, Rule 10 — Note 38 (contd.)

(Unnecessary joinder.) ** AIR 1922 Mad 332 (332): 45 Mad 194 (DB). (Improper joinder.)

(3) An order awarding costs under sub-rule (2) is not appealable. AIR 1937 Lah 67 (68).

(4) Where defendant's name is struck out on ground that plaintiff has no cause of action against him, and the suit is dismissed as against him, the order, in substance, amounts to a decree and is therefore appealable as such. AIR 1941 Nag 166 (167). (AIR 1926 Nag 75 NOT FOLLOWED.) ** AIR 1941 Pat 385 (387): 20 Pat 417 (DB) ** AIR 1919 Mad 871 (872): 42 Mad 219 (DB) ** AIR 1931 All 333 (336): 53 All 466 (DB).

(5) Partition suit — Name of one of defendants struck out leaving undecided defendant's claim to a share in partition — Order amounts to a decree and is appealable. AIR 1925 Pat 121 (122, 123): 3 Pat 859.

(6) Mere fact that order under this rule is drafted in form of a decree will not make it a decree, so as to confer a right of appeal. AIR 1926 Nag 75 (75).

(7) Application for substitution falling under Order 22, Rule 10 and not under Order 1, Rule 10 — Order on is appealable. AIR 1952 Pat 323 (325): 29 Pat 160 (DB) * * AIR 1937 Mad 200 (206).

(8) The principal defendant who agreed in trial Court to transposition of a pro forma defendant as a co-plaintiff cannot challenge in appeal the transposition. AIR 1956 Raj 45 (47).

(9) The question whether a person is a necessary party in suit or not when it depends upon decision of mixed questions of fact and law which were not raised and decided either in trial Court or first appellate Court, will not be allowed to be raised for first time in second appeal. AIR 1954 Raj 17 (22): ILR (1953) 3 Raj 720 (DB).

(10) Tehsildar ordering addition of parties — Order appealable under Section 16 (2), Andhra Ten. Act. (1962) 2 Andh WR 180.

39. Revision.— (1) Addition of parties may, in some cases, raise controversies as to "the power of Court", in contradistinction to its inherent jurisdiction, or in other words, of jurisdiction in the limited sense in which it is used in Section 115 of the Code. AIR 1958 SC 886 (895).

(2) An order under Order 1, Rule 10 is not ordinarily revisable under Section 115. AIR 1954 Madh B 156 (157) ** ILR (1953) Hyd 265 (270) ** AIR 1952 Trav-Co 74 (74, 75) * * AIR 1942 Oudh 338 (338): 18 Luck 56 ** AIR 1934 Pat 370 (372) ** AIR 1955 Him Pra 43 (44). (Even if it is erroneous.)

(3) Where the order amounts to a failure to exercise jurisdiction, as where the Court considers it has no power to act under this rule, it is revisable. AIR 1951 Pat 364 (366) (DB) ** AIR 1916 Cal 80 (82) (DB) ** AIR 1934 All 25 (27) (DB).

(4) Court failing to consider whether application under Order 1, Rule 10 should be granted or not — Revision lies. AIR 1958 Madh Pra 6 (7) ** ('10) 13 Oudh Cas 109 (112) (DB).

(5) Refusal to add necessary party — Order is revisable. AIR 1953 Cal 348 (349) ** AIR 1948 Oudh 44 (45) ** AIR 1935 PC 185 (186): 62 Ind App 257.

(6) Improper addition of party causing misjoinder — Order is revisable. AIR 1926 Mad 135 (136) ** AIR 1928 Pat 281 (282).

(7) Order transposing defendant as plaintiff causing prejudice to party is revisable. AIR 1953 Sau 100 (100).

(8) Order refusing application for joinder on ground that applicant has no locus standi or that plaintiff objects to such joinder is revisable. AIR 1942 Oudh 388 (388): 18 Luck 56 ** ('10) 7 Ind Cas 481 (482) (DB) (Cal) * * (94) 21 Cal 539 (542) (DB).

(9) Where the order is manifestly unjust, a revision will lie under Section 115. AIR 1950 Mys 23 (26) ** ('12) 15 Oudh Cas 304 (308, 309) (DB) ** AIR 1918 Mad 1137 (1139).

(10) Order dismissing application under Order 1, Rule 10 — High Court can interfere in revision if it finds some material irregularity or illegality in order. AIR 1969 Punj 57 (59): 70 Pun LR 451.

(11) Addition of parties — Question is of judicial discretion — Wrong exercise of discretion amounts to material irregularity and can be interfered with in revision. 1965 Raj LW 487.

Order 1, Rule 11 — Note 1

(1) The word "person" means a party to suit, and Court has no power to give conduct of suit to a stranger. AIR 1928 Cal 143 (146) (DB).

(2) Where more persons than one join as co-plaintiffs in one action they should all be jointly represented by one or more counsel. Each one of the plaintiffs or each one of the defendants, as the case may be, is not entitled to appear, act and plead by his own advocate. Even where different advocates appear for different plaintiffs or different defendants whose defence is set out in one common written statement, the Court under Order 1, Rule 11 has got the indisputable power to direct any of these advocates to be in charge of the case for all the plaintiffs or defendants, as the case may be. AIR 1961 Bom 94 (95, 96): 62 Bom LR 947.

(3) Under this rule read with Order 1, Rule 10, Court has power to transpose a defendant as plaintiff and give him the conduct of suit. AIR 1921 Mad 124 (124) (DB).

R. 12. Appearance of one of several plaintiffs or defendants for others.—(1) Where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

[1882 and 1877, S. 35; 1859, S. 115.]

R. 13. Objections as to non-joinder or misjoinder.—All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

[1882 and 1877, S. 34; See O. 1, R. 9; O. 2, R. 7 and S. 99.]

Order 1, Rule 12 — Note 1

(1) Although under Rule 12, when it is read by itself, it may appear that each one of the plaintiffs or the defendants has got an independent right of acting, appearing or pleading for himself its implication when it is read in conjunction with Rule 11 cannot lead to the conclusion that each one of the plaintiffs or each one of the defendants, as the case may be, is also entitled to appear, act and plead by his own advocate. AIR 1961 Bom 94 (96): 62 Bom LR 947.

ORDER 1, RULE 13 — SYNOPSIS

1. Scope.
2. Objection at late stage.
3. "Unless the ground of objection has subsequently arisen".

1. Scope. — (1) The rule applies to non-joinder or misjoinder of parties to appeals, as well as to suits. AIR 1921 Mad 243 (245): 44 Mad 344 (DB).

(2) Rule applies to references to arbitration. AIR 1914 Cal 497 (498) (DB).

(3) Rule applies to election petitions under the Representation of the People Act, 1951. **AIR 1957 SC 444 (445): 1957 SCR 370 ** AIR 1954 SC 210 (214, 215): 1954 SCR 892.**

(4) In the case of an election petition which is defective on the ground of non-inclusion of a necessary party a plea of waiver under this Rule cannot prevail over the mandatory provisions of Section 86 (1) of the Representation of the People Act, 1951 which leave no option to the Court but to dismiss the petition. AIR 1969 Andh Pra 68 (76).

(5) Objection on the ground of want of cause of action or right of suit in plaintiff, which is disclosed only after evidence is taken — Rule does not apply. (1900) 25 Bom 433 (467).

(6) Although the rule limits the right of a defendant to object, it does not in any way affect the Court's power under O. 1, Rule 10 to add or strike out parties; nor does it limit the right of the plaintiff to add parties. (1906) 3 All L Jour 474 (475) (DB) ** (1881) 5 Bom 609 (612) (DB).

[See AIR 1936 PC 51 (54).]

2. Objection at late stage. — (1) Objections as to misjoinder or non-joinder of parties not raised in lower Court should not be allowed to be raised for first time in Appellate Court. AIR 1956 Bom 241 (243): ILR (1956) Bom 369 ** AIR 1957 Madh B 113 (114) ** AIR 1955 All 172 (176) (DB) ** AIR 1964 Tripura 13 (15) ** AIR 1961 Pat 28 (30, 31).

(2) Objection if not taken in written statement and before first hearing, must be deemed to have been waived. AIR 1955 All 172 (176) (DB) ** AIR 1953 Pat 178 (180): 31 Pat 851 (DB) ** AIR 1915 Mad 319 (319) (DB).

(3) Company — Liquidation — Provisional liquidator appointed — Suit by director in name of company — Objection as to incompetency of suit raised after cancellation of order appointing liquidator — Cannot be raised. (1961) 31 Com Cas 610 (Cal).

(4) Where objection is taken at the proper time, Court is bound to adjudicate upon it. (1887) 14 Cal 435 (438) (DB).

(5) Adjudication of objection is binding on parties till it is set aside. AIR 1956 Cal 577 (583) (DB) ** AIR 1950 Mad 760 (761) ** AIR 1956 Cal 577 (583): 60 Cal WN 1006 (DB). (Necessary parties not impleaded — Defendant's objection of non-joinder overruled — No appeal — Decree passed — Defendant will not be allowed to challenge decree on ground of defect of parties.)

(6) If after objection is taken by defendant plaintiff proceeds with suit without adding necessary parties, and the Court finds that the objection is well founded, the suit must be dismissed. AIR 1956 Trav-Co 181 (183): ILR (1956) Trav-Co 62 (FB) ** (1881) 6 Cal 815 (823) (DB).

(7) Objection raised in lower Court not pressed — It cannot be allowed to be re-opened in Appellate Court. AIR 1918 Mad 1260 (1261) (DB).

ORDER II

FRAME OF SUIT

R. 1. Frame of suit.—Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

[1882 and 1877, S. 42.]

Order 1, Rule 13 — Note 2 (contd.)

(8) Party raising objection on ground of non-joinder should show which person is necessary to be joined. AIR 1953 Pat 178 (180): 31 Pat 851 (DB) ** AIR 1936 Mad 782 (783).

(9) Where defendant opposes plaintiff's application for joinder of certain parties and Court rejects the application, defendant cannot subsequently raise the plea of non-joinder with respect to such parties. AIR 1925 Pat 57 (58): 3 Pat 818 (DB).

(10) Where a suit was first heard ex parte and, on defendant's application, suit was ordered to be re-heard and he was allowed to put in a plea of non-joinder, it was held that the objection was taken in proper time. (1900) 1900 Pun LR No. 2, page 4 (7) (DB).

(11) Where a guardian of minor defendant neglects to raise the plea in his written statement, it will not be deemed a waiver against the minor so as to preclude him from raising it in his written statement after attaining majority. AIR 1932 Mad 583 (586) (DB).

(12) Order 1, Rule 13 does not apply to non-joinder of necessary parties. AIR 1953 Assam 193 (194): ILR (1953) 5 Assam 326 (FB) ** ILR (1954) 4 Raj 244 (250) ** (1891) 13 All 432 (465) (FB) ** 1965 Raj LW 92 (93).

[But see AIR 1956 Cal 577 (583): 60 Cal WN 1006 (DB). (Necessary parties not impleaded — Defendant's objection of non-joinder overruled — No appeal — Decree passed held defendant will not be allowed to challenge it on ground of defect of parties.) ** AIR 1918 Mad 535 (536) (DB).]

(13) Plea of non-joinder of necessary parties — Can be taken at any stage provided no new facts have to be alleged or proved — Plea, in fact, taken in the case, though vaguely, at earlier stage — Plea allowed to be raised in Article 227 proceeding. AIR 1969 Cal 360 (361).

(14) An objection on ground of non-joinder cannot be taken by a defendant who is found to have no interest in subject-matter of suit. AIR 1914 Oudh 109 (111) (DB).

3. "Unless the ground of objection has subsequently arisen".— (1) An objection as to non-joinder of parties cannot be allowed to be raised after settlement of issues merely by reason of the fact that ground of objection was not known to the defendant at or before the settlement of issues. AIR 1915 Mad 319 (319) (DB).

(2) A defendant cannot be deemed to have waived the objection under this rule when he had no opportunity of taking the objection or when he was ignorant of the facts on which the objection depended. (1892) 14 All 524 (526) (DB).

ORDER 2, RULE 1 — SYNOPSIS

1. Scope.
2. Subjects in dispute.
3. "As far as practicable".

1. Scope.— (1) The penalty for non-compliance with the rule is provided partly by Section 11, Explanation IV and partly by Order 2, Rule 2. AIR 1931 Bom 114 (116).

(2) Order 2, Rule 1 has reference mainly, if not exclusively, to correct joinder of causes of action, adequate inclusion of reliefs claimed, and so forth, rather than to joinder of parties. AIR 1914 Lah 187 (192): 1915 Pun Re No. 3 (DB).

2. Subjects in dispute.— (1) The expression "subject in dispute" means "the cause of action or the subject-matter of litigation, that is, the right which one party claims as against the other, and demands the judgment of the Court upon". (1903) 26 Mad 760 (766) (DB).

(2) Although it is ordinarily not open to the parties to plead that the debt was divisible unless the contract had expressly stipulated therefor, yet where a special enactment (such as the Madras Indebted Agriculturists (Repayment of Debt) Act 1955) which is invested with an overriding power with regard to any other law creates a liability to pay only in instalments, each instalment would furnish a distinct cause of action. (1962) 2 Mad LJ 352.

(3) Where a plaintiff sues as owner he should bring before the Court in the same suit all the grounds of attack available to him with reference to his claim for ownership. (1901) 25 Bom 189 (192, 197) (DB) ** AIR 1923 Mad 257 (259): 46 Mad 13 (DB).

(4) A suit for partition should generaliy embrace the whole partible property belonging to parties subject to various exceptions. AIR 1920 All 87 (88) (DB) ** (1897) 24 Bom 128 (130, 133, 134) (DB) ** AIR 1923 Cal 501 (502, 504) (DB) ** AIR 1916 Pat 347 (348): 1 Pat L Jour 393 (DB) ** AIR 1954 Raj 269 (270): ILR (1954) 4 Raj 423.

(5) All disputes arising between parties should be settled in one suit for partition instead of leaving the parties to have their disputes determined piecemeal at different times by different Courts. AIR 1929 Bom 424 (429) (DB).

R. 2. Suit to include the whole claim.—(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Relinquishment of part of claim.—(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Order 2, Rule 1 — Note 2 (contd.)

(6) As a general rule, a partner cannot sue merely for his share of the profits of the firm, but must sue for taking the whole accounts of the firm. (1887) 9 All 120 (121) (DB). (Suit in respect of certain losses only of a partnership does not lie.) ** (1874) 21 Suth WR 300 (301) (DB).

[But see AIR 1931 Mad 300 (302): 54 Mad 671 (DB).]

(7) Every suit for pre-emption must include the whole of property subject to plaintiff's right of pre-emption. (1886) 6 All 423 (424, 425) (DB) ** AIR 1931 Oudh 52 (53).

(8) Suit for declaration of right to maintenance — Plaint must be so framed as to enable ascertainment of amount of maintenance. AIR 1926 Sind 18 (19) (DB).

(9) A suit to enforce, or to redeem a mortgage partially is, as a rule, not maintainable. (1899) 22 Mad 209 (211, 212) (DB).

(10) In a suit by vendee to recover possession of property from vendor, equity in favour of vendor arising on account of non-payment of whole or part of purchase-money may also be enforced. AIR 1929 Bom 60 (63).

(11) Although in a suit on mortgage, full accounts should be taken between the mortgagor and the mortgagee, the mortgagor is not entitled to claim an account of an entirely independent transaction. AIR 1930 Cal 85 (85, 86) (DB).

(12) Where in proceedings under Section 145 of the Criminal Procedure Code, the property if placed in the possession of a receiver, and a civil suit is brought for the determination of the rights of the rival claimants, the right of the successful claimant to obtain possession from the receiver is not a "subject in dispute" in the suit, and hence the suit need not include a prayer for possession. AIR 1925 Mad 427 (428).

(13) When a plaintiff comes to Court to set aside an adoption on foot of which there is a partition, the obligation lies on him to so constitute his suit as to enable the Court to deal with the whole subject-matter and dispose of all the rights and interests of the parties to the deed. He cannot seek to set aside the adoption without also repudiating the deed of partition. AIR 1951 Orissa 313 (321) (DB).

(14) A suit for accounts will lie only in such cases where an amount due to a plaintiff cannot be ascertained without a mutual settlement of accounts; but where with a little effort such as an arithmetical calculation, the amount can be ascertained, the suit must be for the recovery of the precise amount of money. AIR 1957 J and K 47 (2) (47).

3. "As far as practicable".— (1) Where the evidence in support of one ground of his claim is destructive of the other ground, the plaintiff is not bound to bring into the same suit, both the grounds of his claim. (1908) 31 Mad 385 (396).

ORDER 2, RULE 2 — SYNOPSIS

1. Scope and object.
2. Whole claim to be included in suit.
3. Plaintiff must have been aware of the claim.
4. Court must have jurisdiction to try the claim.
5. Cause of action.
6. Obligation and collateral security.
7. Sucessive claim arising under the same obligation.
8. Omission to sue in respect of a portion of a claim.
9. Minor.
10. Intentional relinquishment.
11. Omission to sue for all reliefs.
12. Suits for possession and rent.
13. Suits for specific performance and other reliefs.
14. Partition suits.
15. Mortgage suits.
16. Other examples.
17. Leave of Court.
18. Identity of the parties necessary in both the suits.
19. Previous suits must have been decided on merits.
20. Rule does not apply to different causes of action.
21. First suit for possession, second for mesne profits.
22. Other examples of different causes of action.
23. "Shall not afterwards sue".
24. Set off.
25. Plea in defence not barred.
26. Insolvency proceedings, not suits.
27. Application to sue in forma pauperis.
28. Amendment of plaint.
29. Writ petition.

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Omission to sue for one of several reliefs.—(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any reliefs so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

ILLUSTRATION

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

[1882 and 1877, S. 43; 1859, S. 7; See Ss. 11 and 12.]

Order 2, Rule 2 (contd.)

1. Scope and object.— (1) The rule is based on the principle that the defendant should not be twice vexed for one and the same cause. AIR 1958 Andh Pra 608 (610) (DB) ** AIR 1955 Andhra 194 (196) ** AIR 1955 Orissa 6 (10): 1955 Cri L Jour 162 (DB) ** AIR 1931 PC 229 (230) ** AIR 1966 Andh Pra 325 (327): (1965) 2 Andh WR 226 (DB) ** AIR 1964 Raj 114 (116): 1964 Raj LW 55 (DB).

(2) To apply Order 2, Rule 2 two conditions must be satisfied, firstly that the previous and the present suit must arise out of the same cause of action and secondly both the suits must be between the same parties. (1966) 1 Andh LT 251 (252): (1966) 2 Andh WR 253 ** AIR 1966 Andh Pra 325 (327): (1965) 2 Andh WR 226.

(3) Subsequent suit based on a distinct cause of action — No question of it being barred either as res judicata or under O. 2, Rule 2, C. P. C. arises. (1969) 69 Pun LR 1062.

(4) The rule does not vest any right in the defendants. AIR 1933 All 228 (229) (DB).

(5) The correct test to apply in cases falling under Order 2, Rule 2 is to see whether the claim in the second suit is in fact founded upon a cause of action distinct from that which was the foundation of the first suit. (1966) 1 Andh LT 251 (253): (1966) 2 Andh WR 253.

(6) The rule bars the splitting of claims and the splitting of remedies. AIR 1949 PC 78 (84): 75 Ind App 121: ILR (1948) All 571 ** AIR 1958 Assam 67 (69): ILR (1956) 8 Assam 177 ** 1956 All L Jour 918 (919) ** AIR 1955 All 661 (662) (DB) ** AIR 1959 Andh Pra 404 (406, 407): (1959) 1 Andh WR 208.

(7) In order to sustain a bar under O. 2, Rule 2, the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave of the Court, omitted to sue for the relief for which the second suit had been filed. AIR 1968 Mad 226 (228): (1967) 2 Mad LJ 490.

(8) Parties cannot by agreement override the rule. AIR 1914 Lah 121 (122): 1914 Pun Re No. 4 (DB).

(9) The rule should be construed strictly. AIR 1953 Vindh Pra 31 (32) ** AIR 1915 Cal 126 (126): 41 Cal 825 (DB).

(10) Omission to object under this rule in the previous suit is not a bar to an objection in respect of the later suit. AIR 1942 Pesh 9 (10).

(11) This rule does not apply to an application for restitution. AIR 1935 All 195 (197) ** AIR 1918 Pat 396 (397, 398): 3 Pat L Jour 367 (DB) ** AIR 1935 Cal 206 (208): 62 Cal 217 (DB).

(12) The rule has no application to proceedings before the Madras Hindu Religious Endowments Board. AIR 1948 Mad 152 (153): ILR (1947) Mad 828 (DB).

(13) The rule does not apply to certificate proceedings. AIR 1948 Pat 313 (316): 26 Pat 312 (DB).

(14) Rule 2 of the rules made under Section 28 of the Madras Agriculturists' Relief Act does not offend Order 2, Rule 2. AIR 1942 Mad 362 (363): ILR (1942) Mad 647.

(15) The provisions of Order 2, Rule 2 will apply to a case under the Punjab Security of Land Tenures Act or the Punjab Tenancy Act on the ground that a person's right to relinquish a portion of his claim is a matter of general law and procedure and in consonance with the principles of natural justice. ILR (1965) 1 Punj 667 (670): 1965 Cur LJ 328.

(16) Applicability — Bar of Order 2, Rule 2 may not apply to petition under Article 226 of the Constitution. AIR 1962 SC 1334 (1337): 1962 Supp (1) SCR 315 ** AIR 1965 SC 1153 (1159): (1965) 2 SCR 547 ** (1968) 70 Pun LR 1095.

(17) Order 2, Rule 2 will have no application to enquiries under Section 8 of the Travancore Cochin Forest Act 1951. 80 Mad LW 44 (45): (1967) 2 Mad LJ 302 (DB).

(18) Decree for different reliefs — Separate and successive execution applications in respect of each relief are competent. Order 2, Rule 2 does not apply to execution proceedings. AIR 1960 Assam 16 (17): ILR (1959) 11 Assam 95.

Order 2, Rule 2 — Note 1 (contd.)

(19) Petition for divorce against wife on ground of adultery — Claim for damages against adulterer cannot be joined — Order 2, Rule 2 does not apply to an application under Hindu Marriage Act (1955). AIR 1963 Guj 152 (153): (1963) 4 Guj LR 514.

(20) A bar under Order 2, Rule 2 is not really a matter of substance but one of procedure. ILR (1961) 2 All 606.

(21) In a certain sense the bar under Order 2, Rule 2 is in pari materia with the bar created by Section 11, C. P. C. ILR (1961) 2 All 606.

(22) Proceedings under Section 45-D (2), Banking Companies Act (1949) — Principles underlying Order 2, Rule 2 and O. 34, Rule 14, C. P. C. can be extended. AIR 1965 Mad 421 (421): (1965) 1 Mad LJ 231.

(23) The scheme of the rule is that it is mandatory that the right based upon one cause of action should be litigated in one suit unless it comes within the purview of the sub-rule (3). AIR 1961 Andh Pra 157 (159): (1959) 2 Andh WR 505 (DB).

(24) In its application to a mortgagee suing the mortgagor, Order 2, Rule 2 is of a scope altogether different from that of Section 67-A of T. P. Act. On the one hand, the former section will come in only when there is a single cause of action; the latter subject to other conditions, applies when there are more than one mortgage. On the other hand, the disability imposed by Order 2, Rule 2 on the plaintiff is absolute, he cannot bring fresh suit. While the disability imposed on the plaintiff-mortgagee by Section 67-A is not absolute, as the section itself does not expressly create any such disability. It being enacted solely for the benefit of the defendant mortgagor, he can waive it. AIR 1959 Madh Pra 426 (428, 429): 1959 MPLJ 554.

(25) The purpose of O. 2, R. 2 is to prevent a party from enforcing a claim on one and the same cause of action by instalments. But apart from statute, this rule cannot be said to be based on equity, justice and good conscience to be enforced by a Court of law. Order 2, R. 2 can only apply when such law was in force at the time when the first suit was brought and is also in force when the second suit is brought. AIR 1959 Raj 95 (95, 96): 1959 Raj LW 52. (A suit for possession of the agricultural land was one cognisable by the Revenue Courts, under Sec. 190 (a) of the Tonk Land Regulation and not being a civil suit hearable by the Revenue Courts under Section 191. Order 2, Rule 2, Civil P. C. did not apply to it.)

2. Whole claim to be included in suit. — (1) Under sub-rule (1) every suit shall include the whole of the claim in respect of the cause of action. AIR 1917 Cal 841 (843, 844): 43 Cal 95 ** AIR 1936 Lah 379 (380) (DB).

(2) Under sub-rule (3) where the plaintiff is entitled to several reliefs, he may sue for one or more of such reliefs, and reserve his right, with the leave of the Court, to sue later on for the other reliefs. (1881) 5 Bom 463 (465).

3. Plaintiff must have been aware of the claim. — (1) The plaintiff must have been aware, at the time of his first suit, of his right to the portion omitted by him or of the facts which would have entitled him to sue for it. AIR 1923 All 230 (230, 231) (DB) ** (1888) 15 Cal 800 (808): 15 Ind App 106 (PC) ** AIR 1917 Lah 19 (21): 1916 Pun Re No. 94 ** AIR 1936 Mad 699 (700) ** AIR 1964 Andh Pra 124 (125): (1963) 2 Andh LT 418. (Partition suit — Properties, existence of which plaintiff had no knowledge, omitted — Subsequent suit for partition of these properties is not barred.)

(2) Actual knowledge as opposed to constructive knowledge is necessary to bar a subsequent suit. AIR 1918 Nag 158 (159).

(3) If the plaintiff was aware of his right, the fact that omission to include any portion of his claim in his former suit was accidental or due to mere oversight will not exempt him from the bar. AIR 1953 All 541 (542) ** AIR 1941 Pat 37 (38) (DB) ** (1867) 11 Moo Ind App 551 (605, 606) (PC).

4. Court must have jurisdiction to try the claim. — (1) The bar of Order 2, Rule 2 does not apply unless the Court which tried the former suit had jurisdiction to try the claim omitted by the plaintiff. **AIR 1940 PC 70 (74): 67 Ind App 179: ILR (1940) Kar (PC) 149: ILR (1940) Lah 330.**

(2) Where the prior suit was in a Revenue Court, and the later suit was in a Civil Court in respect of a claim not triable by the Revenue Court, the later suit is not barred under this rule. AIR 1942 Oudh 325 (327): 17 Luck 712 ** (1887) 9 All 23 (25).

(3) Where the addition of the claim would offend the provisions of Order 2, Rule 4 or Rule 5, it may be omitted and subsequently sued on. (1902) 24 All 553 (554, 555) (DB).

(4) Where a certificate under the Pensions Act was necessary condition but was wanting in the former suit, a subsequent suit is not barred. **AIR 1929 PC 166 (169): 56 Ind App 267: 51 All 439.**

(5) Addition of a relief depriving the Court of jurisdiction to try the suit does not affect the applicability of the rule. AIR 1952 Mys 99 (101): ILR (1952) Mys 259 (DB) ** AIR 1951 Pat 190 (193) (DB).

5. Cause of action. — (1) The expression "cause of action" in this rule means the cause of action for which the suit was brought. AIR 1954 Bom 125 (128): ILR (1954) Bom 187 ** (1885) 8 Mad 520 (524): 12 Ind App 116 (PC) ** (1966) 1 Andh LT 251 (252): (1960) 2 Andh WR 253.

Order 2, Rule 2 — Note 5 (contd.)

[See also AIR 1966 Madh Pra 318 (323): 1966 Jab LJ 1133.]

(2) In order that the cause of action may be the same it is necessary not only that the facts which would entitle the plaintiff to the right claimed must be the same, but also that the infringement of his right at the hands of the defendant must have arisen, in substance, out of the same transaction. AIR 1955 All 661 (663) (DB) ** (1966) 1 Andh LT 251 (252): (1966) 2 Andh WR 253 ** (1963) 65 Pun LR 838 (847) ** ILR (1961) 2 All 606.

(3) A rough test as to whether the cause of action is the same is to see whether the same evidence will sustain both suits. **AIR 1949 PC 78 (86): 75 Ind App 121** ** ILR (1955) Punj 395 (399) ** ILR (1961) 2 All 606 ** ILR (1967) Guj 545: 8 Guj LR 677 ** (1966) 1 Andh LT 251 (253): (1966) 2 Andh WR 253. (If apart from what is the proof in the first case some additional facts have to be proved in the second one it cannot be said that the two suits are based on the same cause of action.) ** AIR 1960 Mys 178 (181): 37 Mys LJ 889.

(4) The allegations in the two suits, and not the facts found by the Court in the former suit, decide whether the cause of action is the same. AIR 1942 Cal 407 (410) ** (1882) 8 Cal 819 (823, 824) (DB) ** AIR 1924 Bom 141 (142) ** AIR 1915 Mad 888 (888): 38 Mad 247 (DB) ** (1966) 1 Andh LT 251 (253): (1966) 2 Andh WR 253.

[But see (1910) 8 Ind Cas 9 (12) (All).]

(5) The cause of action refers entirely to the grounds set out in the plaint as the cause of action upon which the plaintiff asks the Court to arrive at a conclusion in his favour. AIR 1954 Bom 125 (127): ILR (1954) Bom 187 ** ILR (1955) Punj 395 (399)**AIR 1954 Mad 158 (160) ** AIR 1949 PC 78 (86): 75 Ind App 121: ILR (1948) All 571 ** AIR 1966 Andh Pra 325 (327): (1965) 2 Andh WR 226 (DB) ** (1966) 8 Orissa JD 26.

(6) The causes in the two suits may be the same though the fact alleged may not be exactly identical in the two cases. **AIR 1949 PC 78 (86): 75 Ind App 121** ** AIR 1964 Bom 42 (43, 44, 46): 65 Bom LR 588. (The circumstance that in the two suits the plaintiff may be required to establish that the defendant was in possession of the property during two different periods will not justify the conclusion that the cause of action for the two suits is different.)

(7) Order 2, Rule 2 does not require that when a transaction gives rise to several causes of action, the plaintiff must combine all the causes of action in one suit and if necessary base his claims alternatively in the same suit. AIR 1968 Mad 226 (228): (1967) 2 MLJ 490 ** AIR 1964 Pat 452 (455) ** AIR 1961 Orissa 148 (150) ** AIR 1960 Mys 178 (181): 37 Mys LJ 889.

(8) Each encroachment gives rise to a different cause of action. (1963) 65 Pun LR 838 (841).

(9) Plaintiff cannot split up the parts really constituting the same cause of action and file different suits in respect of them. AIR 1925 Oudh 53 (54) ** AIR 1933 Pat 715 (717) (DB) ** AIR 1968 Mad 226 (228): (1967) 2 Mad LJ 490 ** AIR 1968 Raj 51 (54): 1967 Raj LW 637 (DB).

[See however 1963 All WR (HC) 619 ** AIR 1925 Nag 366 (368). (But where the cause of action has been split up by the agreement of the parties, it cannot be said that there is a single cause of action.)]

(10) The correct test to find whether there has been a splitting up is whether the claim in the new suit is in fact founded on a cause of action distinct from that which was the foundation of the first suit. AIR 1964 Madh Pra 129 (131, 132): 1963 Jab LJ 953 (DB) ** (1966) 8 Orissa JD 26.

(11) The material cause of action under this rule is one which is ripe for enforcement and on which the plaintiff can make a present claim. AIR 1956 Cal 570 (573) (DB) ** AIR 1955 Trav-Co 170 (171).

(12) A cause of action consists of all facts which it is essential for the plaintiff to allege and to establish which taken with the law applicable to them gives him a right against defendants. The plaintiff cannot create a cause of action solely by his own effort; it must be created for him by some act of the defendant. AIR 1965 All 590 (594): 1965 All WR (HC) 146 (FB) ** AIR 1966 Andh Pra 325 (327):(1965) 2 Andh WR 226 (DB). (It has no relation whatever to the defence that may be raised.) ** AIR 1966 Madh Pra 95 (104): 1965 MPLJ 809 (DB) ** AIR 1964 Madh Pra 129 (131, 132): 1963 Jab LJ 953 (DB).

(13) A plaintiff must state not only the cause of action but also other circumstances such as that the Court has jurisdiction and that the cause of action has not been dead or discharged. But these circumstances do not become part of cause of action on account of their being stated along with the cause of action in the plaint. AIR 1965 All 590 (594): 1965 All WR (HC) 146 (FB).

(14) In order to apply the provision of Order 2, Rule 2, C. P. C. to bar a suit what was essential to be found out was (1) as to what was the cause of action in respect of which the claim was made in the previous suit, (2) whether the claim or a portion of a claim made in the subsequent suit was based on the same cause of action as the previous one and was between the same parties unless the second condition was fulfilled there could be no bar to the claim made in the subsequent suit. ILR (1967) Guj 545: 8 Guj LR 677 ** AIR 1960 Mys 304 (308, 309): 38 Mys LJ 875 (DB).

(15) The meaning of the term of cause of action as used in Order 9, Rule 9, C. P. C. is exactly the same as used in

Order 2, Rule 2 — Note 5 (contd.)
Order 2, Rule 2. AIR 1960 Pat 387 (390): 1960 BLJR 389 (DB).

(16) The principles which are applicable in the decision of the question as to the identity of the causes of action are: (1) That the correct test in cases falling under Order 2, Rule 2 is whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit. (2) The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment. (3) If the evidence to support the two claims is different, then the causes of action are also different. (4) The causes of action in the two suits may be considered to be the same if in substance they are identical and (5) the cause of action has no relation whatever to the defence that may be set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff. AIR 1964 Bom 42 (43): 65 Bom LR 588. **(AIR 1949 PC 78,** Rel. on.)

(17) Where a special enactment which is invested with a overriding power with regard to any other law creates this effect of a liability to pay the debt in instalments; it is a reasonable interpretation to hold that each instalment will furnish a distinct cause of action. (1962) 2 Mad LJ 352 (DB).

(18) If by reason of later events, the satisfaction or discharge is rendered nugatory or is found to be void, again a claim accrues to the plaintiff-mortgagee. It may be that it is the original liability of the opposite party that has to be enforced. But there is a fresh cause of action. AIR 1968 Mad 226 (229): (1967) 2 Mad LJ 490.

6. Obligation and collateral security.— (1) An obligation and a collateral security for its performance constitute but one cause of action. AIR 1947 Oudh 135 (136): 22 Luck 26 (DB) ** (1880) 2 All 838 (839) (DB) ** (1963) 1 Andh WR 195. (Five mortgages executed to secure payment held collateral security constituting one cause of action.) ** 1962 Ker LJ 609: 1962 Ker LT 521. (Viewed as two remedies they may both be claimed. Where therefore the suit is based on both the difference in the period of limitation in respect of the remedies is immaterial.)

(2) Except for the Explanation the two would constitute distinct causes of action as they are under the English Law. **AIR 1922 PC 412 (413): 50 Ind App 115.**

7. Successive claims arising under the same obligation.— (1) Successive claims arising under the same obligation constitute a single cause of action. (1873) 20 Suth WR 358 (361) (DB) ** (1906) 8 Bom LR 547 (549) (DB) ** (1886) 9 Mad 279 (280, 281) (DB).

(2) Rule 2 is itself an artificial rule and the Explanation further extends the scope of the rule by enacting that successive claims arising under the same obligation shall be deemed to constitute a single cause of action. The Explanation is not intended to be an Illustration of the provisions of the rule but is itself a substantive provision, making what would otherwise be two independent causes of action, one cause of action for the purposes of the rule. AIR 1959 Andh Pra 404 (406, 407): (1959) 1 Andh WR 208 (DB).

(3) In the following cases it was held that the suit should include the whole claim :—

(a) Arrears of instalments under instalment bond. (1906) 8 Bom LR 547 (549) (DB).

(b) Arrears of rent for successive years. AIR 1956 Cal 570 (574) (DB) ** AIR 1954 Mad 158 (159, 160) ** AIR 1925 All 795 (796, 797) (DB) ** AIR 1922 Bom 152 (153): 46 Bom 229 (DB).

(c) Suits for royalty. AIR 1917 Cal 841 (843, 844): 43 Cal 95.

(d) Suits for profits. AIR 1951 All 561 (561) (DB).

(e) Suits for annuity. AIR 1922 All 379 (380, 381): 44 All 663 (DB).

(4) The extended meaning of the expression "cause of action" under the Explanation is only for the purpose of this Rule and does not apply to other provisions. AIR 1948 Cal 366 (367) (DB).

(5) The rule is not rendered inapplicable because of any variation in the reliefs claimable in the successive years. AIR 1954 Mad 158 (160).

(6) Where the lessor was given the option to claim each instalment of rent, not on the date it fell due but on subsequent date he himself pitched upon, the lessor can bring several suits. AIR 1956 Mad 640 (640).

(7) Plaintiff purchasing property and afterwards getting by separate assignment right to arrears of rent up to date of purchase — Separate suits for rent accrued after and before purchase are maintainable. AIR 1919 Mad 273 (274) (DB).

(8) The rule does not prevent the plaintiff from taking any other remedy which he may have for recovery. (1898) 21 Mad 236 (237) (DB).

(9) Where the bar pleaded is not one under this rule but is based on the ground of merger of the cause of action in the prior judgment, the bar will only apply to the claims actually included in the prior suit. AIR 1947 Cal 11 (14): ILR (1946) 2 Cal 605 (DB).

(10) The explanation to the rule must receive a strict construction since it operates as a bar of suit. AIR 1954 Mad 158 (159).

(11) Suit in respect of certain dealings of defendant recorded in plaintiff's khata — Obligation in respect of each item of khata is separate entity and the entries

Order 2, Rule 2 — Note 7 (contd.)
were not successive claims arising out of one obligation — Suit not barred by O. 2, Rule 2. AIR 1960 Madh Pra 315 (315): 1960 MPLJ 814.

8. Omission to sue in respect of a portion of a claim.— (1) Omission to sue for the whole claim will bar a fresh suit in respect of the portion so omitted. (1901) 25 Bom 162 (167) (DB) ** (1905) 2 Cal L Jour 480 (484) (DB) ** AIR 1933 Lah 412 (415) (DB).

(2) The bar cannot be avoided even by express reservation in the plaint of the right to sue for the omitted portion. AIR 1917 Cal 568 (570) (DB) ** AIR 1938 Rang 76 (79): 1937 Rang LR 447 (DB).

(3) Where the plaintiff seeks to amend his plaint by including omitted portion but is not allowed to do so, he cannot avoid the bar. **AIR 1949 PC 78 (87): 75 Ind App 121.**

(4) Where a plaintiff who is entitled to a larger interest claims only a smaller interest, the bar will apply. AIR 1937 Rang 324 (330).

(5) A person's right to relinquish a portion of his claim is a matter of general law and procedure and is in consonance with the principles of natural justice. 1965 Cur LJ 328: ILR (1965) Punj 667.

(6) Where a plaint is returned for presentation to the proper Court, an intermediate claim arising must be included in the plaint at the time of its representation in the proper Court. AIR 1954 Mad 158 (161).

(7) Where plaints in suits for arrears of rent for different periods were presented to revenue Court on the same day, it was held that all the plaints formed one document and there was no omission to sue or relinquishment of any portion of claim though no prayer was before the Court to treat them as one suit. AIR 1939 Mad 724 (729).

Suits for breaches of contract.— (8) Where the plaintiff in a suit for damages for breach of contract omits to claim a portion of the damages due, he cannot subsequently sue for such portion. (1883) 9 Cal 143 (146) (DB) ** (1909) 1 Ind Cas 319 (320) (DB) (Bom) ** AIR 1914 Lah 26 (28) (DB).

(9) Where the covenants although contained in the same contract create distinct obligations, the breach of each of them will give rise to a distinct cause of action. AIR 1940 Pat 76 (80): 18 Pat 789 (DB). (Obiter — Per Rowland J.) ** (1897) 21 Bom 267 (271) (DB) ** AIR 1923 Cal 615 (619) (DB) ** AIR 1966 Madh Pra 95 (104): 1965 MPLJ 809 (DB).

(10) Where the defendant commits breach of a contract of sale of goods by refusing to accept a portion of the goods and also by refusing to pay for the goods accepted, there is only one cause of action. The plaintiff cannot split it up and sue separately for the price of the goods accepted by the defendant, and for damages for the non-acceptance of the other goods. (1892) 19 Cal 372 (376, 380) (FB).

(11) Whole of the claim is to be included in a single suit where the plaintiff sues for the refund of the price paid as well as for damages for the failure to supply a portion of the goods contracted for. AIR 1950 Hyd 18 (19): ILR (1951) Hyd 178 (DB) ** AIR 1946 All 512 (514): ILR (1947) All 3 (DB).

(12) Prima facie each separate order and delivery of goods constitute a separate cause of action. AIR 1924 Rang 145 (146): 1 Rang 694 (DB) ** AIR 1916 Mad 544 (545) (DB).

(13) If all the goods were to be delivered under a single contract, then it would be a case of successive claims arising under the same obligation and there would be only one cause of action. AIR 1924 Rang 145 (146): 1 Rang 694 (DB) ** 1956 All L Jour 918 (919). (Two breaches of contract in one contract — Only one suit will lie.)

(14) Where the parties expressly provide in the indent that each monthly shipment should be treated as a separate contract, there would be a separate cause of action in respect of each monthly shipment. (1896) 19 Mad 304 (306) (DB) ** AIR 1915 Cal 126 (127): 41 Cal 825.

(15) Dismissal of public servant — Reliefs of declaration that order is wrongful and of arrears of salary cannot be separated. AIR 1964 Orissa 111 (112): ILR (1963) Cut 741 (DB) ** AIR 1968 Bom 304 (307): 69 Bom LR 710 (DB) ** AIR 1968 Madh Pra 204 (208): 1968 MPLJ 328 (DB) ** 1965 All LJ 292. (Claim for arrears of salary barred under Order 2, Rule 2 — It cannot be recovered under Section 15, Payment of Wages Act.)

Suits relating to different properties.— (16) Where the facts complained of are the same, there is only one cause of action though the reliefs sought may relate to different properties or different portions of a property. AIR 1956 Him Pra 50 (53) ** AIR 1958 Pat 565 (566). (Goods consigned to Railway — One consignment of 54 bales — 3 bales lost and some articles missing from 2 bales — Separate suits not maintainable.) ** AIR 1944 Mad 435 (436) ** AIR 1942 All 122 (125, 126): ILR (1942) All 103 (DB) ** AIR 1942 Cal 407 (411) ** AIR 1940 Pat 76 (80): 18 Pat 789 (DB). (Obiter — Per Rowland J.) ** (1867) 11 Moo Ind App 551 (605) (PC) ** AIR 1931 Bom 114 (116).

Suit for rent.— (17) A suit for rent must include the whole amount due to the plaintiff as rent. AIR 1948 Cal 366 (367) (DB) ** AIR 1930 All 527 (528) ** AIR 1933 Cal 831 (832).

(18) Suit for rent due for certain years — Plaintiff not including in suit claim rent for subsequent year which had become due on date of suit — Subsequent suit for

Order 2, Rule 2 — Note 8 (contd.)
recovery of such rent is barred under Order 2, Rule 2. AIR 1964 Andh Pra 412 (413): (1963) 2 Andh WR 1.

Suit for damages for tort.— (19) In a suit for damages for tort the entire amount of damages has to be recovered in one suit and several suits therefor should be discouraged. AIR 1931 All 670 (672) (DB).

Suit for accounts — (20) A suit for accounts should include all items claimed. AIR 1917 Cal 568 (570) ** AIR 1935 Lah 321 (322).

(21) Where the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united with another and form one continuous demand, the whole together forms but one cause of action. Madh BLJ 1954 HCR 636 (638) ** AIR 1916 Cal 580 (580, 581): 42 Cal 1043 (DB).

(22) Where in a suit for accounts the defendant says that on a taking of accounts he will be found entitled to get some amount but does not specify such amount, or pay Court-fee thereon, he cannot be deemed to have waived his right for such amount. AIR 1933 Sind 247 (249) (DB).

(23) In a suit for accounts for village profits, there is a separate and distinct cause of action in respect of accounts for each year. AIR 1947 Nag 176 (177): ILR (1947) Nag 235.

Suit on mortgages.— (24) A mortgagor suing for redemption and failing to claim recovery of a portion of the property cannot sue again for it. (1905) 28 Mad 406 (407, 408) (DB) ** AIR 1923 Bom 63 (64) (DB).

[But see (1886) 9 Mad 92 (95) (DB).]

(25) A puisne mortgagee who pays off a prior mortgage must include in the suit on his mortgage any further claim he may have by reason of such payment. (1910) 37 Cal 589 (597) (DB) ** (1911) 10 Ind Cas 336 (337) (DB) (All).

(26) A mortgagee holding a separate money bond against the mortgagor is not bound to enforce the money bond, along with the mortgage. AIR 1925 Mad 991 (992).

First suit for interest in mortgage and second for principal.— (27) Where there is a single obligation to pay the interest and the principal under a mortgage, a suit for interest alone when the principal also has become due will bar a subsequent suit for the principal. **AIR 1922 PC 412 (414):** 4 Lah 32: 50 Ind App 115 ** **AIR 1922 PC 23 (25, 26): 49 Ind App 9: 44** All 121 ** AIR 1958 Andh Pra 608 (610) (DB).

(28) Where there is an independent obligation to pay interest, a prior suit for interest is no bar to a later suit on the mortgage although the principal sum had become due. AIR 1940 Lah 498 (500) ** AIR 1925 Mad 1120 (1122): 48 Mad 703 (DB) ** AIR 1930 All 286 (287): 51 All 974 (DB) ** AIR 1963 Raj 116 (118, 119): 1963 Raj LW 1.

(29) Where, at the time of the prior suit, the principal sum had not become due, a subsequent suit for the principal will not be barred. AIR 1927 Mad 580 (581, 582) (DB) ** (1951) 29 Mys L Jour 51 (54) (DB) ** (1928) 107 Ind Cas 591 (592) (DB) (All).

Separate suits for unpaid instalments of interest and the balance of mortgage money where whole amount becomes due under default clause.— (30) A proviso of the nature of a default clause is inserted in a mortgage deed exclusively for the benefit of the mortgagees and it purports to give them an option either to enforce their security at once, or if the security is ample, to stand by their investment for the full term of the mortgage. **AIR 1932 PC 207 (211):** 7 Luck 442: 59 Ind App 376 ** **AIR 1926 PC 85 (87):** 48 All 457: 53 Ind App 187.

(31) Suit to recover arrears of defaulted instalments not converted into a suit for whole amount of kuri security bond — Subsequent suit for whole amount held not barred. AIR 1954 Trav-Co 511 (518) (DB).

(32) If the default clause provides that on default in payment of interest at the due time the mortgagee should be entitled to sell the properties for principal and interest, out of Court, and default occurs, but the mortgagee sues for interest alone, a subsequent suit for the principal is not barred. AIR 1929 Rang 71 (72): 6 Rang 771 (DB).

Instalment bonds with default clause in other cases.— (33) Where a creditor has an option either to sue for the whole amount or to sue for the instalments only, and he sues only for the instalments, a second suit by him when further instalments fall due will not be barred under this rule. AIR 1935 All 461 (462): 57 All 838 (DB) ** AIR 1945 All 119 (120): ILR (1945) All 105 ** AIR 1942 Nag 138 (140): ILR (1943) Nag 379.

[But see AIR 1939 Rang 251 (252): 1939 Rang LR 180.]

First suit for interest under a mortgage, second suit for possession.— (34) Where on the first default the mortgagee is entitled to sue both for possession and interest he cannot maintain separate suit in respect of them. (1910) 8 Ind Cas 224 (225) (Lah) ** AIR 1914 Lah 121 (123): 1914 Pun Re No. 4 (DB).

[See however AIR 1916 Lah 298 (298).]

[But see 1886 Pun Re No. 79, page 165 (165) (DB).]

(35) If mortgagee is entitled on default to sue either for interest or possession, separate suits are barred. AIR 1920 Lah 1 (3, 4): 1 Lah 457 (FB).

Order 2, Rule 2 — Note 8 (contd.)

Lease to mortgagor by mortgagee with possession — First suit for rent, second suit for principal. — (36) Where the lease forms in reality only an arrangement for the payment of interest, separate suits for rent and principal will not lie after principal has become due. Madh BLJ 1955 HCR 1368 (1375) ** AIR 1926 Lah 559 (560, 561) (DB) ** AIR 1960 Pat 106 (109): 1959 BLJR 521.

(37) Separate suits will lie where the lease and the mortgage constitute distinct and separate transactions. AIR 1928 Lah 732 (733) (DB) ** AIR 1932 Mad 466 (468, 469, 473) (DB) ** AIR 1964 Madh Pra 129 (131, 132): 1963 Jab LJ 953 (DB) ** AIR 1963 Ker 186 (187, 188): 1962 Ker LT 647 ** AIR 1963 Pat 350 (353): 1963 BLJR 361 (DB).

[See also AIR 1963 Pat 87 (92): 1962 BLJR 789 (DB).]

[See however AIR 1968 Mad 226 (228): (1967) 2 MLJ 490. (Transaction same — Causes of action held different.) ** 1962 Jab LJ 1049: 1962 MPC 314. (Transaction same — Causes of action held different.)]

(38) In certain Debt Relief Acts a possessory mortgage and a lease-back are directed to be counted together as a simple mortgage; but that can only be for the purpose of those Acts and cannot be extended to cases under Order 2, Rule 2, C. P. C. as well. AIR 1963 Ker 186 (187, 188): 1962 Ker LT 647.

(39) Anomalous mortgage — Lease to mortgagor — Obligation to pay rent arising independently out of lease — Suit for rent for certain period does not bar second suit for same relief for subsequent period. AIR 1957 Raj 32 (35): ILR (1957) 7 Raj 268.

Suit for principal barred under rule — Suit for interest. — (40) Where a suit to recover the principal becomes barred by reason of this rule, a suit merely for interest on the principal will also be barred. AIR 1954 Sau 93 (94).

Partition suits. — (41) A suit for partition of joint property must include the whole of the properties jointly held by the parties. AIR 1953 All 541 (542) ** AIR 1927 Mad 213 (214).

(42) Where some items are omitted in the partition suit, the penalty is not the dismissal of the suit but the bar of a fresh suit for the partition of the omitted items. (1883) 7 Bom 182 (184) (DB) ** (1911) 9 Ind Cas 424 (425) (Oudh) ** AIR 1960 Pat 76 (79, 80).

(43) Where at the time of the previous suit the omitted portion was not available for partition at that time, separate suit for partition of omitted portion is not barred. (1900) 23 Mad 608 (612) (DB).

(44) Where the omission in the previous suit was due to ignorance of existence of the omitted items, separate suit will not be barred. AIR 1927 Mad 213 (215) ** AIR 1932 Nag 92 (93) ** AIR 1960 Pat 76 (79, 80).

(45) A suit for partition of property held jointly by a Hindu family does not bar a suit for partition of property held by the family jointly with strangers. (1899) 23 Bom 597 (598, 601, 602) (DB) ** AIR 1924 Nag 89 (91): 20 Nag LR 28.

(46) Where the alienee of a share of joint family property sues for partition, he must sue for general partition. (1899) 24 Bom 128 (134) (DB).

(47) An alienee's suit for partial partition is not liable to be dismissed solely for that reason. (1912) 14 Ind Cas 524 (527, 528) (Mad).

(48) There is no bar to suits for partition based on distinct causes of action. AIR 1930 All 371 (372) (DB) ** AIR 1933 PC 106 (108).

(49) The rule against a suit for partial partition is not applicable to tenants-in-common. AIR 1955 Andhra 215 (217) ** AIR 1954 Raj 269 (270): ILR (1954) 4 Raj 423 (DB) ** AIR 1949 Nag 366 (368): ILR (1949) Nag 358 ** AIR 1924 Mad 124 (124): 46 Mad 844 (DB).

(50) Suit for partition of plaintiff's tarwad properties would not bar subsequent suit for partition of properties of tavazhi as different entity. AIR 1954 Mad 987 (992) (DB).

(51) Suit for declaration of title to certain plots of land would bar subsequent suit for declaration and possession of other plots accidentally omitted from first suit. AIR 1941 Pat 37 (38) (DB).

(52) Principles of Order 2, Rule 2 cannot apply to a partition suit where the Court or the Commissioner has omitted to give the income of certain property to one of the parties in a final decree. AIR 1935 Nag 137 (138): 31 Nag LR 304.

9. Minor. — (1) Minor cannot on attaining majority sue on the same cause of action in respect of any portion of claim omitted by his next friend unless the omission in the previous suit was due to the gross negligence, fraud, glaring laches caused by physical incapacity on the part of the next friend or the acts of the next friend were unreasonable or improper in the conduct of the suit or the minor interests were not properly safeguarded. AIR 1942 Bom 338 (338): ILR (1943) Bom 49 (DB) ** (1899) 22 Mad 309 (310) (DB) ** (1895) 22 Cal 8 (13, 14) (DB). (Gross negligence.) ** (1912) 14 Ind Cas 95 (97) (DB). (Fraud.) ** AIR 1921 Bom 434 (434): 45 Bom 805 (DB). (Interests not properly safeguarded.)

[See however AIR 1964 Andh Pra 124 (126): (1963) 2 Andh LT 418. (Mistake.)]

10. Intentional relinquishment. — (1) Plaintiff may relinquish any portion of his claim in order to bring it within the jurisdiction of a particular Court; if the suit is once instituted in a Court having no jurisdiction to grant the relief prayed for, the only order that the Court can pass is to return the plaint and not to allow the

Order 2, Rule 2 — Note 10 (contd.)
amendment of the plaint by relinquishment of reliefs. AIR 1953 Hyd 230 (231): ILR (1953) Hyd 323 (DB) ** AIR 1943 Nag 293 (295): ILR (1943) Nag 603 (DB) ** AIR 1921 Mad 696 (698, 700) (DB). (Per Sadasiva Aiyar, J., Coutts-Trotter, J., contra.)

(2) Where the plaintiff intentionally relinquishes any portion of his claim, he cannot subsequently bring a fresh suit in respect of it. (1913) 20 Ind Cas 173 (174) (DB) (All).

(3) No decree can be passed in respect of the part of the claim which the plaintiff has relinquished of his own accord. ILR (1955) 5 Raj 462 (473).

11. Omission to sue for all reliefs. — (1) If a plaintiff omits, without the leave of the Court, to sue for any of the reliefs which he is entitled to claim in respect of the cause of action, he shall not afterwards sue for the relief so omitted by him. AIR 1955 Mad 545 (546) ** AIR 1951 Pat 190 (193) (DB) ** AIR 1933 Bom 437 (438): 58 Bom 67 (DB) ** **AIR 1931 PC 229 (230)** ** AIR 1925 Cal 305 (306) (DB) ** **AIR 1961 SC 1419 (1422, 1424, 1425): (1961) 3 SCR 880** ** 1965 All LJ 292 ** 1962 Cur LJ 427 (Punj) ** AIR 1961 Andh Pra 157 (159): (1959) 2 Andh WR 505 (DB). ((1900) ILR 25 Bom 161; (1908) 1 IC 319, Rel. on.)

(2) Under Order 2, Rule 2, C. P. C. plaintiff may not sue in respect of all the reliefs and may relinquish a portion of his claim. AIR 1966 J & K 124 (126): 1966 Kash LJ 401 ** AIR 1959 Ker 116 (119): 1958 Ker LT 782 (DB). (Inconsistent contentions should be raised by way of alternative contentions — Defendant cannot be allowed to raise new plea after suit is decreed on ground that new plea would have been inconsistent with plea already advanced.)

(3) The mere fact that reliefs are claimable in the alternative will not prevent the applicability of this rule. AIR 1953 Raj 59 (61): ILR (1952) 2 Raj 919 (DB) ** AIR 1952 Mys 99 (101): ILR (1952) Mys 259 (DB).

[But see AIR 1955 Mad 545 (546) ** AIR 1951 Bom 167 (168): ILR (1950) Bom 421 (DB). (AIR 1920 Lah 1: 1 Lah 457 (FB), Foll.; AIR 1932 Lah 523, Not foll.)]

(4) Where the right to relief in respect of which a further suit is brought did not exist at the date of the former suit, the rule does not apply. AIR 1922 Mad 413 (414, 415) (DB) ** AIR 1927 Oudh 498 (499) (DB) ** AIR 1934 Pat 515 (518) (DB) ** AIR 1968 Raj 51 (54): 1967 Raj LW 63 (DB) ** (1966) 1 Andh WR 364 (366) ** AIR 1964 Mys 276 (276, 277): 1962 Mys LJ (Supp) 316 ** AIR 1964 Raj 114 (117): 1964 Raj LW 55 (DB) ** AIR 1960 Mys 249 (252): 38 Mys LJ 347.

(5) Where a mortgagee has asked for and obtained only a personal decree against the mortgagor for the mortgage amount, he may subsequently institute a suit for sale in enforcement of the mortgage. AIR 1940 Pat 283 (285, 286) (DB).

(6) A plaintiff who sues for a relief to which he is not entitled is not debarred from suing for a relief to which he is entitled. AIR 1925 Lah 459 (460): 6 Lah 384 (DB).

[See also AIR 1968 Manipur 64 (67). (Declaration obtained in previous suit — Subsequent suit for mere possession maintainable — No need to pray for declaration again.)]

(7) The relinquishment of his right by a plaintiff to sue for one of the reliefs need not be express, but may be implicit in his conduct. **AIR 1954 SC 352 (355): 1955 SCR 99.**

(8) Suit for declaration that plaintiff is entitled to pension at higher rate — But arrears of pension upto date of suit at higher rate not claimed — **Held,** omission to claim arrears would not make declaratory decree, if granted, meaningless or infructuous because decree would create recurring cause of action for enhanced rate of pension for future also — Such suit was not barred by proviso to Section 42 or by Order 2, Rule 2 of Civil P. C. — Subsequent suit for arrears would however be barred under Order 2, Rule 2. AIR 1966 J and K 124 (125): 1966 Kash LJ 401.

12. Suits for possession and rent. — (1) Where under a contract of lease, the lessee is bound to pay the rent at the stated periods, and on default, to deliver up possession to the lessor, and on such default occurring, lessor sues lessee for possession first and then brings a subsequent suit for rent, the latter suit is barred. AIR 1914 Bom 130 (130, 131): 38 Bom 444 (DB).

[But see (1913) 35 All 512 (516) (FB) ** AIR 1952 All 344 (344) (DB) ** AIR 1922 Lah 118 (119) (DB) ** (1909) 32 Mad 330 (332, 333) (DB).]

(2) Suit for recovery of arrears is not barred by suit for possession under Bombay Rents, Hotel and Lodging House Rates Control Act, 57 of 1947. AIR 1956 Bom 102 (104).

(3) Default clause in lease giving right to lessor to sue for ejectment and rent for unexpired period of lease at higher rate — Lessor suing for rent from date of default till date of suit and not exercising his right under default clause — Another suit by lessor on subsequent default for rent is not barred. AIR 1937 Sind 300 (302): 32 Sind LR 80 (DB).

(4) Where under a contract of lease with a default clause the lessor first sues for rent, and subsequently for ejectment, the latter suit is barred. AIR 1933 All 84 (85) (DB).

(5) If the determination of tenancy is independent of default in payment of rent, a suit for rent will not bar a subsequent suit for possession, the causes of action for the two suits being different. AIR

Order 2, Rule 2 — Note 12 (contd.)
1955 Trav-Co 170 (171) ** AIR 1951 Pat 190 (193) (DB).

(6) Where in a suit for possession of leased property on the ground of termination of lease, the amount of rent from the date of the suit to the date of the restoration of possession was also decreed, it was held that the decree, so far as it ordered payment of rent from the date of suit till the date of possession could not stand. AIR 1964 Assam 102 (105): ILR (1964) 16 Assam 1.

13. Suits for specific performance and other reliefs. — (1) Where A sues B for specific performance of an agreement to sell and subsequently on the basis of the same agreement sues for possession, the suit is barred. AIR 1955 Cal 402 (407) ** AIR 1950 All 415 (416): ILR (1952) 2 All 657 (DB) ** AIR 1924 Mad 360 (361, 363): 47 Mad 150 (DB) ** AIR 1920 Pat 89 (91): 5 Pat L Jour 314 (DB).

[But see AIR 1941 Bom 247 (249, 250): ILR (1941) Bom 361 (DB).]

(2) Subsequent suit based on the conveyance obtained in pursuance of the decree in the first suit, for specific performance to sell is not barred. AIR 1950 All 415 (416): ILR (1952) 2 All 657 (DB) ** AIR 1924 Mad 360 (363): 47 Mad 150 (DB) ** (1894) 18 Bom 537 (542) (DB) ** AIR 1960 Cal 626 (630): 64 Cal WN 439 (DB). (The cause of action in a suit for specific performance of a contract to execute a document of transfer is not a cause of action for possession of land.)

(3) Where A first sues for possession and later on for specific performance, both being based on the same agreement, the latter suit is barred. (1901) 24 Mad 491 (503): 28 Ind App 221 (PC).

(4) In a case where plaintiff is not entitled to more than one relief in respect of the same cause of action and the first suit fails on the ground that such a suit does not lie, a second suit for proper relief is not barred. AIR 1925 Lah 459 (460): 6 Lah 384 (DB).

(5) Breach of contract for sale — Suit for specific performance — Damages for breach not claimed — Subsequent suit for damages is barred. AIR 1957 Andh Pra 960 (961) ** (1966) 70 Cal WN 843 (850, 852) ** AIR 1966 Mys 215 (217): (1965) 1 Mys LJ 253 ** AIR 1963 Cal 468 (469).

(6) V and R joint owners — V agreeing to sale his half share to plaintiff. V and R selling the whole property to deft. Plaintiff suing for specific performance and subsequent suit for partition against deft. — **Held,** the right to partition arose only when the plaintiff obtained ownership after the sale in consequence of the decree for specific performance — Hence, subsequent suit for partition as based on a distinct cause of action was not barred under Order 2, Rule 2. (1967) 11 Law Rep 266: (1967) 2 Mys LJ 70.

(7) Applicability — Reliefs in both suits must arise from same cause of action — Earlier suit for refund of earnest money — Subsequent suit for specific performance of contract of sale — Suit held not governed by Order 2, Rule 2. AIR 1965 Madh Pra 177 (179): 1965 MPLJ 829 (DB).

14. Partition suits. — (1) A partition suit should include the entire divisible property of the parties and all the reliefs that could be claimed in a partition suit. AIR 1922 Bom 119 (120): 46 Bom 327 (DB) ** AIR 1935 Pat 80 (82) (DB) ** AIR 1961 Orissa 111 (113): 27 Cut LT 43 (DB).

(2) A joint Hindu family consisting of six brothers carried on various businesses, one of them being motor bus service business which was being managed by two brothers, defendants 1 and 2. In 1945, five brothers filed a suit for partition against their eldest brother. The suit was compromised in March 1946 and by one of the terms of the compromise the parties had agreed to confine the taking of all accounts upto the end of March 1946. Regardless of the compromise the eldest brother commenced a fresh suit in 1949 claiming share of the profits and assets of the motor business carried on by defendants 1 and 2 after March 1946. It was held by the Supreme Court that the suit was founded on the same cause of action which he had relinquished in the former suit and, therefore, the suit was barred. **AIR 1954 SC 352 (355): 1955 SCR 99.**

(3) A suit for damages for use and occupation during the period the partition suit was pending is based on a different cause of action. AIR 1920 Cal 537 (538) (DB).

(4) When there is no omission on the plaintiff's part to claim a certain relief, the mere fact that the final decree fails to grant such relief will not make this rule applicable. AIR 1935 Nag 137 (138): 31 Nag LR 304 ** AIR 1957 Andh Pra 981 (983).

(5) Prior suit for partition on ground of plaintiff's being legitimate son — Subsequent suit on ground of his being illegitimate son not barred. AIR 1957 Mad 470 (471): ILR (1957) Mad 968.

(6) A separate suit for mesne profits in respect of income received by the co-sharer in possession subsequent to the institution of the prior suit for partition is maintainable and Order 2, Rule 2 or Section 11 would not bar such a suit for failure to include the claim for mesne profits in the partition suit. AIR 1963 Mad 402 (403): (1963) 1 Mad LJ 148.

15. Mortgage suits. — (1) In a suit on mortgage neither the mortgage money, nor the security can be split up without the consent of the parties or permission of the Court. AIR 1955 Trav-Co 17 (17) ** AIR 1931 Cal 806 (807).

(2) In a suit for redemption, all claims between mortgagor and mortgagee should

Order 2, Rule 2 — Note 15 (contd.)
be settled, and a separate suit for excess profits received by the mortgagee cannot be brought even though such profits may accrue after the institution of the suit. AIR 1957 Pat 446 (446, 447) (DB) ** (1908) 30 All 225 (227) (DB) ** AIR 1927 Nag 302 (303) ** AIR 1920 Mad 531 (532) (DB) ** AIR 1936 Cal 200 (202).

(3) In a suit for redemption of a mortgage where the possession is with the mortgagee, the mortgagor must include in his suit his claim for mesne profits upto the date of final decree and if he does not do so, a separate suit for mesne profits will be barred under Order 2, Rule 2. ILR (1966) Andh Pra 39 (65) (DB).

(4) A separate suit is maintainable for the mesne profits accruing after the date of payment under the preliminary decree. AIR 1920 Pat 106 (106): 5 Pat L Jour 595 (DB) ** AIR 1926 Cal 178 (178) (DB) ** AIR 1918 Mad 284 (284) (DB).

(5) A subsequent suit for compensation for demolition of the mortgaged property by the mortgagee while in possession will be barred if such relief is not claimed in a prior suit for redemption. AIR 1954 Bom 417 (418, 419): ILR (1954) Bom 1131.

(6) Where a usufructuary mortgagee, being deprived of possession, sues for possession alone, he cannot, on his suit for possession being dismissed, sue for the mortgage money. AIR 1921 Lah 309 (310) (DB) ** AIR 1932 Lah 523 (524, 525) ** AIR 1926 Pat 87 (88, 89) (DB).

(7) A prior suit for recovery of consideration by a usufructuary mortgagee would not bar a subsequent suit for possession. AIR 1955 Mad 545 (546).

(8) Where a mortgagee can at the end of the specified period either claim possession of the property mortgaged or recover the mortgage amount with interest, the mortgagee's failure, in a suit for possession, to claim the relief for recovery of the money due on the mortgage does not preclude him from seeking that relief in a subsequent suit. AIR 1939 Lah 112 (113) (DB) ** AIR 1951 Bom 167 (168, 169): ILR (1950) Bom 421 (DB).

(9) Where a mortgagee on being dispossessed of the mortgaged property is entitled, under the mortgage bond, to claim both the principal mortgage money as also compensation, the cause of action for both the reliefs is the same, namely, dispossession. AIR 1955 Pat 297 (300) (DB).

(10) Where the two suits are based on distinct causes of action, the second suit will not be barred although the claim to relief may arise out of the same mortgage. AIR 1954 Sau 93 (95) ** AIR 1953 Raj 59 (65): ILR (1952) 2 Raj 919 (DB) ** (1904) 27 Mad 102 (105).

[But see AIR 1918 Lah 289 (290): 1918 Pun Re No. 119 (DB).]

(11) A secured creditor who limits his claim in a prior suit to the amount of valuation of the security made under Section 47 of the Provincial Insolvency Act is precluded from recovering any amount in excess of that valuation in a subsequent suit. AIR 1955 Andhra 152 (155, 156) (DB).

(12) Mortgage of share in village — Mortgagee purchasing property under mortgage decree — Mortgagor ejected from his sir land and other lands by lambardar — Lambardar also obtaining possession of certain other lands — Mortgagee is entitled to a proportionate share in those lands — Omission to ask for sale of those lands in the mortgage suit does not bar his claim for partition under Order 2, R. 2. **(1962) 1 SCJ 158: (1961) 3 SCR 913 (922).** (It is not necessary in a suit for sale to specify the lands in the possession of the mortgagor specifically and they would pass on sale along with the share sold.)

16. Other examples. — (1) A suit for a personal decree for maintenance bars a subsequent suit for declaring it a charge on property. AIR 1931 Mad 705 (707) ** AIR 1937 All 56 (57): ILR (1937) All 269 (DB).

(2) A suit for exclusive possession being dismissed, a second suit for joint possession is barred. (1911) 11 Ind Cas 87 (88) (All).

(3) Where there is an agreement to pay a debt partly in cash and partly by executing a mortgage, a single suit must be brought for both the reliefs. (1901) 25 Bom 161 (166) (DB).

(4) A Court is not entitled suo motu to direct a plaintiff to make a relief upon the same cause of action which the plaintiff omits to include in his plaint or intentionally relinquishes. 1957 All WR (HC) 85 (86).

(5) A suit by a lessee against his lessor for loss of income caused by his eviction before the expiry of the lease bars a suit for damages for breach of the covenant for quiet enjoyment. (1892) 2 Mad L Jour 190 (199) (DB).

(6) Prior suit for dissolution of partnership — Subsequent suit for possession — **Held,** suit for possession was not barred. ('62) 64 Pun LR 680.

(7) Suit in respect of the property in the hands of the widow of the deceased owner in the capacity as heir to the deceased bars a suit in respect of that property in the capacity of reversioner. AIR 1961 Punj 322 (323, 324).

17. Leave of Court. — (1) The leave under sub-r. (3) need not be express but may be inferred from the circumstances of the case. AIR 1921 Pat 193 (195): 6 Pat L Jour 373 (FB) ** AIR 1938 Mad 865 (876, 877) (DB).

(2) The competence of the Court to grant leave is not affected by the value of the relief sought to be omitted. (1910) 33 All 244 (246) (DB) ** AIR 1938 Rang 290 (292).

(3) Court's power to grant leave is confined to reliefs only and does not extend to

Order 2, Rule 2 — Note 17 (contd.)
allowing a splitting up of claim. AIR 1917 Cal 841 (843, 844): 43 Cal 95 (DB).

(4) Where a plaintiff in his suit for specific performance of an agreement for sale simpliciter omits to sue for possession of the property, which is situate outside the jurisdiction of the High Court, in order to get an adjudication by the High Court, the High Court will not grant leave in respect of possession of the property. AIR 1955 Cal 402 (408).

(5) Leave under this rule may be obtained after the first hearing; it is not necessary that the application for leave should precede or accompany the plaint in the suit. AIR 1938 Mad 979 (982): ILR (1939) Mad 317.

18. Identity of the parties necessary in both the suits.— (1) In order that the rule may apply, the two suits must be between the same parties or between persons claiming through the same parties. AIR 1947 Cal 11 (14): ILR (1946) 2 Cal 605 (DB) ** AIR 1929 Mad 96 (103) (DB) ** AIR 1919 All 270 (271): 41 All 583 (DB) ** AIR 1920 Bom 90 (93): 44 Bom 352 (DB) ** ILR (1967) Guj 545: 8 Guj LR 677 ** 1961 MPLJ 602.

(2) Rule does not apply where same persons sue or are sued in different capacities in the two suits. AIR 1954 Trav-Co 384 (387) (DB) ** AIR 1936 All 422 (429) (DB).

(3) The fact that some of the plaintiffs or defendants in the former suit are not parties to the subsequent suit does not make this rule inapplicable. AIR 1955 Andhra 194 (197) ** AIR 1942 All 122 (126): ILR (1942) All 103 (DB).

(4) Where the first suit is against A and the second suit is against A and B, the bar under this rule will apply so far as A is concerned, but it will not apply in the case of B. AIR 1947 Cal 11 (14): ILR (1946) 2 Cal 605 (DB).

(5) Although this rule does not operate as a bar if the second suit is against a different party, the second suit may be barred on the principle of the merger of the cause of action in the judgment. But in order that this principle may apply the previous suit must have included the claim in the second suit. Otherwise, the second suit will not be barred under this principle. AIR 1947 Cal 11 (14): ILR (1946) 2 Cal 605 (DB).

19. Previous suit must have been decided on merits.— (1) Where a suit is dismissed under Order 9, Rule 8 for plaintiff's default, a fresh suit on the same cause of action will be barred under Order 9, Rule 9. AIR 1948 Cal 360 (368) (DB).

(2) Where a previous suit has been dismissed on the ground of a formal defect in the frame of the suit the bar of this rule does not apply. AIR 1930 Lah 634 (635).

(3) Where a claim or relief was included in the previous suit but the Court expressly left the matters undecided, a subsequent suit in respect of such claim or relief is not barred. AIR 1931 Mad 830 (832) ** AIR 1915 Lah 303 (304).

20. Rule does not apply to different causes of action.— (1) The rule does not operate as a bar when the subsequent suit is based on a cause of action different from that on which the first suit was based. AIR 1949 PC 78 (83, 84): 75 Ind App 121: ILR (1948) All 571 ** AIR 1958 Cal 377 (393) * (1958) 62 Cal WN 759 (764) ** AIR 1957 Mad 470 (471): ILR (1957) Mad 968. (Prior suit for partition on ground of plaintiff's being legitimate son — Subsequent suit on ground of his being illegitimate son is not barred.) ** AIR 1957 Andh Pra 76 (78) ** AIR 1956 Cal 570 (573) (DB) ** AIR 1968 Andh Pra 41 (44) (DB) ** AIR 1968 Mad 226 (228): (1967) 2 Mad LJ 490 ** AIR 1964 Bom 42 (43): 65 Bom LR 588 ** AIR 1964 Raj 114 (116): 1964 Raj LW 55 (DB) ** ILR (1961) 2 All 606 ** AIR 1961 Assam 14 (16). (Suit for possession on basis of sale deed — Decree — Execution — Subsequent suit for rectification of mistake in sale deed — Not barred.) ** 1961 MPLJ 741 ** 1962 Jab LJ 226: ILR (1961) Madh Pra 419 ** AIR 1960 Mys 304 (308, 309): 38 Mys LJ 875.

(2) Order 2, Rule 2 does not require that the plaintiff must unite in the same suit all the causes of action which he may have against the defendant. AIR 1964 Raj 114 (116, 117): 1964 Raj LW 55 (DB).

(3) Where suits are based on different causes of action, the rule will not apply although they arise from same transaction. AIR 1957 Orissa 191 (193, 194): ILR (1957) Cut 605. (Previous suit for declaration that plaintiff was validly adopted — Subsequent suit for declaration that deed of adoption in favour of defendant was not valid.) ** AIR 1955 Trav-Co 170 (171) ** AIR 1949 Nag 195 (197): ILR (1948) Nag 780 (DB)** (1966) 1 Andh LT 251 (254): (1966) 2 Andh WR 253. (Where the two suits were based on title but required evidence for avoiding the sale in one case and the will in another it was held that the two suits were based not only on different sets of facts but entirely on different causes of action.)

[See also ILR (1961) 2 All 606.]

(4) Where a plaint is returned for presentation to the proper Court, a cause of action arising after the original presentation of the plaint should be deemed to have arisen subsequent to the previous suit. AIR 1940 PC 70 (73): 67 Ind App 179: ILR (1940) Kar (PC) 149: ILR (1940) Lah 330 ** AIR 1925 Nag 54 (56, 57).

(5) Where different properties had been claimed to have been acquired in different manners and by distinct incidents obviously there can be no one cause of action covering all the items of properties. (1960) 2 Orissa JD 359.

21. First suit for possession, second for mesne profits.— (1) A suit for possession

Order 2, Rule 2 — Note 21 (contd.)
does not bar a subsequent suit for mesne profits accrued before the first suit. AIR 1951 Trav-Co 14 (16, 17): 1950 Trav-Co LR 416 (DB) ** (1958) 62 Cal WN 759 (764) ** (1962) 66 Cal WN 692 (DB) **. ILR (1959) 2 Cal 476: 62 Cal WN 759.

[But see AIR 1942 Bom 338 (339): ILR (1943) Bom 49 (DB) ** (1895) 17 All 533 (535, 536) (DB).]

(2) A separate suit for mesne profits accruing after the institution of a prior suit for possession is maintainable. AIR 1954 Orissa 202 (204): ILR (1954) Cut 232 ** AIR 1958 Assam 67 (69): ILR (1956) 8 Assam 177 (DB). (Claim for pendente lite mesne profits would not be hit by Order 2, Rule 2.) ** AIR 1954 Trav-Co 377 (380) ** AIR 1931 All 429 (432): 53 All 951 (SB) ** AIR 1966 Madh Pra 186 (188): 1965 Jab LJ 1012 ** 62 Cal WN 759: ILR (1959) 2 Cal 476.

[But see AIR 1927 All 716 (716, 717): 49 All 597 (DB).]

(3) A claim for mesne profits cannot itself be split up and the plaintiff should include the whole of the mesne profits accrued due at the time of the suit. (1886) 12 Cal 482 (484) (PC).

[See however AIR 1923 Cal 371 (372, 373) (DB).]

(4) A suit for mesne profits alone is no bar to a subsequent suit for possession. (1883) 9 Cal 283 (287, 288) (DB) ** (1909) 1 Ind Cas 644 (645) (DB) (Mad).

[But see AIR 1953 Madh B 161 (162): ILR (1952) Madh B 378 ** AIR 1940 All 524 (524): ILR (1940) All 781 (DB) ** AIR 1966 Andh Pra 325 (327): (1965) 2 Andh WR 226 (DB). (Cause of action for recovery of immovable property is distinct from that for mesne profits.)]

22. Other examples of different causes of action. — (1) A suit by a Mahomedan widow for dower does not bar a suit by her for declaration of her right to possess her husband's estate for her life, in accordance with a local custom. (1894) 21 Cal 157 (163): 20 Ind App 155 (PC).

(2) A suit by Hindu reversioners for injunction restraining alienations by a Hindu widow is no bar to a suit for declaration that a gift by the widow is inoperative. (1889) 16 Cal 98 (102): 15 Ind App 156 (PC).

(3) Each alienation of a joint family property by a Hindu widow gives rise to a distinct and separate cause of action and a suit by a reversioner to set aside an alienation of a property not included in a previous suit is not barred by Order 2, Rule 2. (1968) 2 Andh LT 204 (DB).

(4) A suit for possession of land held under a will wrongfully deprived of, is no bar to a suit for personal property under the will. (1885) 8 Mad 520 (524): 12 Ind App 116 (PC).

(5) A suit for the wrongful conversion of goods given in a will is no bar to a suit to obtain payment of the legacies without any claim in respect of any of the goods to which the former suit related. AIR 1925 PC 105 (108): 48 Mad 312: 52 Ind App 214.

(6) A suit by a Hindu daughter to establish her title to her father's estate as heir in reversion on her mother's death is no bar to a suit for possession of a specific portion of the estate. AIR 1929 PC 166 (169): 56 Ind App 267: 51 All 439.

(7) A suit to eject the defendant on the basis of a lease is no bar to a suit based on title. AIR 1949 Pat 358 (360): 27 Pat 751 (DB).

(8) For other instances, see the undermentioned cases: AIR 1957 Andh Pra 76 (78). (Plaintiff's cause of action to sue as a sub-partner of the defendant and demand an account from him as such sub-partner is different from the cause of action on which he based his earlier suit which was that the plaintiff was a partner along with the defendant and another and was entitled to sue for dissolution of the firm.) ** ILR (1955) Punj 395 (401). (Suit for declaration in regard to half portion of vacant site — Claim based on allegation that plaintiffs were in possession as heirs of one of their collaterals — Subsequent suit for possession of other portion of site — Plaintiffs claiming through their respective grandfathers — Causes of action in two suits held were distinct and hence subsequent suit was not barred under Order 2 Rule 2.) ** (1909) 31 All 557 (571): 36 Ind App 210: 13 Oudh Cas 183 (PC). (First suit for share inherited from sister no bar to suit for share inherited from father.) ** (1882) 8 Cal 483 (514) (FB). (Decree declaring right to accounts is no bar to suit for amount found due on adjustment of accounts.) ** (1901) 24 Mad 147 (157): 27 Ind App 151 (PC). (Suit for partition by younger brother of zamindar dismissed as the property was impartible — Suit for maintenance not barred.) ** AIR 1968 Mad 226 (228, 229): (1967) 2 Mad LJ 490. (Conveyance in discharge of mortgage — Conveyance set aside — Suit for damages and recovery of money — Failure of suit — Suit on original mortgage — **Held,** suits were not cumulative nor the cause of action identical — The suit was not barred.) ** AIR 1968 Raj 51 (54): 1967 Raj LW 63 (DB). (First suit on apprehension of alienation of family property — Second suit on actual damage to the proprietary rights of the plaintiff — **Held,** the two suits were based on distinct cause of action.) ** 8 Guj LR 677: ILR (1967) Guj 545. (The mere fact that two of the parties to the subsequent rent-note were also parties to the earlier rent-note of 1951, or that the property and the rent for the property was the same, could not make the right to action in any way the same or identical, so as to justify the plaintiff to joint both the causes of action in the earlier suit.) ** ILR (1966) 1 Cal 669. (Previ-

Order 2, Rule 2 — Note 22 (contd.)

ous suit based on threat of unlawful dispossession — No question of title involved — Subsequent suit based on title and for affirmation of possession and permanent injunction — As the present cause of action was not existent at the time of the previous suit, the subsequent suit is not barred under Order 2, Rule 2.) ** 78 Mad LW 172: ILR (1965) 1 Mad 254. (Suit for recovery of possession of property transferred under agreement of sale executed by guardian of plaintiff — Earlier suit filed by plaintiff's guardian in respect of trespass and encroachment on property, cannot operate as bar under Rule 2 — As reliefs in two suits flow out of entirely different causes of action, rule cannot apply.) ** AIR 1964 All 531 (533): 1964 All WR (HC) 329. (Dismissal of earlier suit for declaration of title — Second suit for joint possession — Not barred.) ** AIR 1964 Guj 174 (178): (1964) 5 Guj LR 678. (Cause of action for suit for declaration that certain sale deed by deceased was fictitious, is different from cause of action for suit for administration of properties of the deceased.) ** AIR 1964 Pat 452 (455). (Where the earlier suit was for redemption of a mortgage in respect of a few Kathas while the subsequent suit was for declaration of title to the entire area and for ejectment of the trespasser therefrom — **Held,** that the causes of action in two suits were different and the bar under Order 2, Rule 2 did not apply.) ** 63 Bom LR 269: 1960 Nag LJ 765. (The cause of action for claiming the mesne profits for each successive year thus arise separately in each year when the defendants wrongfully receive the profits. It is open for the plaintiff to file a suit for mesne profits in respect of each year. Order 2, R. 2, would not apply to such cases.) ** AIR 1959 All 33 (37): 1958 All WR (HC) 675. (First suit for injunction restraining tenant from making alteration — Notice pending suit, treating forfeiture as determining lease — Second suit for ejectment — Not barred.) ** (1959) 2 Andh WR 7: 1960 Andh LT 118. (Suit for possession — Deft. not in possession — Final decision — Deft. trespassing upon the land after final decision — Subsequent suit for possession against deft. not barred.) ** AIR 1959 Mys 244 (250): 37 Mys LJ 581. (Previous suit on the allegation that wall was exclusively owned by plaintiff — Decision that it was joint — Subsequent suit on the basis of joint ownership — Cause of action held different.) ** AIR 1959 Mys 227 (230, 232): 37 Mys LJ 412. (First suit for declaration of status of adopted son and for shikmidari — Decision that plaintiff was adopted son but was out of possession — Second suit for possession not barred as the cause of action was distinct.) ** AIR 1959 Mys 173 (174): 35 Mys LJ 266. (Previous suit for injunction against threat of dispossession — Subsequent suit for possession — Cause of action different — Suit not barred.)

[See also AIR 1959 Tripura 19 (21). (That the lands being quite different, differently recorded in the land records and separately assessed to rent it was open to the plaintiff to sue separately even if the trespass was committed in the course of the same transaction.)]

23. "Shall not afterwards sue."— (1) The omission of a portion of a claim or the omission to ask for a relief does not affect the maintainability of the suit but bars only subsequent proceedings in respect of them. AIR 1951 Pat 556 (557): 30 Pat 406 (DB) ** ILR (1951) 2 Cal 413 (414) ** AIR 1938 Mad 979 (981, 982): ILR (1939) Mad 317.

(2) There is difference of opinion where two suits are filed simultaneously as to which of the two suits is barred:

(a) Suit which bears the later number should be presumed to have been filed later and should be held as barred. (1894) 16 All 165 (172, 173) (FB).

(b) Plaintiff in such a case should be given an option to choose as to which of the two suits should be dismissed. AIR 1926 Mad 934 (936): 49 Mad 969 (DB).

(c) The question of option will properly arise only where the plaintiff proves that both the plaints were presented simultaneously and in the absence of evidence to that effect, it must be presumed that the suits were presented and admitted in the order in which they were numbered. AIR 1952 Him Pra & B 28 (30, 31). (Obiter.)

(d) In such a case, the Court can, under its inherent powers, consolidate the two suits and not dismiss one of them as offending against this rule. AIR 1943 Bom 12 (17, 18): ILR (1943) Bom 104 (DB) ** AIR 1959 Tripura 19 (21).

(e) The principle of consolidation will not apply where the suits are simultaneously filed in a Court which has no pecuniary jurisdiction to try the consolidated suits. AIR 1952 Him Pra and B 28 (30).

(3) The bar under the rule will apply to a later suit though instituted during the pendency of the prior suit. AIR 1947 Lah 102 (103) (DB) ** AIR 1963 Madh Pra 51 (55): 1962 MPLJ 1102 (DB). (Where two suits are instituted on the same day, in the absence of anything to prove otherwise, the numbers assigned to the suits must determine which is the previously instituted suit.)

(4) The point of time for the purpose of determining the bar under the rule is the date of the institution of the suit. AIR 1954 Bom 125 (128): ILR (1954) Bom 187.

R. 3. Joinder of causes of action.—(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

[1882, S. 45, paras 1 and 3; 1877, S. 45; R. S. C., O. 18, R. 1. See S. 99 and Rr. 4 to 6 below.]

Order 2, Rule 2 — Note 23 (contd.)

(5) The bar of the rule applies only to a later suit. It does not apply to any other remedy open to the plaintiff. AIR 1919 Sind 79 (79): 13 Sind LR 153 (DB) ** AIR 1958 Cal 377 (393).

(6) The burden of establishing a bar under this rule is on the defendant. AIR 1955 Trav-Co 170 (171) ** AIR 1927 Lah 840 (840, 841). (20 Cal 716, Followed.) ** AIR 1933 All 852 (853).

(7) Court is not bound to take up the point of bar under this rule proprio motu. AIR 1915 Lah 285 (286) (DB).

(8) The objection under the rule cannot be raised for the first time in appeal except on terms which would indemnify the other side for the omission to take it as a preliminary point in suit. (1911) 38 Cal 629: 6 Low Bur Rul 18: 38 Ind App 140 (PC) ** AIR 1955 Mad 545 (546).

[But see AIR 1932 All 510 (511): 54 All 65 (68) (DB). (Plea allowed in appeal as being one of law.)]

24. Set-off. — (1) If the defendant omits any portion of the claim he is entitled to make by way of set-off, he cannot subsequently sue in respect of it. AIR 1955 Orissa 6 (10, 11): 1955 Cri L Jour 162 (DB) ** AIR 1942 Mad 580 (581): ILR (1942) Mad 835 (DB) ** (1905) 32 Cal 654 (657) (DB).

(2) A defendant pleading a set-off is under no greater disability than is imposed by Order 2, Rule 2 on a plaintiff. AIR 1957 Andh Pra 896 (897).

25. Plea in defence not barred.— (1) The rule does not bar a plea in defence. AIR 1940 Lah 166 (168, 169) ** AIR 1933 Bom 51 (55): 57 Bom 346 (DB) ** AIR 1936 Mad 473 (476) (DB) ** (1966) 1 Andh WR 364 (366).

(2) As the plea is a technical bar it has to be established and cannot be presumed merely on the basis of inferential reasoning. **AIR 1964 SC 1810 (1812, 1813): (1964) 7 SCR 831 ** AIR 1967 Pat 423: 1967 BLJR** 445 (FB).

(3) A plea of a bar under Order 2, R. 2, Civil P. C. can be established only if the defendant files in evidence the pleading in the previous suit and thereby proves to the Court the identity of the causes of action in the two suits. **AIR 1964 SC 1810 (1812, 1813): (1964) 7 SCR 831 ** AIR 1967 Pat 423 (424): 1967 BLJR** 445 (FB) ** AIR 1959 Mys 227: 37 Mys LJ 412 (DB).

[OVERRULED on another point in AIR 1963 Mys 1 (FB).]

(4) Previous suit having been withdrawn with leave to trying a fresh one the objection under Order 2, Rule 2 is no longer available to the defendant. (1963) 65 Pun LR 838.

26. Insolvency proceedings, not suits.— (1) The rule does not enable the Official Assignee to apply to the Insolvency Court for a declaration that the right of a certain creditor of the insolvent to sue for a certain debt is barred. AIR 1925 Mad 1120 (1120, 1121): 48 Mad 703 (DB).

27. Application to sue in forma pauperis.— (1) Where an application to sue in forma pauperis has been rejected it does not amount to a suit and the provisions of this rule do not apply to it. (1899) 21 All 359 (360, 361) (DB).

28. Amendment of plaint.— (1) The rule does not preclude the amendment of plaint by the addition of the claim which had been omitted. **AIR 1940 PC 70 (73): 67 Ind App 179: ILR (1940) Kar (PC) 149: ILR (1940) Lah 339.**

29. Writ petition.— (1) Court giving incorrect interpretation to Order 2, Rule 2, Civil P. C. and dismissing suit on ground that it was barred under that rule — Error apparent on face of record — **Held,** that Court having failed to exercise jurisdiction in not deciding suit on merits writ application could be allowed. AIR 1964 Raj 114 (118): 1964 Raj LW 55 (DB).

ORDER 2, RULE 3 — SYNOPSIS

1. Scope.
2. "Save as otherwise provided."
3. The rule presupposes several causes of action.
4. Alternative reliefs.
5. One plaintiff, one defendant, several causes of action.
6. One plaintiff, two or more defendants — Causes of action joint against all the defendants.
7. Misjoinder of defendants and causes of action.
8. Conspiracy to commit wrong or breach of contract.
9. Two or more plaintiffs, one defendant — Plaintiffs jointly interested in the causes of action.

Order 2, Rule 3 — Synopsis (contd.)

10. Misjoinder of plaintiffs and causes of action.

11. Misjoinder of parties and causes of action.

12. Procedure in cases of misjoinder.

13. Addition of unnecessary parties.

14. Jurisdiction.

15. Revision.

1. Scope.— (1) Order 2, Rule 3 must be read with Order 1, Rules 1 and 3. AIR 1918 Cal 858 (859): 45 Cal 111 (DB).

(2) A plaintiff may not only join different causes of action against the same defendant or the same defendants as provided in this rule but he may also join different causes of action against different defendants if he is able to bring his case within the purview of Order 1, Rule 3. AIR 1941 Oudh 56 (59): 16 Luck 113 ** Madh BLJ 1954 HCR 1233 (1235) ** AIR 1926 Sind 66 (68): 19 Sind LR 395 (DB) ** AIR 1964 Guj 174 (177): (1964) 5 Guj LR 678. (Administration suit and prayer for declaring sale deed executed by deceased as sham.)

(3) For the application of Order 1, R. 3 and Order 2, Rule 3, there must be some "common question of law or fact" and also "the same act or transaction or the same series of acts or transactions" in respect of which or out of which the alleged right to relief arises. AIR 1953 Cal 185 (186, 187): ILR (1954) 1 Cal 154 (DB).

(4) No question of convenience or inconvenience is material under Order 2, Rule 3. AIR 1954 All 455 (455).

(5) Several causes of action properly joined under this rule — Court can still hold separate trials of different issues whenever necessary. AIR 1954 All 455 (455) ** (1911) 10 Ind Cas 48 (48, 49) (Lah) ** AIR 1918 Cal 858 (860): 45 Cal 111 (DB).

(6) Question of misjoinder must be decided on allegations in plaint and not on what is found to be correct ultimately. (1905) 27 All 564(566) (DB) ** AIR 1919 Pat 381 (382, 383) (DB) ** AIR 1925 Bom 342 (342) (DB) ** AIR 1918 Cal 858 (861): 45 Cal 111 (DB) ** 1959 Ker LT 849.

(7) The provisions of this rule have been held to be applicable to writ application under Article 226 by virtue of Section 141. AIR 1958 Andh Pra 16 (17): ILR (1957) Andh Pra 678 (DB).

(8) Petition for divorce against wife on ground of adultery — Claim for damages against adulteror cannot be joined — Section 21 of Hindu Marriage Act does not make Order 2, Rules 2 and 3 applicable to such cases. AIR 1963 Guj 152 (152, 153): (1964) 4 Guj LR 514.

[But see AIR 1964 Andh Pra 308 (312, 313, 314): (1964) 1 Andh WR 389. (But rules framed by Andhra Pradesh High Court, Rule 9 allows such joinder of parties and causes of action.)]

(9) If causes of action are separate, a single petition against the same defendant is not maintainable, even if a common question of law is involved. AIR 1962 Tripura 7 (10).

(10) Decree satisfied by one of joint judgment debtors by making several payments—Each payment gives rise to a separate cause of action—In a suit for contribution for excess payment, limitation will run separately for each payment. 1963 Ker LT 884.

2. "Save as otherwise provided."— (1) Order 2, Rule 3 is to be applied subject to any other provisions of law to the contrary such as Rules 4 and 5 of this Order. AIR 1925 Pat 674 (675) (DB).

(2) Order 2, Rule 3 is also subject to the general principles of pleading, and a plaintiff cannot, on the authority of this rule, claim on alternative titles which arise out of inconsistent facts though he may claim even on inconsistent titles. AIR 1925 Pat 674 (675) (DB).

3. The rule presupposes several causes of action.— (1) This rule enables joinder of several causes of action in one suit subject to certain restrictions. AIR 1940 Pat 579 (579) ** (1902) 24 All 358 (360) (DB).

(2) The rule presupposes that there are several causes of action to be united in a single suit; so where there is really but a single cause of action no question of misjoinder arises. (1902) 29 Cal 257 (259) (DB) ** (1894) 16 All 359 (361) (DB) ** AIR 1929 Bom 51 (53) (DB).

(3) A joinder of several reliefs is not a joinder of several causes of action, in a suit based on a single cause of action. AIR 1929 Bom 51 (53) (DB).

(4) An ancillary relief claimed in a suit does not amount to a distinct cause of action. (1906) 29 Mad 29 (31) (DB) ** AIR 1915 Mad 217 (220) (DB) ** AIR 1924 Pat 65 (66) (DB).

4. Alternative reliefs.— (1) Alternative reliefs may be claimed either on the same cause of action against different defendants or on different causes of action against the same defendant or defendants. The former class of cases is provided for in Order 1, Rule 3. Order 2, Rule 3 deals with the latter class of cases. AIR 1948 Nag 32 (34): ILR (1947) Nag 288 ** AIR 1924 Pat 280 (282) (DB) ** AIR 1924 Mad 520 (521).

(2) Where the two reliefs claimed in the alternative were interlinked there was no question of putting the plaintiffs on election to choose between the two reliefs. There was no misjoinder of causes of action. AIR 1965 Orissa 108 (110): 31 Cut LT 61.

(3) Hindu Law — Madras School — Alienation by one of the coparceners of his share — Suit for partition by alienee — Title of alienee to partition of property

Order 2, Rule 3 — Note 4 (contd.)
alienated found defective — Claim by alienee for reimbursement of price of proportionate portion not maintainable. AIR 1961 Mad 405 (407): 74 Mad LW 16.

5. One plaintiff, one defendant, several causes of action.— (1) Order 2, Rule 3 authorises a plaintiff to unite several causes of action against a single defendant. AIR 1955 All 112 (113): ILR (1955) 1 All 881 (FB) ** AIR 1949 Bom 351 (355): ILR (1949) Bom 620 ** 52 Cal WN 316 (318) ** AIR 1947 Nag 86 (87): ILR (1947) Nag 159 ** AIR 1963 Bom 173 (175): 64 Bom LR 765 (DB). (Composite application under Sections 397 and 398 of Companies Act, 1956.)

(2) If all the causes of action cannot be conveniently tried together, an order may be made directing separate trials of the same. AIR 1954 All 455 (455) ** AIR 1942 All 387 (389): ILR (1942) All 862 (DB).

(3) Joinder of numerous causes of action amounting to an abuse of the process of the Court is not contemplated by this rule. AIR 1935 Rang 209 (210) (DB).

(4) A person who is made a defendant in different capacities is not the "same defendant" within the meaning of this rule. AIR 1928 Mad 764 (769) (DB).

6. One plaintiff, two or more defendants — Causes of action joint against all the defendants.— (1) For applicability of the rule defendants must be jointly liable in respect of each and every one of the causes of action sought to be joined. AIR 1948 Nag 181 (181): ILR (1947) Nag 623 ** (1909) 34 Bom 358 (367) ** (1883) 5 All 163 (171) (FB).

(2) For applicability of the rule it is not necessary, that each of such defendants should be interested in all the reliefs claimed provided they are interested jointly in the main questions raised in the litigation. (1884) 6 All 106 (108) (DB) ** (1909) 34 Bom 358 (368).

(3) Where several defendants are sued for refund of monies by each under a wrong order for rateable distribution, there is no misjoinder. (1886) 13 Cal 159 (162) (DB) ** (1897) 1897 Pun Re No. 43, p. 195 (199) (DB).

(4) Where there is only a single cause of action against several defendants there can be no misjoinder of causes of action. (1908) 30 All 560 (562) (FB) ** (1883) 9 Cal 763 (764, 765) (DB).

(5) Where possession is claimed against A and also against persons holding by derivative titles under A, the cause of action is a single one and there is no misjoinder. AIR 1948 Sind 95 (96): ILR (1947) Kar 86 (DB) ** (1902) 29 Cal 871 (880, 881) ** (1909) 33 Bom 293 (305) (DB).

(6) Where a reversioner sues to set aside the alienations by a Hindu widow in favour of several defendants, the suit is not bad for misjoinder. AIR 1914 All 393 (394): 36 All 406 (DB) ** AIR 1916 Bom 310 (311, 312): 40 Bom 351 (DB) ** (1910) 6 Ind Cas 248 (249) (DB) (Cal) ** (1921) 59 Ind Cas 522 (522) (DB) (Lah).

(7) A suit by a member of a Hindu joint family to set aside a number of alienations made by the manager of the family and impleading all the alienees as defendants is not bad for misjoinder of causes of action. AIR 1941 All 209 (211): ILR (1941) All 370.

(8) Joinder of causes of action on the mortgage of joint family property and on promissory note executed by head of the family was held permissible under this Rule. (1963) Mys LJ (Sup) 121 (DB).

(9) In a partition suit, where assets in possession of defendant were involved along with other assets of the deceased, held that there was no misjoinder of causes of action or parties. 1959 Ker LT 849.

7. Misjoinder of defendants and causes of action.— (1) A suit against several defendants on causes of action accrued against each of them separately and in respect of which they are not jointly liable is bad for misjoinder. AIR 1950 Cal 128 (128, 129). (Suit for accounts.) ** ILR (1953) 1 Cal 15 (18). (Partition suit.) ** (1883) 5 All 163 (171) (FB)** AIR 1966 Punj 344 (347): ILR (1966) 1 Punj 803. (Composite election petition challenging election of Sarpanch and Panch.) ** (1965) 2 Mad LJ 502. (Suit against maker of promissory note and guarantor.)

(2) Where a single suit was filed to eject several tenants in possession of different parcels of the land of the plaintiff it was held that the plaintiff should have brought separate suits against the several tenants. AIR 1920 PC 67 (67, 70): 43 Mad 567: 47 Ind App 76.

(3) A single suit for possession against several trespassers on different parcels of land is not maintainable. AIR 1947 Cal 374 (378): ILR (1947) 1 Cal 559 (DB) ** AIR 1918 All 425 (426): 40 All 7 (DB).

(4) Suit for money due on bond executed by first defendant — Other defendants joined on ground that they had colluded with first defendant in taking assignments of his property to defraud plaintiff. **Held,** there was misjoinder. (1867) 11 Moo Ind App 468 (473) (PC).

(5) In suits on contracts, strangers to the contract having distinct interests by themselves cannot be joined. (1911) 12 Ind Cas 813 (822) (DB) (Bom) ** AIR 1918 Mad 681 (687): 40 Mad 365 (FB).

(6) Plaintiff and defendants holding separate accounts in touzi — Default in kist of revenue in respect of separate accounts of defendants — Plaintiffs depositing entire amounts on same date in order to avert sale — One suit for reimbursement and contribution against several defendants — Suit held bad for multifariousness as defaults were distinct, separate and unconnected and so were the payments. AIR 1953 Cal 185 (186, 187): ILR (1954) 1 Cal 154 (DB).

Order 2, Rule 3 — Note 7 (contd.)

(7) Persons claiming adversely to mortgagor and mortgagee should not be joined in one suit. (1906) 33 Cal 425 (440, 441) (DB).

(8) A cause of action arising out of a joint liability of some defendants cannot be united with another cause of action under a transaction in which one of them alone was concerned. (1909) 4 Ind Cas 1097 (1101, 1102) (DB) (Mad) ** 1888 Pun Re No. 189, p. 487 (488) (DB).

(9) Separate causes of action against separate sets of defendants cannot be joined in one suit. AIR 1954 Manipur 5 (6) ** (1883) 6 Mad 273 (276) (DB) ** (1902) 6 Cal WN 585 (587, 589) (DB).

(10) In suits for partition no cause of action can be joined which has no bearing on the question of partition. AIR 1949 Mad 410 (412) ** (1908) 18 Mad L Jour 85 (87) (DB).

(11) A suit for specific performance or a suit for redemption of a mortgage of any kind does not lie within the ambit of a partition suit. AIR 1954 Mad 799 (802): ILR (1954) Mad 926 (DB).

(12) Though a suit may fall outside this rule by reason of joinder of distinct causes of action against different defendants, it may be supported by the terms of Order 1, Rule 3, if the several causes of action are so connected with the same act or transaction as to give rise to a common question of law or fact at the trial. AIR 1958 Cal 710 (712) ** AIR 1918 Cal 858 (859, 860): 45 Cal 111 (122, 123) (DB) ** (1908) 31 Mad 252 (256, 257) (DB) ** (1905) 9 Cal WN 656 (661) (DB).

(13) Claim against first defendant's failure to pay rent. Gravamen of charge against second defendant, a trustee of a temple, is negligence in failing to include previous years' rent in a suit against first defendant. **Held,** this was a case of misjoinder of parties and of causes of action. AIR 1964 Andh Pra 412 (414): (1963) 2 Andh WR 1.

(14) Suit by Bank for recovery of loan on overdraft account — Agent and managing director joined as defendants with principal debtor — Cause of action against former being advancing of money in excess of his authority and against the latter being that he acquiesced and approved the action of the former — Suit held bad for misjoinder of causes of action. AIR 1962 Assam 85 (87): (1960) 1 Assam LR 332 (DB).

(15) Coal supplied to defendant coal merchant throughout relevant period. Defendant entered into partnership with another during the period, but partnership stood dissolved on date of filing of suit.

Held, there was no misjoinder of causes of action in the suit against the defendant for recovery of sums due for supply of coal. AIR 1966 Pat 346 (348, 349) (DB).

(16) Suit for specific performance where execution of sale-deed only was asked as relief — Person claiming title to property anterior to sale contract in suit need not have been made parties. AIR 1964 Tripura 16 (17).

8. Conspiracy to commit wrong or breach of contract.— (1) Distinct causes of action against several defendants may be united in one suit if the joint liability of the defendants arises by reason of a conspiracy or common design to commit the injury. AIR 1956 Nag 146 (150): ILR (1956) Nag 378 (DB) ** (1891) 14 Mad 103 (108) (DB) ** (1901) 28 Cal 769 (783) (DB).

(2) Where A and B combine together to assault C a suit by C against A and B for damages for the assault is maintainable. (1902) 26 Bom 259 (264) (DB).

(3) In a suit by A against B for damages for breach of contract, C, D and F can be joined with B, on the ground that they conspired together with B to bring about the breach and damages jointly and severally can be claimed against them also. AIR 1950 Cal 479 (480, 483) (DB).

9. Two or more plaintiffs, one defendant — Plaintiffs jointly interested in the causes of action.— (1) Where two or more plaintiffs are jointly interested in two or more causes of action against the same defendant, they can join all the causes of action in the same suit. (1884) 6 All 632 (633) (DB) ** (1900) 13 CPLR 130 (135, 136) ** AIR 1914 Mad 256 (258) ** (1912) 16 Ind Cas 623 (624) (DB) ** 1965 All LJ 965: 1965 All WR (HC) 754. (Persons assessed under Section 114 of District Boards Act challenging vires of Sec. 114.)

(2) This rule has no application when the cause of action is a single one. In such cases, the several plaintiffs entitled to sue on the cause of action may join as plaintiffs in the same suit under Order 1, Rule 1. (1906) 33 Cal 367 (370) (DB) ** (1896) 19 Mad 335 (336, 337) ** AIR 1929 Bom 51 (53, 54) (DB).

(3) A and B sue C for recovery of certain property. A bases his title on inheritance and B on purchase of a portion of the property from A. It was held that A and B have distinct causes of action in such a case. (1896) 18 All 219 (221) (DB) ** (1896) 18 All 131 (140) (DB).

[But see (1906) 33 Cal 367 (370).]

10. Misjoinder of plaintiffs and causes of action.— (1) Two or more plaintiffs cannot properly unite in one suit two or more causes of action, in which they are separately interested unless they can do so under Order 1, Rule 1. (1897) 24 Cal 540 (543) (DB) ** AIR 1923 Pat 411 (412).

(2) Where a single wrongful act or infringement gives rise to separate causes of action in favour of several plaintiffs, a single suit by all of them is maintainable under Order 1, Rule 1. AIR 1958 Andh Pra 16 (17): ILR (1957) Andh Pra 678 (DB) **

Order 2, Rule 3 — Note 10 (contd.)
AIR 1956 Assam 7 (8) ** AIR 1956 Vindh Pra 16 (16).

(3) Single suit by five persons against same defendant—Suit based on single contract but evidence revealing five contracts, one with each of plaintiffs — No question of misjoinder arises — Suit is liable to be dismissed — None of plaintiffs can be granted benefit of election under Order 1, Rule 2. AIR 1925 Bom 342 (342) (DB).

(4) Suit by several plaintiffs against State each claiming prescriptive title by adverse possession to parcel of land in his exclusive possession — There was misjoinder of plaintiffs and also misjoinder of causes of action and hence the suit was bad for multifariousness. AIR 1964 Orissa 159 (160): ILR (1964) Cut 160.

11. Misjoinder of parties and causes of action.— (1) Where each plaintiff has only a separate right against each defendant the suit is bad for misjoinder. (1910) 34 Mad 55 (57) (DB).

(2) Where each plaintiff has only a separate right against the defendants jointly the suit is bad for misjoinder. (1901) 26 Bom 259 (264, 265).

(3) Where different sets of plaintiffs are separately entitled against different sets of defendants, the suit is bad for misjoinder. AIR 1956 Pepsu 80 (82): ILR (1956) Patiala 141 ** (1897) 1 Cal WN ciii (civ) (DB).

12. Procedure in cases of misjoinder.— (1) Under the provisions of Section 99 and Order 2, Rule 7, the misjoinder is regarded only as an irregularity and no suit will be dismissed on the mere ground of misjoinder of causes of action. AIR 1917 Mad 517 (517) (DB) ** **AIR 1937 PC 42 (45): 16 Pat 149** ** AIR 1964 Andh Pra 412 (414): (1963) 2 Andh WR 1.

(2) When a valid objection as to misjoinder is taken at the proper time the Court may allow appropriate amendments or withdrawal under the provisions of the Code. (1932) 142 Ind Cas 542 (544) (DB) (Nag).

(3) A plea of misjoinder cannot be taken in appeal as a ground for the reversal of a decree or for a remand unless it has affected the merits of the case or jurisdiction of the Court. (1913) 18 Ind Cas 117 (118) (DB) (Cal) ** (1909) 36 Ind App 103 (113): 36 Cal 780 (PC) ** **AIR 1937 PC 42 (45): 16 Pat 149** ** AIR 1964 Guj 174 (177): (1964) 5 Guj LR 678.

(4) Plea for misjoinder of causes of action cannot be allowed to be put forward for the first time in a revision petition against a decree of Full Bench of Court of Small Causes, Madras. (1965) 2 Mad LJ 502.

(5) If the merits have been affected by the misjoinder the Court may remand the case for a separate finding on any one or more of the claims in the suit or for any amendment that may be deemed necessary. (1910) 34 Mad 55 (57) (DB) ** (1909) 3 Sind LR 108 (113) (DB). (Remand for amendment.)

13. Addition of unnecessary parties.— (1) The question of misjoinder will have to be determined only with reference to necessary parties in the suit. So in suits for pre-emption where the vendor is not a necessary party to the suit, the joinder as defendants of different vendors of the same vendee will not make the suit bad for misjoinder. AIR 1924 Lah 156 (157) ** (1909) 32 All 14 (18) (DB).

(2) Impleading third party — Question generally of judicial discretion to be exercised subject to provisions of Order 1, Rule 1 and Orders 2 and 3. AIR 1969 Raj 131 (133): 1969 Raj LW 121.

14. Jurisdiction.— (1) The value of a suit in which more causes of action than one have been united is the aggregate value of the several subject matters at the date of suit. AIR 1916 Lah 363 (363): 1915 Pun Re No. 100 (DB).

(2) Where it is found that the valuation of the suit based on several causes of action exceeds the pecuniary jurisdiction of the Court, the plaintiff can bring several suits, by separating the causes of action against the same defendant, thus, bringing each claim within the pecuniary jurisdiction of the Court. AIR 1956 Vindh Pra 6 (7).

(3) Provisions of this rule are subject to the condition that the Court has local jurisdiction in respect of all the causes of action involved. AIR 1955 Mad 595 (596) ** AIR 1954 Madh B 156 (158) ** AIR 1942 All 387 (389): ILR (1942) All 862 (DB).

(4) On death of life assured, suit filed for recovery of sums assured under several policies.

Held, under Andhra Pradesh Court-fees and Suits Valuation Act 1956, each policy claim to be separately valued for purposes of payment of Court-fee. AIR 1963 Andh Pra 63 (65): (1962) 2 Andh WR 15.

(5) Although a suit on promissory note alone would have been within the jurisdiction of the Court of Civil Judge, the District Judge had the jurisdiction to try the suit along with the claim on a mortgage. But the Court-fee should be calculated separately for each and added as per Section 9 of Court-fees Act 1900. (1963) Mys LJ (Sup) 121 (DB).

(6) It is not open to an applicant to confer jurisdiction on a Court under sub-rule (2) by uniting causes of action which are not allowed by sub-rule (1). In such cases Court can ask the applicant to split the causes of action or dismiss the same for misjoinder of causes of action. ILR (1967) 1 Ker 721: 1967 Ker LR 372.

15. Revision.— (1) Where the lower Court either misunderstands the nature of judicial discretion or otherwise wrongly holds that a suit is or is not bad for misjoinder of causes of action, a revision will lie . AIR 1951 Pat 352 (353) (DB) **

R. 4. Only certain claims to be joined for recovery of immoveable property.—No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except—

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(b) claims for damages for breach of any contract under which the property or any part thereof is held; and

(c) claims in which the relief sought is based on the same cause of action:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

[1882, S. 44, Rule (a); 1877, S. 44A; 1859, S. 10; R. S. C., O. 18, R. 2.]

Order 2, Rule 3 — Note 15 (contd.)
AIR 1922 Mad 332 (333, 334): 45 Mad 194 (DB) ** AIR 1922 Mad 436 (436) (DB).

ORDER 2, RULE 4 — SYNOPSIS

1. Scope.
2. Suit must be for the recovery of immovable property.
3. Leave of Court.
4. Clause (a).
5. Clause (b).
6. Clause (c).
7. Proviso.

1. Scope.— (1) In suits for recovery of immovable property, only the claims specified in three clauses of the rule can be joined. (1882) 5 Mad 161 (161, 162) (DB) ** 1908 Pun Re No. 30, p. 187 (192) (FB) ** (1895) 17 All 274 (277) (DB) ** AIR 1935 Pesh 161 (163) (DB).

(2) The object of rule is to avoid a joinder of claims of a character dissimilar to a claim for recovery of immovable property. (1882) 5 Mad 161 (161, 162) (DB) ** (1902) 25 All 229 (230) (DB) ** (1894) 17 All 274 (276, 277) (DB).

(3) The rule does not apply to a joinder of several claims where relief sought is based on same cause of action. Nor does it apply to joinder of several claims, all for the recovery of immovable property. (1882) 5 Mad 161 (161) (DB) ** AIR 1926 All 710 (711): 49 All 219 (DB) ** (1909) 4 Ind Cas 116 (118) (DB) (Cal).

2. Suit must be for the recovery of immovable property.— (1) Order 2, Rule 4 will not apply unless the suit is for recovery of immovable property. (1903) 30 Cal 369 (384) (SB).

(2) A suit upon a mortgage for recovery of money and a claim for arrears of rent on the lease of the mortgaged property executed by the mortgagor is not a suit for recovery of immovable property within this rule. (1891) 14 Mad 284 (286) (DB).

(3) Suit for redemption of mortgage of immovable property not within rule. AIR 1951 Simla 233 (235).

(4) A suit for a share in a mortgage decree is not a suit for recovery of immovable property within the meaning of this rule. (1911) 12 Ind Cas 684 (686) (DB) (Cal).

3. Leave of Court.— (1) Though leave of Court must ordinarily be obtained before instituting the suit, it can be obtained even afterwards in proper cases. AIR 1941 Bom 247 (250): ILR (1941) Bom 361 (DB).

(2) Where leave of Court would be necessary for the joinder of several claims, it is optional with the plaintiff either to apply for leave under this rule or to file separale suits in respect of each of them. (1884) 6 All 358 (362) (DB).

(3) Where leave is not obtained and a suit is dismissed on ground of misjoinder of causes of action, the time occupied in previous proceedings may be deducted in computing the period of limitation for instituting separate suits. (1897) 20 Mad 48 (51) (FB).

4. Clause (a).— (1) As to whether claims for recovery of immovable property and claims for mesne profits before suit constitute one cause of action or distinct causes of action, see Notes under O. 2, R. 2.

(2) A claim for mesne profits may be joined in a suit for recovery of immovable property. AIR 1943 Cal 1 (4): ILR (1942) 2 Cal 268 (DB).

(3) Clause (a) does not imply that a claim for mesne profits and a claim for possession necessarily amount to separate and distinct causes of action. AIR 1953 Madh-B 161 (165): ILR (1952) Madh-B 378.

(4) Partition suit — Final decree passed — Fresh suit for mesne profits by one of contesting parties against other co-sharer in respect of excess of lands found in his possession up to date of final decree — Barred by Order 2, Rule 2 and Section 11, Expl. 4 — Such a claim for accounts is not strictly a claim for mesne profits and neither Order 20, Rule 12 nor Order 2, Rule 4 applies to it. AIR 1961 Orissa 111 (112): 29 Cut LT 43 (DB).

5. Clause (b).— (1) In a suit for the recovery of possession of premises after the expiry of a lease, a claim for damages for breach of contract to deliver vacant possession can be joined under Clause (b). AIR 1946 Cal 357 (364): ILR (1946) 1 Cal 411.

6. Clause (c).— (1) Clause (c) is not really an exception to the rule, but has been inserted in order to avoid the possibility of mistake and to make the rule perfectly clear. AIR 1914 Lah 121 (123): 1914 Pun Re No. 4 (DB).

R. 5. Claims by or against executor, administrator or heir.—No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

[1882, S. 44, Rule (b); R. S. C., O. 18, R. 5.]

Order 2, Rule 4 — Note 6 (contd.)

(2) The rule has to be read with O. 2, Rule 2. (1887) 10 Mad 375 (506) (DB).

(3) There is nothing irregular in seeking to recover in one suit immovable and moveable property, if the cause of action is the same in respect of both. (1904) 31 Cal 262 (272): 31 Ind App 10 (PC) ** AIR 1932 PC 216 (227): 59 Cal 1399: 59 Ind App 331 ** AIR 1932 Bom 595 (596) (DB).

(4) An administration suit in which a claim to a relief in regard to a partnership business and a claim for recovery of immovable property on same cause of action are joined is not bad for misjoinder. AIR 1927 Bom 470 (471): 51 Bom 800 (DB).

[See however (1902) 24 All 553 (555) (DB).]

(5) In a suit against an administrator to recover damages for malfeasance, a claim for the recovery of immovable property in the hands of the administrator and certain others cannot be joined. AIR 1917 Pat 74 (76): 2 Pat L Jour 642 (DB).

(6) There is no legal bar to the combining of the relief for compulsory registration with the additional relief of declaration of title and possession in one and the same suit. AIR 1958 Pat 193 (196).

7. Proviso. — (1) So long as no question of limitation is involved, there is no objection to a claim for redemption and one for possession and partition being joined together in the same suit brought by a co-mortgagor against another co-mortgagor who alone has redeemed the mortgaged property belonging to the joint family. **AIR 1953 SC 1 (2): 1953 SCR 243:** ILR (1952) Punj 495.

(2) **Held,** that as a decree for redemption would become infructuous if the trespasser was not a party to suit, and the plaintiff would be unable to obtain undisturbed possession, it was eminently necessary to make the trespasser party and try and decide his claim before passing a decree for redemption in plaintiff's favour. — Suit for redemption — Trespasser in possession of mortgaged property — Not necessary party — Joinder whether proper, depends on facts. AIR 1961 Pat 28 (34).

(3) Where in a suit for redemption the plaintiff claims to be put into possession of the mortgaged property not only as against the mortgagee but also against persons in possession under a paramount title, leave of Court is necessary for a joinder of those claims. AIR 1924 Pat 613 (615): 3 Pat 244 (DB).

ORDER 2, RULE 5 — SYNOPSIS

1. Scope.
2. Claim by or against executor, administrator or heir as such.
3. "Estate" meaning of.
4. Joint of personal claims.

1. Scope. — (1) Though this rule deals with suits by or against only executors, administrators or heirs, a legatee or the next of kin, for example, also will come under the same category. The reason why executors, administrators and heirs are alone singled out by the Legislature in the rule is that, while acquiring title from the deceased in the same manner as the legatees or the next of kin, they, in addition, represent him. The closing words of this rule indicate this reason. (1907) 31 Bom 105 (110, 111) (DB).

(2) It makes no difference to the applicability of this rule that the two claims are made in the alternative. AIR 1935 Bom 343 (344): 59 Bom 573.

2. Claim by or against executor, administrator or heir as such. — (1) The words "claim by an heir as such" mean claim by him in a representative capacity, that is, as representing the person whose heir he claims to be. ('96) 18 All 256 (259) (DB).

(2) A suing executor of B for property in his possession on ground that A inherited it from B — Claim by A is in his own personal right. (1907) 31 Bom 105 (110, 111) (DB). **(DISSENTING FROM** 6 Bom 390.)

[But see (1911) 35 Bom 297 (301) (DB).]

(3) A claim as surviving coparcener of a joint Hindu family and a claim as sole heir of a deceased member of the family for recovery of a debt due on a promissory note executed in favour of latter cannot be joined in same suit. AIR 1935 Bom 343 (344): 59 Bom 573.

3. "Estate", meaning of. — (1) The word "estate" means not only estate rightly and properly held by executors, but also the "estate" which they hold in the belief that they are executors. AIR 1918 Cal 870 (873) (DB) ** AIR 1917 Cal 662 (663) (DB).

(2) The claim of a Hindu widow of a deceased undivided coparcener for maintenance against the surviving coparceners is not against the estate of the deceased husband. AIR 1914 Bom 193 (195): 38 Bom 120.

4. Joinder of personal claims. — (1) A suit against an executor for the administration of the estate of a deceased person and for an account of the partnership

R. 6. Power of Court to order separate trials.—Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient.

[1882, S. 45, para 2 and Ss. 46 and 47; R. S. C., O. 18, R. 1.]

R. 7. Objections as to misjoinder.—All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, unless the

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Order 2, Rule 5 — Note 4 (contd.)

carried on by the executor and the deceased is not bad for misjoinder. AIR 1927 Bom 470 (473): 51 Bom 800 (DB).

(2) Where A and B carried on a partnership and after A's death his son C continued the partnership with B, and subsequently C as administrator sued B for accounts of the partnership between A and B and also for dissolution of his own partnership, it was held that there was no misjoinder inasmuch as his personal claim arose out of the estate. AIR 1922 Mad 436 (436, 437) (DB).

(3) The expression "arises with reference to" is not to be narrowly construed. AIR 1922 Mad 436 (436, 437) (DB).

ORDER 2, RULE 6 — SYNOPSIS

1. Scope.
2. Power to order separate trials.
3. Powers of the Appellate Court.
4. Consolidation of suits.
5. Revision.

1. Scope.— (1) Order 2, Rule 6 will apply only when it is open to a plaintiff to combine several causes of action in one suit. It does not apply to a case of misjoinder of causes of action. AIR 1952 Cal 222 (225): ILR (1950) 1 Cal 108 ** AIR 1950 Nag 101 (102): ILR (1950) Nag 344 ** (1904) 27 Mad 80 (84) (DB) ** AIR 1924 All 720 (721).

[But see AIR 1914 Cal 795 (795) (DB).]

(2) Order 2, Rule 6 is an enabling rule. AIR 1941 Oudh 56 (58): 16 Luck 113.

(3) Order 2, Rule 6 is a rule of expediency and convenience. AIR 1939 Nag 256 (257).

(4) Composite election petition challenging election of Sarpanch and Panch — Not maintainable in view of Section 13-B and Section 13-C of the Punjab Grampanchayat Act. Order 2, Rule 6 has no application to such a case which is one of misjoinder of causes of action. AIR 1966 Punj 344 (347): ILR (1966) 1 Punj 803.

2. Power to order separate trials.— (1) Where any causes of action joined in one suit cannot be conveniently tried or disposed of together Court may order separate trials. (1892) 14 All 531 (536) (DB) ** AIR 1928 Mad 764 (767) (DB) ** AIR 1937 All 86 (87, 88): ILR (1938) All 153 (DB).

(2) The object of rule is to prevent embarrassment in trial of suit. AIR 1951 Simla (Punj) 233 (235).

(3) If the Court does not find it inconvenient to try the suit as brought, the plaintiff is entitled to continue the suit in the form in which he has filed it. AIR 1954 All 455 (455).

(4) Where the Court orders separate trials, it should deal with separate causes of action as sub-suits under the title, and number of the principal suit from which they spring, and should not order the plaintiff to file separate plaints. AIR 1951 Simla (Punj) 233 (235) ** AIR 1947 Nag 86 (87): ILR (1947) Nag 159 ** AIR 1941 All 209 (211): ILR (1941) All 370.

3. Powers of the Appellate Court.— (1) Appellate Court will not interfere with the discretion of trial Court in the matter of ordering separate trials. AIR 1941 Oudh 56 (58): 16 Luck 113 ** AIR 1924 Lah 156 (157).

4. Consolidation of suits.— (1) Court has inherent power ex debito justitiae to consolidate proceedings. (1906) 33 Cal 927 (932) (DB) ** (1913) 40 Cal 955 (959) (DB) ** ILR (1961) 11 Raj 1173.

[But see (1894) 22 Cal 511 (518).]

(2) Power to consolidate suits will be exercised only where it is asked for before the trial of suits begins and only where the parties are the same and the evidence given is common in all cases. AIR 1917 Cal 841 (841): 43 Cal 95 (DB) ** ILR (1961) 11 Raj 1173.

(3) Where the cases have very little in common and all parties except one are against it, a consolidation of the cases will be a material irregularity within the meaning of Section 115. AIR 1933 Pat 61 (62).

5. Revision.— (1) High Court will not interfere in revision with discretion of trial Court under this rule in the matter of ordering separate trials or refusing to do so. AIR 1951 Simla (Punj) 233 (235).

[See ILR (1955) Patiala 60 (64).]

(2) An application to consolidate is a separate and independent proceeding which has nothing to do with the matters to be decided in either of the suits. It is not in the nature of an interlocutory application in the suit. Hence revision lies in respect of an order to consolidate two suits for the purpose of hearing evidence where the issues in the two suits are different and the parties are not common and the order had been passed without the consent of the parties in the two suits. AIR 1961 Guj 92 (93): (1961) 2 Guj LR 179. (Such an order is illegal.)

Order 2, Rule 7

1. Objections to misjoinder of causes of action.— (1) Entertainment of an objection on ground of misjoinder of causes of

ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

[See S. 99, O. 1, Rr. 9 and 13.]

HIGH COURT AMENDMENTS

Chandigarh

Same as in Punjab—see Act 31 of 1966, S. 32 (1-11-1966).

Delhi and Himachal Pradesh

Same as in Punjab with necessary modifications—see Act 26 of 1966, S. 7, proviso and S. 13. [3-10-66 and 1-5-1967].

Rule 8

Haryana

Same as in Punjab with necessary modifications—see Act 31 of 1966, S. 32 (1-11-1966).

Kerala : Laccadive, Minicoy and Amindivi Islands

Sub-rule (1) is the same as that of Punjab except for the words "by striking out the remaining causes of action" in sub-rule (1), the word "suitably" is substituted. And in sub-rule (2), for the words "amended plaints for the remaining causes of action", the words "the amended plaint for the remaining cause of action" are substituted (9-6-1959) and Reg. 8 of 1965, S. 2 and Schedule (with effect from 1-10-1967).

Punjab

Add the following rule to Order 2:—

"Rule 8—(1) Where an objection, duly taken, has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed, and shall, within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed, the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the court-fees that may be necessary. Should the plaintiff not comply with the Court's order, the Court shall proceed as provided in R. 18 of O. 6 and as required by the provisions of the Court-fees Act." (12-5-1909.); Act 31 of 1966, Ss. 29 and 32 (1-11-1966).

Rajasthan

Add Rule 8 in Order 2:

"8. (1) Where such objection has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed and shall within a time to be fixed by the Court amend the plaint by striking out the remaining causes of action.

Order 2, Rule 7 — Note 1 (contd.)

action, when the case has proceeded far beyond settlement of issues does not deserve encouragement. AIR 1949 Nag 314 (316): ILR (1949) Nag 94.

[See AIR 1958 Cal 710 (713) (DB).]

(2) The plea of misjoinder cannot for the first time be taken in appeal or in second appeal. AIR 1950 Pepsu 7 (8): 1 Pepsu LR 180 ** AIR 1918 Nag 233 (233) ** AIR 1932 Bom 595 (596) (DB) ** AIR 1918 Cal 685 (686) (DB) ** AIR 1964 Guj 174 (177): (1964) 5 Guj LR 678.

(3) The defect of misjoinder is not a ground for reversing a decree by virtue of Section 99. AIR 1915 Mad 320 (320) (DB).

(4) Suit bad for misjoinder of causes of action. Court should not dismiss suit, but should give plaintiff opportunity to amend his plaint and to proceed with the claim in respect of one of the causes of action. AIR 1950 Mad 760 (761) ** AIR 1948 All 60 (62) ** AIR 1942 Cal 69 (70): ILR (1942) 1 Cal 235 (DB).

2. Waiver of objections.— (1) An objection on ground of misjoinder of causes of action will be deemed to have been waived if not taken at the proper time. AIR 1921 Cal 368 (371) (DB) ** AIR 1932 Bom 595 (596) (DB) ** AIR 1928 Mad 764 (771) (DB) ** AIR 1931 Pat 64 (68): 10 Pat 234 (DB).

(2) Objection raised but not pressed — It will be deemed to have been waived.

(2) When the plaintiff has selected the cause of action with which he will proceed the Court may on his application pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the court-fees that may be necessary. Should the plaintiff not comply with the Court's order, the Court shall proceed as provided in Rule 18 of Order 6 and as required by the provisions of the Court-fees Act." (14-8-1954.)

ORDER III

RECOGNIZED AGENTS AND PLEADERS

[See Section 85]

R. 1. Appearances, etc., may be in person, by recognized agent or by pleader.—Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader [a][appearing, applying or acting, as the case may be] on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

[1882, S. 36; 1877, Ss. 36, 49, 50, 417, 418, 435; 1859, Ss. 26, 16.]

[a] Substituted by the Code of Civil Procedure (Second Amendment) Act, 1926 (XXII of 1926), Section 2, for "duly appointed to act".

Order 2 Rule 7 — Note 2 (contd.)

AIR 1955 All 361 (362) (DB) ** AIR 1927 Bom 470 (471): 51 Bom 800 (DB).

(3) Where no objection of misjoinder had been taken in trial Court, and parties had gone to trial, under Section 99 the findings of Court as regards alternative reliefs as to which there was misjoinder are binding on all parties. AIR 1954 Mad 799 (802): ILR (1954) Mad 926 (DB).

(4) Even if a party waives his objection it is still open to Court to take objection at any time on its own initiative and adopt the procedure laid down in Rule 6. (1911) 12 Ind Cas 813 (822, 824) (DB) (Bom).

ORDER 3, RULE 1 — SYNOPSIS

1. Scope.
2. Appearance and act.
3. Appearance of party in person.
4. Appearance by pleader.
5. Direction to appear in person — Proviso.

1. Scope. — (1) Rule laid down in Order 3, Rule 1 is the general rule. AIR 1951 Hyd 143 (153): ILR (1951) Hyd 689 (FB) ** AIR 1954 J and K 45 (46): 12 J and K LR 122 ** AIR 1941 Nag 205 (206): ILR (1942) Nag 258.

(2) There are other modes of appearances, applications , or acting, expressly prescribed by the Code for particular cases which are taken out of the operation of the general rule to the extent so prescribed. AIR 1943 Cal 13 (15).

(3) A defendant who is not present in person at the hearing and whose pleader is also absent or has no instruction to go on with the case cannot be said to have appeared at the hearing. (1896) 23 Cal 738 (758) (FB) ** AIR 1937 All 347 (348) (DB) ** AIR 1926 Mad 971 (973) (DB) ** (1898) 23 Bom 414 (421, 422). [But see (1873) 20 Suth WR 53 (53) (DB).]

(4) The words "except where otherwise expressly provided by any law for the time being in force" do not refer to the other parts of the Code but to laws other than the Code. AIR 1941 Nag 205 (206): ILR (1942) Nag 258.

(4-A) Where under the rules framed in connection with election petitions under a Panchayat Raj Act a person could present the petition personally and there is nothing in the provisions to show that it could not be presented otherwise than in person by the petitioner himself the petition could also be presented through an agent. 1963 All LJ 542.

(5) The next friend of a minor plaintiff is to be regarded as a party for the purpose of appointing a recognised agent for acting on his behalf in the suit. AIR 1944 Bom 201 (202): ILR (1944) Bom 66.

(6) The chief officer of a company who is appointed by the duly appointed Managing Agents of the company as the duly authorised agent to conduct all civil suits on their behalf by virtue of a power of attorney in his favour, is fully competent to file a suit on behalf of the company. It is purely a case of sub-agency and the sub-agent is fully competent to file the suit on behalf of the plaintiff-company. AIR 1960 J and K 47 (49) (DB).

(7) The guardian ad litem of a minor who stands on the same footing as a next friend can appoint a recognized agent. AIR 1961 Him Pra 38 (39).

(8) The act of presentation of an application for leave to appeal to Supreme

Order 3 Rule 1 — Note 1 (contd.)

Court by the clerk of the Government Advocate representing the State is not according to law. AIR 1952 Raj 180 (181): ILR (1952) 2 Raj 492 (DB).

(9) Where a suit is instituted in a Court in India on behalf of the plaintiff who resides abroad permanently the provisions of Rr. 1 and 2 of O. 3 require the act of signing the plaint to be done by a recognized agent as defined by R. 2. If however it is signed by one who is found not to be a recognized agent the defect can be cured provided the suit was instituted with the knowledge and authority of the plaintiff. AIR 1962 Ker 19 (20, 21): 1961 Ker LT 182.

(10) Neither O. 3 R. 1, Civil P. C. nor Section 340, Criminal P. C. apply to departmental enquiries and a person cannot claim to be represented at such an enquiry against him by an advocate where the rules governing it do not provide for the right. AIR 1968 All 270 (272): 1968 Lab IC 910.

2. Appearance and act. — (1) 'Acting' includes applying. ILR (1953) 2 Cal 309 (315, 316) ** AIR 1938 Lah 698 (701): ILR (1938) Lah 417 (DB).

(2) The words "appearance" and "act" do not include 'pleading'. AIR 1955 Bom 262 (265) ** AIR 1955 Madh B 109 (111) ** AIR 1934 Cal 563 (563): 61 Cal 324 ** AIR 1959 Bom 21 (24) : 59 Bom LR 1019 ** AIR 1959 Raj 35 (35, 36) : 1959 Raj LW 54.

[But see AIR 1948 East Punj 61 (63).]

(3) Examining and cross-examining of witness is acting and not pleading which means only addressing the Court. AIR 1966 Raj 170 (172): 1966 Raj LW 77. (AIR 1955 Madh Bha 109 and obiter view in AIR 1955 Bom 262 **Dissented from.**)

(4) Insolvency proceedings against partnership firm — Filing of warrant of attorney of firm would be appearance of each of the partners. (1967) 71 Cal WN 1062 (DB).

(5) The signing and verificatioon of a plaint is not appearance, application or act in or to a Court as contemplated by O. 3, R. 1. 1963 Ker LT 463 (464): 1963 Ker LJ 255 ** AIR 1961 Bom 292 (298): 62 Bom LR 251 (DB).

(6) Where a pleader who has been duly authorised to act in Court on behalf of a party, engages another pleader to plead, the latter cannot "act" on behalf of the client. ILR (1953) 2 Cal 309 (316).

(7) A counsel authorised to do "pervi" is competent to sign and present memorandum of appeal. ILR (1954) 4 Raj 721 (724, 725) (DB).

(8) The presentation of an execution application in Court is an 'act'. AIR 1958 Raj 128 (130) : ILR (1957) 7 Raj 1064 (DB) ** AIR 1957 Andh Pra 172 (178, 179): ILR (1957) Andh Pra 1 (FB).

(9) Acting includes applying. AIR 1957 Andh Pra 172 (178, 179) : ILR (1957) Andh Pra 1 (FB).

3. Appearance of party in person.—(1) The purpose for which a party appeared or the action which he took on appearance is immaterial. AIR 1949 Punj 86 (87) : ILR (1948) East Punj 356 (DB) ** (1899) 23 Bom 414 (422) (DB) ** AIR 1918 All 333 (334) : 40 All 590 (DB) ** AIR 1964 Raj 197 (200) : 1964 Raj LW 290 (DB).

(2) Where the party does not actually appear before the Court when the suit is called on for hearing, the fact that he was present in the precincts of the court-house does not constitute appearance. AIR 1939 All 451 (451) ** (1911) 12 Ind Cas 903 (904) (Bom).

(3) Where the pleader engaged is absent at the hearing but the party himself is ready to go on with the case, he must be deemed to "appear" in the case. (1909) 33 Bom 475 (477) (DB) ** AIR 1945 Mad 300 (301).

(4) Where the pleader is absent but the party is present and applies for adjournment he must be deemed to "appear". AIR 1940 All 248 (249) : ILR (1940) All 229 (DB).

(5) Where the pleader engaged reports "no instructions" and the party takes no further part in the proceedings, his mere presence in Court will not make it an appearance in the suit. AIR 1943 Mad 728 (728) ** AIR 1926 Mad 971 (973) (DB) **AIR 1932 Cal 418 (419): 59 Cal 756 (DB) ** AIR 1951 Pat 291 (292): 29 Pat 659 (DB) ** AIR 1939 All 451 (451, 452).

[But see AIR 1949 East Punj 86 (87): ILR (1948) East Punj 356 (DB).]

(6) A party appearing in person has a right of audience in Court. AIR 1955 Bom 262 (264).

(7) Where due to some defect in the authority of the counsel, he cannot have the right of audience, it is incumbent upon the Court to call and hear the party and dispose of the case. Simply because the counsel cannot appear in a case it does not mean that the case should be dismissed without giving the party an opportunity to make submissions. 1960 Andh LT 150 (151).

4. Appearance by pleader — (1) The appearance of the pleader of a party is under this rule, equivalent to the appearance of the party himself. AIR 1956 Bhopal 54 ('54) ** AIR 1957 Raj 11 (15): ILR (1956) 6 Raj 926(DB) ** AIR 1929 All 811 (812) (DB) ** AIR 1927 Pat 291 (292): 6 Pat 383 (DB) ** AIR 1964 Raj 197 (200): 1964 Raj LW 290 (DB).

(2) Where more persons than one join as co-plaintiffs in one action they should all be jointly represented by one or more counsel. Each one of the plaintiffs or each one of the defendants as the case may be is not entitled to appear, act and plead by his own advocate. AIR 1961 Bom 94 (95): 62 Bom LR 947.

R. 2. Recognized agents.—The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other

Order 3 Rule 1 — Note 4 (contd.)

(3) In order to constitute the presence of the pleader of a party, an "appearance" on his behalf, it is necessary that he should have been duly instructed and able to answer all material questions relating to the suit. AIR 1924 Bom 139 (139) (DB) ** AIR 1923 Pat 520 (521) (DB) ** AIR 1928 Mad 831 (834 to 836) (DB) ** AIR 1964 Raj 197 (200): 1964 Raj LW 290 (DB).

(4) Whether the counsel is duly instructed or not is a question of fact which may either be determined either on the basis of evidence on record or may be inferred from the conduct of the counsel at the time of hearing of the suit. Where a counsel though physically present in the court neither acts nor pleads on behalf of his client and remains a silent spectator of what is done by the court without in any way participating in its proceedings, it would be quite reasonable to infer in such circumstances that he was not duly instructed by his client. While drawing such an inference due regard should be given to the purpose for which the appearance was required on that particular date of hearing. AIR 1961 Raj 88 (90, 91): 1961 Raj LW 538.

(5) Where the pleader of a party is absent, or refuses to appear for him, there is no appearance. AIR 1925 All 58 (58) (DB) ** 1887 All WN 65 (66) (DB) ** AIR 1956 Bhopal 54 (54, 55) ** AIR 1924 Mad 842 (843).

(6) Where the pleader of a party reports "no instructions" there is no appearance. AIR 1957 Raj 11 (15): ILR (1956) 6 Raj 926 (DB) ** AIR 1956 Nag 179 (183): ILR (1956) Nag 132 (DB). (AIR 1948 Nag 310: ILR (1948) Nag 462, **OVERRULED.)** ** AIR 1956 Bhopal 54 (54, 55) ** AIR 1943 Bom 321 (322): ILR (1944) Bom 1 (FB).

[See however AIR 1949 All 754 (756).]

(7) Where the pleader is instructed only to apply for an adjournment on the refusal of which he withdraws from the case, there is no "appearance" on behalf of the party. AIR 1956 Bhopal 54 (54, 55) ** AIR 1953 Assam 91 (92): ILR (1952) 4 Assam 112 ** (1900) 22 All 66 (76) (FB) ** (1907) 34 Cal 403 (417) (FB). **(OVERRULING** 27 Cal 529.) ** AIR 1925 Mad 21 (22): 47 Mad 819 (FB).

[But see (1963) 1 Mys LJ 544 (546) ** (1896) 23 Cal 991 (995).]

(8) If without reporting no instructions the pleader simply asks for an adjournment on the ground that he is not prepared with the case, there is appearance. AIR 1956 Bhopal 54 (54, 55) ** AIR 1949 Orissa 35 (35, 37): ILR (1949) 1 Cut 446 (DB) ** AIR 1937 All 284 (285).

[But see (1886) 12 Cal 605 (606) (DB).]

5. Direction to appear in person — Proviso. — (1) A Court has jurisdiction to direct, under the proviso, a party to appear in person, and on his failure to do so, to dismiss the suit or proceed ex parte, under Order 9, Rule 12. AIR 1949 Mad 292 (295): ILR (1949) Mad 343 ** ILR (1955) Patiala 459 (462) ** AIR 1919 Pat 36 (37): 4 Pat L Jour 152 (DB).

(2) Where one party desires the presence of the opposite party in Court for the purpose of examining him as a witness the proper procedure is to adopt the procedure provided by Order 16. AIR 1920 Mad 213 (216) ** AIR 1933 Mad 821 (822) ** AIR 1959 Andh Pra 645 (646): (1959) 2 Andh WR 532.

(3) Where the plaintiff is of unsound mind he should not be ordered to appear before the Court. ILR (1955) Patiala 459 (464).

[But see AIR 1920 Mad 213 (214).]

(4) The inherent powers under O. 3, Rule 1 which are intended for extraordinary cases should not be exercised if it is not shown that the plaintiff resorted to any delaying tactics or was interested in protracting the proceeding initiated by himself. AIR 1959 Andh Pra 645 (646): (1959) 2 Andh WR 532.

ORDER 3, RULE 2 — SYNOPSIS

1. Persons holding powers of attorney.
2. Power-of-attorney.
3. Objection to authority.
4. Persons carrying on business.

1. Persons holding powers of attorney. — (1) An agent who holds a power-of-attorney should be allowed to appear and act under this rule but the defendant may question his authority to do so. AIR 1948 East Punj 61 (62) ** AIR 1936 Lah 894 (895) ** (1892) 19 Cal 678 (681): 19 Ind App 135 (PC) ** (1906) 33 Cal 625 (629) (SB).

(2) It is the duty of the first Court to decide the question of authority. AIR 1917 All 90 (91): 39 All 343 (DB).

agent is expressly authorized to make and do such appearances, applications and acts.

[1882 and 1877, S. 37; 1859, S. 17B.]

HIGH COURT AMENDMENTS

Gujarat

Clause (a) shall be read as follows:—

"Persons holding on behalf of such parties either (i) a general power-of-attorney, or (ii) in the case of proceedings in the High Court of Gujarat an Advocate, and in the case of proceedings in any District, an Advocate or a Pleader to whom a sanad for that District has been issued, holding the requisite special power-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorizing them or him to make and do such appearances, applications and acts on behalf of such parties." (17-8-1931.)

Madhya Pradesh

Clause (a) is the same as that of Gujarat except that for the words "in the High Court of Gujarat, an Advocate", the words "in the High Court of Madhya Pradesh, an Advocate of that High Court" and for the words "in any district, an Advocate", the words "in any district, any Advocate" are substituted. (16-9-1960.)

Order 3 Rule 2 — Note 1 (contd.)

(3) A recognised agent can offer to be bound by the oath of the other party under Section 9 of the Oaths Act. AIR 1932 Lah 414 (416).

[But see (1890) 14 Bom 455 (457) (DB).]

(4) A recognised agent has no right of audience and cannot plead or examine witnesses. AIR 1955 Bom 262 (263, 264) ** AIR 1955 Madh B 109 (111). (AIR 1948 East Punj 61, **DISSENTED FROM.**) ** (1969) 1 Mad LJ 207: 82 LW 54 ** 1969 MPLJ 193: 1969 Jab LJ 250. (Holder of General power of attorney cannot act and plead on behalf of suitor in the M. P. High Court.) ** AIR 1964 Madh Pra 264 (267): 1964 MPLJ 629 (DB).

[See however AIR 1948 East Punj 61 (62, 63).]

[But see AIR 1966 Raj 170 (172): 1966 Raj LW 77. (Recognised agent can examine and cross-examine witnesses as he does not thereby plead.)]

(5) An agent who has been given a general power-of-attorney authorising him to mortgage a certain property on behalf of his principal and do other necessary acts in respect of the principal's interest in the property, cannot bind the principal to a personal money decree for the balance remaining due after the sale of the property. AIR 1931 Rang 223 (224) (DB).

(6) Persons authorised by the Government under Order 27, Rule 2 to act for it in respect of any judicial proceeding are to be deemed as recognised agents within the meaning of Order 3 by whom appearance and applications may be made or done on behalf of the Government. 1967 Raj LW 297: ILR (1967) 17 Raj 538.

(7) The General Manager of the Railway administered by the Central Government under Rule 2 of Order 27, C. P. Code, has the authority to represent the Central Government in matters enumerated therein and under Section 145 (1), Railways Act, it is also open to him in the manner provided therein to authorise even any other person to act for or represent him in any proceeding. AIR 1956 Pat 511 (513, 514) (DB).

(8) Suit by firm — Plaint filed and verified by person having power of attorney executed in his favour by manager of firm who was also one of the partners — Power of attorney authorising him to sue for recovery of money due to firm from defendant and also to appear and represent firm in any Court in any jurisdiction and to make. sign, verify, present and file any plaint — Suit is properly instituted — Each partner need not have signed the power of attorney, since one partner is agent of firm. **AIR 1961 SC 325 (330): (1961) 1 SCR 982.**

(9) The husband of a woman cannot be deemed to be her recognised agent within the meaning of Rule 2 of Order 3 or as an agent appointed to accept service of notice under R. 6 sub-rule (1) unless he has been so appointed by an instrument in writing signed by her. AIR 1962 Ker 266 (267): (1962) 1 Ker LR 131.

(10) Where there is a valid authority, mere formal defects will not invalidate the acts of the agent. (1903) 26 Mad 197 (198, 199) ** AIR 1932 Pat 3 (4) (DB) ** (1910) 37 Cal. 399 (405) (DB) ** 1964 Cur LJ 449 (Punj) ** AIR 1963 Madh Pra 127 (128).

[But see AIR 1914 All 536 (537): 36 All 46 (DB).]

Order 3 Rule 2 — Note 1 (contd.)

(11) Even where there is no authority originally to do an act, it could be given subsequently by the principal ratifying the unauthorised acts. AIR 1954 J and K 45 (47): 12 J and K LR 122 ** AIR 1962 Ker 19 (21): 1961 Ker LT 182. (Suit however must have been instituted with the knowledge and authority of the plaintiff.) ** AIR 1960 Cal 15 (20) (DB).

[But see AIR 1920 Pat 581 (582) (DB).]

(12) Without applying the mind to the question whether a person who filed an application on behalf of a party did or did not in fact hold a power of attorney it cannot be concluded that the application was filed by an unauthorised person merely because the counsel of the party cannot say whether that person held any power of attorney and explain why it was not filed with the application. AIR 1968 Madh Pra 118 (121): 1968 MPLJ 19 (DB).

(13) A person who is not an advocate or a legal practitioner can appear in several cases on behalf of parties as their recognised agent on the strength of general powers of attorney given by them in his favour and Rules 1 and 3 of Order 3 do not put any limitation on the number of cases in which and the number of persons on whose behalf a person can appear as a recognised agent. AIR 1964 Madh Pra 264 (267): 1964 MPLJ 629 (DB).

(14) Under Rule 2 as amended by Bombay High Court although undoubtedly the power-of-attorney must authorise the agent to do the necessary acts, that authority must appear not in a special power-of-attorney but a general power-of-attorney. AIR 1959 Bom 386 (389): 60 Bom LR 1288 (DB).

(15) A general power-of-attorney must confer upon the donee all necessary powers with regard to the business of the donor or at least with regard to a particular class of business of the donor, and it must at least authorise the agent to act for the donor with regard to all his litigation in different Courts. The mere fact that wide and full powers are conferred upon the donee with regard to one specific matter will not make the power-of-attorney a general power-of attorney. The power must be general with regard to the subject-matter, not general with regard to the powers conferred in respect of a subject-matter. AIR 1959 Bom 386 (388, 389, 390): 60 Bom LR 1288 (DB).

2. Power-of-attorney. — (1) A power-of-attorney should be construed strictly and as giving only such authority as it confers expressly or by necessary implication. AIR 1947 Nag 17 (24): ILR (1946) Nag 824 (FB) ** AIR 1952 Mad 559 (560) ** AIR 1968 Ker 213 (215): 1968 Ker LT 1 (FB) ** AIR 1965 Mys 272 (273): (1964) 2 Mys LJ 352 (DB). (Power of attorney executed for doing all acts and things necessary in connection with suits — Attorney has implied authority to bring suit on behalf of minor represented by next friend and suit is maintainable.)

(2) Every agent has got an implied authority to do whatever is necessary for, or ordinarily incidental to, the effective execution of his express authority in the usual way. AIR 1947 Nag 17 (23): ILR (1946) Nag 824 (FB) ** AIR 1931 All 320 (320) (DB).

(3) An authority to "prosecute a claim" will include an authority to file an appeal. AIR 1934 Lah 973 (973) (DB) ** ILR (1957) Punj 1443 (1448).

[But see AIR 1933 Lah 504 (505).]

(4) A counsel authorised by vakalatnama to do "peravi" is competent to sign and present memorandum of appeal. ILR (1954) 4 Raj 721 (724, 725) (DB).

(5) An agent expressly authorised to settle the dispute by compromise can refer the dispute to arbitration. AIR 1947 Nag 17 (23): ILR (1946) Nag 824 (FB).

(6) A recognised agent is entitled to examine and cross-examine witnesses since in doing that he is only "acting" and not pleading. AIR 1966 Raj 170 (172): 1966 Raj LW 77.

(7) Where by a power of attorney complete power to commence and prosecute and defend all actions, claims, demands etc., on behalf of the executant is given it includes also the power of making execution application by the attorney. AIR 1961 Punj 369 (374): ILR (1960) 2 Punj 241 (DB).

(8) A power to conduct suits generally does not authorise the agent to bring them to a close in an out of the ordinary way. (1890) 14 Bom 455 (457) (DB) ** (1874) 6 NWPHCR 210 (213).

[But see AIR 1932 Lah 414 (415, 416).]

(9) An agent authorised to act only in connection with one particular matter is one acting under a special power-of-attorney. AIR 1916 Bom 155 (156): 41 Bom 40 (DB) ** AIR 1930 Bom 511 (512).

(10) Though a next friend of a minor can appoint a recognised agent for the minor a general power-of-attorney would not enable the attorney to file suits in the name of unspecified minors using the grantor's name as next friend. when the power-of-attorney is executed by the next friend on his own behalf and not in his capacity as next friend of the minor. AIR 1944 Bom 201 (202, 203): ILR (1944) Bom 66.

3. Objection to authority. — (1) An objection to the validity of a power-of-attorney must be taken very early in the trial Court, and if not taken must be deemed to have been waived. AIR 1951 Ajmer 101 (1) (101) ** ILR (1957) Punj

R. 3. Service of process on recognized agent.—(1) Processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

[1882 and 1877, S. 38; 1859, S. 17.]

[a]**R. 4. Appointment of pleader.**—(1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by .or under a power-of-attorney to make such appointment.

(2) Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.

(3) For the purposes of sub-rule (2) an application for review of judgment, an application under Section 144 or Section 152 of this Code, any appeal from any decree or order in the suit and any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of ob-

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Order 3 Rule 2 — Note 3 (contd.)

1443 (1447) ** AIR 1953 Mys 89 (89): ILR (1952) Mys 90 (DB).

(2) A defect in the authority of the agent is only an irregularity not affecting the merits of the case. AIR 1930 Bom 511 (513) ** AIR 1923 Bom 44 (44): 47 Bom 227 (DB) ** 1964 Cur LJ 449 (Punj).

[But see 1907 Pun Re No. 109, p. 506 (510) (DB).]

4. Persons carrying on business. — (1) The person must really carry on business for and in the name of parties not resident within the local limits of the jurisdiction of the Court within which the applications, appearances or acts are to be made or done. 1907 Pun Re No. 109, p. 506 (508) (DB) ** AIR 1931 All 449 (450) (SB).

[See however AIR 1931 Pat 282 (284); 10 Pat 441 (DB).]

(2) The expression "carrying on business" must be interpreted as relating to commercial business. AIR 1937 Mad 293 (294).

(3) The appearance, application or act made or done must relate to matters connected with the trade or business. AIR 1937 Mad 293 (294).

Order 3, Rule 3 — Note 1

(1) This rule imputes the knowledge of the agent to the principal. (1903) 25 All 1 (17): 29 Ind App 203 (PC).

(2) A person holding a power-of-attorney is at liberty to refuse to accept service of summons and appear in a suit brought against the principal even though he is authorised by the power to appear and defend suits. (1882) 8 Cal 317 (326) (DB).

(3) Where in the case of Railway administered by the Central Government, the General Manager executes a special power-of-attorney in favour of B under Section 145, Railways Act, which power of attorney is wide enough to authorise B to represent, act, plead and do all things necessary in the suit, and B has actually acted and pleaded in the trial Court on behalf of the General Manager, notice of appeal arising out of the suit can in law be effectively served on B. AIR 1956 Pat 511 (513, 514) (DB).

ORDER 3, RULE 4 — SYNOPSIS

1. Scope.
2. Pleader.
3. Authority to abandon issue or claim.
4. Power to make admissions.
5. Power to withdraw suit.
6. Power to compromise suit.
7. Power to refer to arbitration.
8. Delegation of authority.
9. Privileges and rights of pleaders.
10. Duties.
11. Appointment of pleaders.
12. Acceptance of engagement.
13. "Until determined with the leave of the Court."
14. "Until all proceedings in the suit are ended."

1. Scope. — (1) This rule does not give an absolute right to any practitioner to appear in Court in any matter he chooses. It is subject to the rules governing the qualifications of the various classes of pleaders and the rules governing the procedure of Courts. AIR 1925 Mad 1201 (1202): 48 Mad 676 (DB) ** AIR 1932 Cal 1 (2, 3): 59 Cal 370 (DB).

(2) A vakalatnama under which a lawyer is empowered to act may be

taining refund of monies paid into the Court in connection with the suit shall be deemed to be proceedings in the suit.

(4) The High Court may, by general order, direct that, where the person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order.

(5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party unless he has filed in Court a memorandum of appearance signed by himself and stating—

(a) the names of the parties to the suit,

(b) the name of the party for whom he appears, and

(c) the name of the person by whom he is authorised to appear:

Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.

[1882 and 1877, S. 39; 1859, S. 18.]

[a] Rule 4 was substituted by the Code of Civil Procedure (Second Amendment) Act, 1926 (XXII of 1926), Section 2, for the original Rule 4.

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Bombay: Dadra and Nagar Havelia

In Order III, Rule 4, for the existing sub-rule (3), substitute the following as sub-rule (3):—

"(3) For the purposes of sub-rule (2) an application for review of judgment, an application under Section 144 or Section 152 of this Code, any appeal or revision

Order 3 Rule 4 — Note 1 (contd.)

general. It may specifically confer wide authority upon the lawyer including the authority to compromise and to receive payment. Even if a vakalatnama is generally worded it will enable a lawyer to accept a cheque on behalf of his client when he is armed with an acknowledgment receipt signed by his client and produces the same before the paying authorities. AIR 1968 Bom 112 (114): 1968 Bom LR 228 (DB).

(3) The rule is not intended to penalise the clients who had in fact instructed an Advocate at one stage of the litigation and immediately ratified his authority after he reported no instructions when the failure to file fresh vakalat was brought to notice. 1955-2 Mad L Jour 124 (125).

(4) The rule does not provide for the form of appointment of a pleader. AIR 1957 Andh Pra 950 (952, 953): ILR (1956) Andhra 420.

(5) Fresh power of attorney is to be filed along with revision petition — Omission is a curable irregularity. AIR 1961 Madh Pra 323 (324): 1961 Jab LJ 399.

(6) Reorganised agent appointed under general power of attorney by suitor — He cannot act or plead on behalf of suitor in High Court. 1969 MPLJ 193: 1969 Jab LJ 250.

(7) Where an assessee authorises the Advocate to appear not only in the rectification proceeding but "in all proceedings connected with the same or any order passed therein" the authortiy covers also the application under S. 66 (1) as that application cannot be said to be unconnected with the application for rectification and both arise out of the same proceedings. AIR 1960 Andhra Pra 422 (423): (1960) 1 Andh WR 280 (DB).

2. Pleader. — (1) The term "pleader" signifies all persons who are entitled to appear and plead and includes an advocate, vakil or attorney. AIR 1955 Madh B 109 (110) ** AIR 1940 Bom 272 (272): ILR (1940) Bom 510 (DB).

(2) The word pleader does not include agents. AIR 1928 Lah 733 (734).

(3) A pleader in India can both plead and act. (1888) 15 Cal 638 (644) (DB) ** 1967 Raj LW 297 (300): ILR (1967) 17 Raj 538.

(4) The contract between a pleader and his client is governed by the law relating to agency. AIR 1958 Andh Pra 652 (653): ILR (1957) Andh Pra 361 (DB) ** AIR 1934 Bom 299 (301): 58 Bom 597 (DB).

(5) Principal has right to revoke vakalat given by agent in favour of Advocate. AIR 1968 Mad 333 (334): (1968) 2 Mad LJ 74.

application from any decree or order in the suit, any application relating to such appeal or revision application, any application for execution of the decree in the suit, any application under Rule 9 or Rule 13 of Order IX of this Code, any application under Rule 4 of Order XXXVIII of this Code and any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or in any of the proceedings mentioned hereinbefore or any application for obtaining refund of monies paid into the Court in connection with the suit or any of the proceedings mentioned hereinbefore shall be deemed to be proceedings in the suit." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 (1-7-65).

Delhi and Himachal Pradesh

Same as that of Punjab—see Act 26 of 1966, Ss. 7 and 17 (w.e.f. 31-10-1966 and 1-5-1967).

Gujarat

In sub-rule (3) the words "or any application relating to such appeal" shall be inserted between the words "order in the suit" and "and any application or act." (17-8-1961.)

Kerala: Laccadive, Minicoy and Amindivi Islands

(i) In sub-rule (2), after the words 'Every such appointment" insert the words "When accepted by the pleader in writing".

(ii) In sub-rule (3) after the words "or section 152", insert the words "or applications under Order IX, Rule 9 or 13".

(iii) Omit sub-rule (5).

(iv) After sub-rule (5) insert the following sub-rule, namely:—

"(6) No pleader appearing on behalf of the Government or on behalf of any public servant sued in his official capacity shall be required to present any document

Order 3 Rule 4 (contd.)

3. Authority to abandon issue or claim. — (1) A pleader's general powers in the conduct of a suit include the power to abandon an issue, which in his discretion, he thinks it inadvisable to press. AIR 1939 Oudh 257 (262): 14 Luck 723 (DB) ** ILR (1964) Mys 1067 (1073) (DB) ** AIR 1962 Mys 140 (143): 40 Mys LJ 116 (DB) ** AIR 1960 Punj 209 (211): 62 Pun LR 110 (DB) ** AIR 1968 Cal 550 (553): 72 Cal WN 867. (But such abandoned issue cannot be agitated in Court of appeal.)

(2) A pleader cannot, unless authorised to do so, bring the suit to a close by offering to be bound by the oath of the opposite party. (1890) 14 Bom 455 (457) (DB) ** AIR 1930 Cal 463 (465) (DB) ** AIR 1961 Raj 209 (210): 1961 Raj LW 288.

[But see AIR 1927 All 584 (584): 49 All 842 (DB) ** AIR 1959 All 382 (383, 384): 1959 All LJ 104 (DB). (Power to abide by the statement of a witness is necessarily implied in the general and wide authority given under the vakalatnama. ILR 14 Bom 455, **DISSENTED.**)]

(3) An adovocate cannot bind the absent plaintiffs by signing the oath petition which is not contemplated by Section 8 of the Oaths Act and is in fact contrary to law. AIR 1953 Mad 708 (709).

4. Power to make admissions.—(1) Where in a particular case an inaccuracy creeps in, it is the duty of counsel to bring the error to the notice of the Court and recall the admission made on the basis of such error. AIR 1951 Nag 161 (162) : ILR (1950) Nag 445.

(2) An admission on a question of fact will always bind the client, unless the pleader has been induced or misled by a mistake or misapprehension as to the actual facts. AIR 1957 Andh Pra 965 (967) ** AIR 1949 Pat 197 (203) : 26 Pat 717 (DB) ** AIR 1934 Bom 186 (187) (DB) ** AIR 1967 Andh Pra 211 (214) : (1967) 1 Andh WR 42 (DB). (Admission by Counsel in course of proceeding can be withdrawn unless estopped — If opposite party has acted to his prejudice on faith of that admission it may not be allowed to be withdrawn.) ** (1967) 2 Andh WR 429 (431) ** (1962) 2 Ker LR 419 (422).

[But see ILR 46 Pat 1301 (1304) (DB). (Concession made by lawyer on facts — Aggrieved party can withdraw from such concession before higher Court.)]

(3) An erroneous admission by a pleader on a question of law does not preclude the party from claiming his legal rights in a higher tribunal. **AIR 1954 SC 526 (544) :** 1955 S C R 520 : I L R (1954) Trav-Co 867 ** AIR 1957 Andhra Pra 965 (967) ** ILR (1955) Punj 1086 (1096) ** AIR 1969 All 14 (24): 1968 All LJ 402 (DB) ** (1968) 70 Pun LR (D) 202 (DB) ** AIR 1966 Cal 438 (445) : (1966) 2 ITJ 524 (DB). (Defect in notice under S. 34, I. T. Act waived by counsel — Client is not bound by waiver.) ** AIR 1965 All 552 (557) (DB) ** AIR 1964 Manipur 7

empowering him to act, but such pleader shall file a memorandum of appearance signed by himself and stating—

(a) the names of the parties to the suit,

(b) the name of the party for whom he appears, and

(c) the name of the person by whom he is authorised to appear." (9-6-1959); Reg. 8 of 1965, S. 3.

Madhya Pradesh

Same as in Punjab, with following modifications in the items:—

(i) Item (x) in Punjab is item (v) in Madhya Pradesh;

(ii) in item (i), for the words "under Sections 22, 24 or 25" read "under Ss. 23, 24 or 25";

(iii) in item (ii), omit "rule 4";

(iv) in item (viii), which is item (ix) in Madhya Pradesh, omit "or Section 154";

(v) omit item (ix);

(vi) in item (xiii) of Punjab, which is item (xii) in Madhya Pradesh, for the words "any application for directing or proceeding for prosecution", read "any application or proceeding for sanctioning prosecution". (18-10-1968.)

Madras and Pondicherry[a]

(a) In sub-rules (1) and (2) for the words "in writing signed" substitute "a document subscribed with his signature in his own hand."

(b) Insert the following as clause 6 :—

"(6) No Government or other pleader appearing on behalf of the Government, or on behalf of any public servant sued in his official capacity, shall be required to

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Order 3, Rule 4 — Note 4 (contd.)

(8) ** ILR (1964) Mys 1067 (1073) (DB) ** (1963) 65 Pun LR 792 ** 1962 Mys LJ (Supp) 395 ** AIR 1960 Mad 457 (459, 460): (1960) 1 Mad LJ 445.

[See however AIR 1952 Bom 16 (18) (DB).]

[But see AIR 1932 Lah 343 (343) : 13 Lah 185 (DB) ** AIR 1930 Mad 547 (547, 548) ** AIR 1929 All 446 (447).]

(4) A party cannot challenge the form of an order made by the Court to which its counsel consented. AIR 1953 SC 98 (103) : 1953 SCR 351. (Order under Section 38, Companies Act — AIR 1951 Mad 572 : ILR (1950) Mad 339, REVERSED.)

(5) Admission relating to matter falling outside scope of authority of lawyer — Not binding on client. AIR 1961 Andh Pra 467 (470) : (1961) 2 Andh WR 101 (FB).

(6) Occupants of house pleadng for first time in appeal that their predecessor-in interest had after expiry of tenancy become statutory tenant — Counsel for owner in an eviction suit conceding that the predecessor-in-interest had so become statutory tenant — Concession of the type by a Counsel in the circumstances would not be held binding on the client. (1965) 67 Pun LR 887.

5. Power to withdraw suit.—(1) A vakalatnama couched in general terms suffices prima facie to authorise a pleader to apply for withdrawal of the suit. (1866) 5 Suth WR 80 (81) (DB) ** (1912) 14 Ind Cas 190 (190) (DB) (Cal).

(2) Application for registration of trade mark — Opposition — Withdrawal — Counsel has power to withdraw opposition unless otherwise instructed by client. 1965 Pun LR (Sup) 284.

6. Power to compromise suit. — (1) In the absence of specific authority, if a pleader enters into a compromise on behalf of the client, the compromise is not binding on the client. AIR 1959 Mad 7 (9) ** AIR 1956 Mad 586 (589) ** AIR 1955 Raj 59 (60) : ILR (1954) 4 Raj 905 (DB).

[See also (1967) 71 Cal WN 145 (150). (Court has discretion to refuse its assistance to such compromise if it results in failure of substantial justice.)]

[See however AIR 1947 Nag 17 (26) : ILR (1946) Nag 824 (FB) ** AIR 1968 Ker 213 (217): 1968 Ker LT 1 (FB). (Advocate's authority to compromise suit or confess judgment—Implied in every vakalat unless expressly excluded — O. 3, R. 4 does not affect the power.) ** AIR 1963 Punj 376 (378). (Counsel has implied power to compromise unless specifically countermanded.) ** AIR 1959 Mad 7 (9): (1958) 2 Mad LJ 34. (Under inherent authority impliedly given to vakil he has power to compromise suit.)

[But see AIR 1960 Bom 20 (21, 22) : 61 Bom LR 757. (Authority of advocate to compromise is implicit in the appointment of advocate.)]

(2) The client may acquiesce in or ratify the compromise. (1900) 6 Cal WN 82 (88) (DB) ** AIR 1925 Cal 696 (700, 702) : 52 Cal 386 ** AIR 1932 Cal 231 (232, 233) : 59 Cal 31 (DB).

(3) Where the original vakalatnama itself specially empowers the pleader to compromise the suit, no second or special vakalatnama is again necessary for the purpose. AIR 1950 Bom 113 (118) : ILR (1949)

present any document empowering him to act, but such pleader shall file a memorandum of appearance signed by himself and stating the particulars mentioned in sub-rule (5)."

[a] See Act 26 of 1968, S. 3 (a), Sch. Pt. II (1-10-1967).

Mysore

Substitute the following for Rule 4:—

"4. (1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document subscribed with his signature in his own hand by such person or by his recognised agent or by some other person duly authorised by or under a power-of-attorney to make such appointment and the appointment has been accepted in writing by the pleader.

(2) Every such appointment shall be filed into Court. Except as otherwise provided in this rule, no such appointment shall be deemed to have been terminated until its determination with the leave of the Court by a document subscribed with his signature in his own hand by the client or his recognised or authorised agent or by the pleader, as the case may be, and filed into Court; or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.

(3) For the purpose of sub-rule (2), proceedings in the suit shall mean all interlocutory and miscellaneous proceedings connected with the suit or any decree or order passed therein taken in the Court in which the suit has been instituted or by which the suit has been disposed of, and shall include applications for review of judgment, applications for amendment or correction of the decree, applications for execution of the decree or any order in the suit or for restitution under Section 144 of the Code or otherwise, applications for leave to appeal against any decree or order passed in the suit, and applications or acts for the purpose of obtaining copies of documents or copies of judgments, decrees or orders, or for the return of documents pro-

Order 3 Rule 4 — Note 6 (contd.)

Bom 428 (DB) ** (1912) 17 Ind Cas 391 (391) (Mad).

(4) A strict interpretation ought to be placed upon the terms empowering the pleader to enter into a compromise. AIR 1954 Mys 167 (167) : ILR (1954) Mys 1 ** AIR 1918 Mad 656 (657) : 41 Mad 233 (235) (DB).

(5) An authority to compromise a suit does not necessarily give an authority to negotiate the terms thereof without reference to his client. AIR 1939 Bom 490 (491) ** AIR 1918 Mad 656 (657) : 41 Mad 233 (DB).

(6) Where in a general power of attorney drafted in Urdu the agent was permitted to compromise ("Sulah") a suit on behalf of the principal, such power does not entitle the agent to refer a case to arbitration ("supurd satisi".) AIR 1969 Andh Pra 211 (212).

(7) A counsel, as distinguished from a pleader, can compromise a suit in the absence of any limitation on his authority. AIR 1958 Pat 521 (526) ** AIR 1955 Raj 59 (60) : ILR (1954) 4 Raj 905 (DB) ** AIR 1954 Nag 250 (251) : ILR (1954) Nag 425 (DB) ** AIR 1930 PC 158 (161, 162) : 57 Ind App 133 : 57 Cal 1311 ** AIR 1935 PC 119 (121) : 14 Pat 545 : 62 Ind App 196.

[But see AIR 1920 Low Bur 103 (104).]

(8) Authority of a counsel extends only to matters involved in the suit and not to collateral matters. AIR 1944 Bom 46 (48)** (1900) 27 Cal 428 (449) (SB) ** AIR 1927 Mad 852 (854) : 50 Mad 786 (DB).

(9) Where a pleader is engaged for the purpose of pleading merely, he has the same power with regard to compromising the suit as an advocate possesses. AIR 1952 All 29 (30) : ILR (1953) 2 All 544 (DB).

(10) A compromise entered into by a pleader duly authorised cannot be interfered with unless there is fraud, collusion, mistake or misapprehension on the part of the pleader. AIR 1932 Cal 231 (233) : 59 Cal 31 (DB) ** AIR 1926 Pat 73 (76) : 4 Pat 766.

(11) A compromise by a pleader is 'acting' within the meaning of this rule. AIR 1947 Nag 17 (25) : ILR (1946) Nag 824 (FB).

[See however AIR 1958 Pat 521 (526).]

(12) Where the advocates appearing on both sides submitted a joint memo to the Court, the advocates alone affixing their signatures to the joint statement and it is not disputed that the counsel signing the joint memo had instructions to do the same, joint memo must be deemed to have been signed as it were by the parties themselves though actually their signatures do not appear on the face of it. AIR 1957 Mad 95 (96) (DB).

[See also 1969 Cri LJ 70 (73) : 1968 All LJ 457. (Applicant making offer to decide the case on statement made on special oath by P—P, apart from being father and brother of some of the opposite parties also advocate for all the opposite parties em-

duced or filed in the suit or for obtaining payment or refunds of monies paid into Court in connection with the suit or any decree or order therein.

(4) (a) In the case of applications for execution of a decree, applications for review of judgment and applications for leave to appeal, a pleader whose appointment continues in force by virtue of sub-rule (2) of this rule and who has been served with the notice in any such application shall be at liberty to intimate to the Court in writing in the form of a memorandum filed into Court at or before the first hearing of any such application or appeal that he has not received instructions from his client and to retire from the case.

(b) Where, however, the pleader does not so report the absence of instructions to the Court but proposes to continue to act on the strength of the original appointment, he shall file into Court at or before the first hearing of such matter a formal memorandum stating that he will continue to appear and act for his client in the said application or appeal, as the case may be.

(c) If a pleader files the memorandum referred to in clause (a) or omits to file the memorandum referred to in clause (b) within the time prescribed therefor, the Court shall proceed as provided in sub-rule (2) of Rule 5 of this Order.

Order 3 Rule 4 — Note 6 (contd.)

powered under Vakalatnama to do all which opposite parties could have done in the case — **Held** as soon as P accepted the offer a binding contract came into existence between applicant and opposite parties.)]

(13) In all cases where an advocate has been given power to compromise there is an assumption that he will not compromise, unless he is instructed and the addition of the word in the vakalatnama that he is empowered to compromise on the advice of the party certainly does not in any way restrict the power of the advocate; and if he files a petition to compromise, he is deemed to have done it under the instructions unless the contrary is proved. 1958-1 Andh WR 451 (454, 455).

7. Power to refer to arbitration. — (1) A pleader cannot make a reference to arbitration where the vakalatama does not specifically authorize him to do so. AIR 1924 Nag 338 (342, 343) ** AIR 1932 Cal 343 (344) ** AIR 1935 Pat 16 (17).

[See however AIR 1947 Nag 17 (26): ILR (1946) Nag 824 (FB).]

(2) A counsel as distinguished from a pleader who derives his authority only from the vakalatnama, has implied authority even to make a reference to arbitration. AIR 1947 Nag 17 (26): ILR (1946) Nag 824 (FB) ** AIR 1932 Lah 373 (374): 13 Lah 775.

(3) A pleader has no authority to revoke the appointment of an arbitrator by the party himself, without the latter's knowledge or instructions. AIR 1922 Nag 39 (40): 18 Nag LR 140.

8. Delegation of authority. — (1) A pleader engaged by the party can delegate his authority to another pleader and request him to appear on his behalf. AIR 1954 Cal 455 (457) (DB) ** AIR 1958 Pat 521 (526).

(2) An advocate who is merely instructed by another pleader who has filed a vakalatnama but who has not filed one on his own account or has not accepted one already filed, has no right to have inspection of documents filed in the suit or proceeding. ILR (1953) 2 Cal 309 (315, 316) (DB).

(3) A presentation by the pleader's clerk or by another pleader delegated for that purpose is equivalent to a presentation by the pleader. AIR 1941 Pesh 1 (3) (DB) ** AIR 1939 Rang 1 (6) : 1939 Rang LR 108 (DB).

(4) In order that an application presented by the pleader's registered clerk should be in accordance with law, it should bear not merely the signature of the party but also the signature of the pleader, so as to indicate that the clerk was acting on behalf of his master. AIR 1952 Bhopal 41 (42).

(5) The act of presentation of an application for leave to appeal to Supreme Court should be done by the party in person, or by his recognised agent or pleader. AIR 1952 Raj 180 (181): ILR (1952) 2 Raj 492 (DB).

9. Privileges and rights of pleaders. — (1) If a pleader refuses to take up a case for any member of the public if a fair and proper fee is tendered to him, adequate instructions are given and the case is of a class which the lawyer is accustomed to take up, such a refusal will amount to professional misconduct. AIR 1929 All 367 (367): 51 All 892 ** AIR 1930 All 262 (263).

[But see (1908) 35 Cal 317 (319) (DB).]

(2) It is the privilege of a pleader to be allowed to plead and to claim an audience for the purpose and cross-examine the witnesses of the other side. A recognised agent has no such right. AIR 1955 Madh B 109 (110, 111) ** AIR 1960 Mad 73 (75): (1960) 1 Mad LJ 21 (DB).

(3) A pleader or solicitor has a lien on the papers entrusted to him until all his costs are paid off. (1880) 4 Bom 353

(5) The High Court may by rule or general order direct that where the person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attached by such person and in such manner as may be specified in the rule or order.

(6) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party unless he has filed into Court a memorandum of appearance signed by himself and stating (a) the names of the parties to the suit, (b) name of the party for whom he appears, and (c) the name of the person by whom he is authorised to appear:

Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has himself been duly appointed to act in Court on behalf of such party.

(7) No Government Pleader or other pleader appearing on behalf of the Government or on behalf of any public servant sued in his official capacity shall be required to present any document empowering him to act, but such pleader shall file into Court a memorandum of appearance signed by him and stating the particulars mentioned in sub-rule (6)". (30-3-1967).

Punjab, Haryana and Chandigarh

For sub-rule (3) of Rule 4, substitute the following:—

"(3) For the purposes of sub-rule (2),—

(i) an application or a proceeding for transfer under Ss. 22, 24 or 25 of this Code, (ii) an application under Rule 4 or Rule 9 or Rule 13 of Order IX of

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Order 3 Rule 4 — Note 9 (contd.)

(356) ** AIR 1925 Bom 351 (352): 49 Bom 505. (Priority of solicitor's lien.) ** AIR 1921 Cal 67 (68): 48 Cal 817.

(4) The lien is an equitable one and can be claimed only as against the client and not third parties. AIR 1952 Mys 141 (143): ILR (1952) Mys 270 ** (1898) 25 Cal 887 (889, 890).

(5) The lien, if any, is postponed to the prior charge of which the Advocate had notice. AIR 1952 Mys 141 (143): ILR (1952) Mys 270.

(6) Where an Advocate takes security for his fees the Advocate abandons the lien if any. AIR 1952 Mys 141 (143) : ILR (1952) Mys 270.

(7) A pleader who has not been paid by the client his remuneration can file a suit for the recovery of the fee agreed upon or by way of quantum meruit under S. 70 of the Contract Act. (1881) 7 Cal 401 (402) ** AIR 1930 Mad 132 (135): 53 Mad 309 (DB).

(8) Advocate conducting cases on behalf of a company — Company going in liquidation — Amounts realised in the cases in pursuance of decree obtained by advocate in hands of the liquidator — Advocate's claim for preference on account of fees and expenses on the ground of lien is maintainable. 1961 Ker LT 968: (1961) 2 Ker LR 587.

10. Duties.—(1) When a pleader accepts a brief it is his bounden duty to attend to his client's interest throughout the proceedings in the case, to represent his interests properly and to prosecute the case with due diligence. AIR 1958 Mad 122 (125) ** (1912) 36 Bom 606 (610) (DB) ** AIR 1924 Cal 257 (268, 269) (FB) ** AIR 1924 All 652 (657): 46 All 553 (DB) ** AIR 1962 Mys 140 (142): 40 Mys LJ 116 (DB). (Presumption is that pleader has acted in interest of client.)

(2) If a pleader is unable to attend when the case is called on, the brief should be returned in good time. AIR 1932 Bom 634 (635).

(3) It is not proper for a pleader to associate himself with reckless charges of fraud and criminality or to indulge in abuse, nor should he put questions attacking a witness's honour unless he has reasonable grounds for believing them to be true. AIR 1925 All 641 (641, 642): 47 All 729 (FB) ** AIR 1927 Cal 823 (825) : 55 Cal 85 (DB) ** AIR 1935 Mad 578 (580) (DB) ** AIR 1960 All 164 (168, 169).

(4) Counsel are expected to help and not to hinder the administration of justice. AIR 1935 All 117 (119): 57 All 573 (DB) ** AIR 1959 Ker 83 (87): 1958 Ker LJ 1046 (DB).

(5) A pleader having once appeared for a client should not appear against him in another litigation arising out of the same dispute and use the information received formerly in his professional capacity. AIR 1917 PC 80 (84) ** (1902) 26 Bom 423 (430) (FB) ** AIR 1925 Mad 1201 (1205): 48 Mad 676 (DB) ** AIR 1964 Andh Pra 261 (264): (1964) 1 Andh WR 133 (FB).

(6) Pleaders owe a duty not only to their clients but also to the Court and are bound to co-operate with the Court in the orderly and pure administration of justice. AIR 1956 Mys 60 (61, 62): ILR (1956) Mys 371: 1956 Cri L Jour 1415 ** AIR 1923 Cal 212 (215) (SB) ** AIR 1929 PC 58 (59): 56 Ind App 80: 51 All 267 ** AIR 1968 Ker 213 (216): 1968 Ker LT 1 (FB).

this Code, (iii) an application under Rule 4 of Order XXXVII of this Code, (iv) an application for review of judgment, (v) a reference arising from or out of the suit, (vi) an application for amendment of the decree or order or the record in the suit or an appeal, reference or revision arising from or out of the suit, (vii) an application for the execution of any decree or order in the suit, (viii) an application for restitution under Section 144 or Section 151 of this Code, (ix) an application under Section 151 of this Code, (x) an application under Section 152 of this Code, (xi) any appeal (including an appeal under the Letters Patent of the High Court) or revision application from any decree or order in the suit or an appeal arising from or out of the suit, (xii) any application relating to or incidental to or arising from or out of such appeal or revision or a reference arising from or out of the suit (including an application for leave to appeal under the Letters Patent of the High Court or for leave to appeal to the Supreme Court), (xiii) any application for directing or proceeding for prosecution under Chapter XXXV of the Code of Criminal Procedure, 1898, relating to the suit or any of the proceedings mentioned hereinbefore or an appeal or revision arising from and out of any order passed in such application or proceeding, (xiv) any application or act for the purposes of obtaining copies of documents or the return of documents produced or filed in the suit or in any of the proceedings mentioned hereinbefore, (xv)

Order 3 Rule 4 — Note 10 (contd.)

(Counsel has triple duty — To Public, Court and client.) ** 1968 Ker LJ 123 (DB) ** AIR 1967 Mad 162 (164): 1967 Cri LJ 551: (1966) 2 Mad LJ 219 (DB) ** AIR 1965 Guj 237 (242): 1965 (2) Cri LJ 491: (1965) 6 Guj LR 702 (DB).

(7) Bench and the Bar are both indispensable for the proper dispensation of justice. One cannot function without the other and for that reason the relations between the two should be of the highest co-operation. AIR 1963 All 477 (479): 1963 (2) Cri LJ 363.

(8) When a matter is heard ex parte a pleader is bound to bring to the notice of the Court adverse as well as favourable authorities on the point. AIR 1916 PC 227 (229): 44 Cal 573: 44 Ind App 30.

(9) Unwarranted or unfounded attacks against the Judge on the part of a pleader amount to misconduct. (1907) 29 All 95 (108, 109) (PC) ** AIR 1924 All 253 (254): 46 All 121 (FB).

(10) Non-payment of fees by itself would normally be no justification for refusing to attend. AIR 1958 Mad 122 (125).

(11) Advocate served with notice of date of hearing for recording party's statement — Advocate informing party — Failure of party to reach Court in time — Advocate also not present — Court imposing fine on advocate — Order not showing that fine was imposed as a result of disciplinary action — Order held, not justified by any rule of law. AIR 1966 Goa 47 (48) (DB).

11. Appointment of pleaders.— (1) The powers intended to be entrusted to a pleader should be specified in the vakalatnama. ILR (1954) 4 Raj 721 (725) (DB) ** ILR (1953) 3 Raj 422 (424) (DB).

(2) Practice — Instructions to counsel by party — Party has to give instructions to his counsel in good time and should not put that off till the actual date of hearing. **AIR 1965 SC 364 (387):** (1964) 7 SCR 267.

(3) Mere technical and formal defects in the vakalatnama do not invalidate the pleader's authority. AIR 1958 Raj 128 (130): ILR (1957) 7 Raj 1064 (DB) ** AIR 1950 Mys 70 (72): ILR (1951) Mys 1262 (DB) ** AIR 1924 Pat 114 (117) (DB) ** AIR 1959 Madh Pra 232 (233): 1959 MPLJ 749 (DB).

(4) If a pleader is appointed to act in Court such appointment must, under sub-rule (1), be in writing signed by the party or by a person duly authorised by him. ILR (1953) 2 Cal 309 (315) (DB) ** AIR 1951 All 451 (451) ** (1935) 39 Cal WN 534 (537).

[See also 1961 Raj LW 521 (523). (From mere fact that vakalatnama is not entered in index it cannot be inferred that it was not filed.)]

(5) An act done on behalf of his client by a pleader who has not been duly appointed by a document in writing as required by this rule is not valid. AIR 1937 Mad 239 (240): ILR (1937) Mad 320 (DB) ** AIR 1935 Mad 786 (789) ** AIR 1935 All 727 (728): 57 All 965 (DB).

[See however 1955-2 Mad LJ 124 (126) ** AIR 1951 Mad 340 (342) ** AIR 1945 Oudh 200 (201): 20 Luck 356.]

(6) Where a vakalatnama is signed by a pleader in token of his acceptance the mere fact that his name does not appear in the body will not make the appointment invalid. AIR 1932 Pat 3 (4) (DB) ** AIR 1923 Nag 281 (281) ** AIR 1918 Cal 482 (482) (DB).

[But see AIR 1935 All 727 (728): 57 All 965 (DB) ** AIR 1931 All 767 (768) (DB).]

(7) Appeal presented by Counsel on behalf of client — Vakil accepting Vakalatnama not signed by the client inadvertently — Client present in Court at the time of presentation — Defect in Vakalatnama held was merely an irregularity

any application for the withdrawal or for obtaining the refund or payment of or out of the monies paid or deposited into the Court in connection with the suit or any of the proceedings mentioned hereinbefore (including withdrawal, refund or payment of or out of the monies deposited as security for costs or for covering the costs of the preparation and printing of the Transcript Record of the appeal to the Supreme Court), (xvi) any application for expunging any remarks or observations on the record of or made in the judgment in the suit or any appeal, revision, reference or review arising from or out of the suit, (xvii) any application for certificate in regard to the substitution of heirs in appeal to the Supreme Court arising from the suit, and (xviii) any application under Rule 15 of Order XLV of the Code, shall be deemed to be proceedings in the suit:

Provided that, where the venue of the suit or the proceedings shifts from one Court (subordinate or otherwise) to another, situate at a different station, the

Order 3 Rule 4 — Note 11 (contd.)

and could be condoned. 1968 All WR (HC) 811.

(8) If the pleader is appointed for the purpose of pleading only, he has to file only a memorandum of appearance signed by himself under sub-rule (5). AIR 1940 Bom 272 (272): ILR (1940) Bom 510 (DB) ** AIR 1966 Raj 170 (172): 1966 Raj LW 77. (For acting in Court pleader has to file Vakalatnama.) ** AIR 1960 Mys 217 (219): 37 Mys LJ 683. (He has no power to give up part of case.)

(9) Where the suit is against Government and public officers, there must be formal vakaltnamas signed by the public officers. Mere intimation by the Government pleader that he is also appearing for the public servants, in the absence of any indication that the Government has undertaken their defence, is not enough. AIR 1954 Cal 455 (456) (DB).

[See also AIR 1960 All 588 (589). (Change in Standing Counsel for State — Fresh vakalatnama or memorandum of appearance should be filed by his successor-in-office.)]

(10) Where the execution application was filed within the period of limitation but without the vakalatnama this initial irregularity is cured if the vakalatnama is filed later on, even after the expiry of limitation. AIR 1951 Mad 340 (342) ** AIR 1958 Raj 128 (130): ILR (1957) 7 Raj 1064 (DB).

(11) A vakalatnama filed after presentation of an application for restoration of the suit dismissed for default but before the final orders are passed, cures the defect in the presentation of the application. 1955-2 Mad LJ 124 (126) ** AIR 1962 J and K 83 (84): 1962 Kash LJ 42.

(12) In a case where a banking company is wound up just as no separate vakalats need be filed in respect of each claim contained in a single list, separate vakalats need not be filed by the advocate appearing for the defendants in each of the claims under the same list. AIR 1957 Ker 17 (18): ILR (1957) Ker 23 ** AIR 1960 Punj 111 (116): (1960) 30 Com Cas 219.

(13) The presentation of an application by a pleader to whom the authority in the prescribed manner under Order 3, Rule 4 was not given is only an irregularity which can be cured at a subsequent stage. AIR 1957 Andh Pra 172 (182): ILR (1957) Andh Pra 1 (FB) ** AIR 1966 SC 1119 (1124): (1966) 3 SCR 242 (FB) ** AIR 1960 Cal 61 (62): 63 Cal WN 832 (DB).

(14) The client may ratify the acts of his pleader. It is no doubt true that mere ratification without compliance with the provision of Order 3, Rule 4 will not benefit the principal but when he ratifies it by means of a written instrument as required by the said rule, the same effect will follow as if the presentation of the application for restoration of suit had been made with proper authority. AIR 1958 Andh Pra 652 (653): ILR (1957) Andh Pra 361 (DB).

12. Acceptance of engagement. — (1) If after filing vakalatnama, the pleader acts for the party, then his appointment may be treated as accepted by the pleader, though the pleader had not signed the vakalatnama in token of his acceptance. AIR 1955 Nag 276 (277, 279): ILR (1955) Nag 821 (DB) ** (1935) 62 Cal 642 (653).

(2) Where the pleader endorses on the vakalatnama that he received it from the party though he did not know the man at all and receives the instructions from a person, who is neither a party nor an agent of the party nor his servant or friend duly authorised, he is guilty of grossly improper conduct. AIR 1954 Pat 303 (304): 1954 Cri L Jour 978 (SB).

13. "Until determined with the leave of the Court." — (1) The appointment of a pleader may be put an end to by the client or the pleader; but in either case it can be done only with the leave of the Court. AIR 1957 Raj 391 (392): ILR (1957) 7 Raj 154 ** AIR 1956 Raj 113(118): ILR (1956) 6 Raj 388 ** AIR 1950 Nag 110 (112, 113) ** AIR 1930 Pat 403 (404): 9 Pat 865 (DB).

(2) The statute does not require the writing containing the withdrawal to be in any particular form. An endorsement on the back of the plaint that the vakil

pleader filing the appointment referred to in sub-rule (2) in the former Court shall not be bound to appear, act or plead in the latter Court, unless he files or he has already filed a memorandum signed by him that he has instructions from his client to appear, act and plead in that Court,". (13-9-1968.)

Rajasthan

(a) In sub-rule (3), the words "or any application relating to such appeal" shall be added between the words "order in the suit" and "and any application or act".

(b) Add as sub-rule (6):—

"(6) No Government pleader within the meaning of Order 27, Rule 8-B, shall be required to present any document empowering him to act, but such pleader shall file a memorandum of appearance signed by himself and stating the particulars mentioned in sub-rule (5)." (14-8-1954.)

Order 3 Rule 4 — Note 13 (contd.)

has no instructions is sufficient. AIR 1957 Raj 391 (392): ILR (1957) 7 Raj 154 ** AIR 1952 Mad 819 (821) ** AIR 1925 Mad 21 (22): 47 Mad 819 (FB).

[See also AIR 1961 Raj 88 (90): 1961 Raj LW 538. (Mere physical presence of counsel in Court without acting or pleading —Inference is that he had no instructions from client.)]

(3) The question whether a particular document is to be taken to be a document in writing signed by the party or the pleader for the determination of the pleader's appointment depends altogether upon the interpretation of that document. AIR 1956 Raj 113 (118): ILR (1956) 6 Raj 388.

(4) An oral statement by the pleader is sufficient for the determination of the authority given to him to appear, apply or act for the client. AIR 1956 Bhopal 54 (54) ** AIR 1951 Mad 686 (2) (686).

[See however AIR 1951 Kutch 69 (70).]

(5) Death means physical death and not civil or constitutional death such as the appointment of the pleader on the bench. AIR 1958 Pat 521 (526).

(6) The Court may grant the leave for the termination of the appointment of a counsel subject to such conditions as it thinks fit. AIR 1951 Nag 278 (279): ILR (1950) Nag 613 (DB) ** AIR 1950 Cal 576 (576) (DB).

(7) Where a counsel has already retired from the case, no order can be made under this rule for payment of fees to him. Nor can such payment be ordered when the appointment of the advocate is terminated at his own request. AIR 1951 Nag 278 (279): ILR (1950) Nag 613 (DB).

14. "Until all proceedings in the suit are ended." — (1) A vakalatnama once filed until a pleader in the suit remains in force until all the proceedings in the suit are ended so far as the client is concerned. ILR (1956) 6 Raj 475 (491) ** AIR 1951 Him Pra 87 (88) ** AIR 1940 Bom 210 (212): ILR (1940) Bom 370 (DB).

(2) A fresh vakalat is not necessary for the purpose of appearing in execution proceedings. ILR (1956) 6 Raj 475 (491) ** AIR 1964 Mad 235 (236): (1964) 2 Mad LJ 165 ** AIR 1961 Bom 258 (259, 260): 63 Bom LR 54. (Vakalatnama authorising pleader to appear, make and receive payments — Authority extends to execution proceedings.)

[See AIR 1959 All 607 (610): 1959 All LJ 727 (DB). (Vakalatnama filed in appeal before High Court — Application for certificate to appeal to Supreme Court — Fresh vakalatnama not necessary.)]

(3) A fresh vakalat is not necessary for appearing in appeal. ILR (1956) 6 Raj 475 (491) ** AIR 1936 Lah 583 (584) ** (1965) All WR (HC) 794 (797): ILR (1966) 1 All 404. (Word "Court" in sub-clause (2) of Rule 4 includes revisional as well as appellate court.) ** AIR 1963 Madh Pra 127 (128) ** AIR 1963 Raj 147 (149): 1962 Raj LW 409 (DB) ** AIR 1962 All 485 (486): 1962 All LJ 586. (Power to file appeal includes power to file revision.) ** 1961 All LJ 514 (515): 1961 All WR (HC) 557 (DB). (Vakalatnama filed in appeal holds good for cross-objection also.)

[See however AIR 1933 Lah 504 (505) ** AIR 1933 Nag 219.]

(4) No fresh vakalat is necessary for review or for setting aside an ex parte decree. AIR 1957 Raj 391 (392): ILR (1957) 7 Raj 154 ** ILR (1956) 6 Raj 475 (491) ** AIR 1944 All 238 (239): ILR (1944) All 592.

[See however AIR 1951 Mad 686 (2) (686).]

(5) No fresh vakalat is necessary for an application to restore a suit dismissed for default. AIR 1957 Raj 391 (392): ILR (1957) 7 Raj 154 ** ILR (1956) 6 Raj 475 (491) ** AIR 1938 Nag 272 (272): ILR (1939) Nag 157 ** AIR 1963 All 374 (375).

[See however AIR 1958 Andh Pra 652 (653): ILR (1957) Andh Pra 361 (DB) ** 1955-2 Mad L Jour 124 (125) ** 1951 Ker L Tim 195 (197).]

(6) Where the vakalat executed by an assessee authorises the auditor to "appear for assessee in all stages. i. e., original and appellate, the vakalat cannot be construed as to enable the auditor to appear and represent the assessee in pro-

R. 5. Service of process on pleader.—Any process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person.

[1882 and 1877, S. 40; 1859, S. 18.]

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Bombay: Dadra and Nagar Haveli

In Order III, for the existing Rule 5 and its marginal note, substitute the following as Rule 5 and marginal note:—

"5. Service of process on Pleader.—Any process served on a pleader who has been appointed to act for any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Gujarat

In Order 3, Rule 5, for the words "on the pleader of any party", the words "on a pleader who has been appointed to act for any party" shall be substituted. (17-8-1961.)

Madhya Pradesh

Same as that of Gujarat (16-9-1960).

Madras and Pondicherry

Insert the following at the end:—

"Explanation.—Service on a pleader who does not act for his client, shall not raise the presumption under this rule." [R.O.C. No. 1810 of 1926—20-12-1927.]; Act 26 of 1968, S. 3 and Sch. Pt. II [w. e. f. 5-9-68].

Mysore

Substitute the following for Rule 5:—

"5. (1) Any process served on the pleader of any party or left at the office or ordinary residence of such pleader and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person.

Explanation.—Service on a pleader engaged only to plead and who does not act for his client shall not raise the presumption under this rule.

Order 3 Rule 4 — Note 14 (contd.)

ceedings for re-assessing the escaped income. ILR (1955) Hyd 80 (94, 95) (DB).

(7) Where the instructions to the counsel are only to apply for an adjournment and the adjournment is refused and the counsel withdraws from the case, it amounts to determination of the counsel's authority. AIR 1956 Bhopal 54 (54).

[But see AIR 1951 Kutch 69 (70).]

(8) An objection on the ground of want of fresh vakalatnama should be raised at the earliest opportunity, in the lower Courts. AIR 1954 Mad 934 (935): ILR (1955) Mad 40 (DB).

(9) Where the advocate has got a vakalat to proceed with the suit arising out of the original petition for leave to sue in forma pauperis that vakalat can be used along with the papers returned for presentation to proper Court. AIR 1957 Andh Pra 654 (656, 657): ILR (1956) Andhra 162.

Order 3, Rule 5 — Note 1

(1) Until the engagement of a pleader is legally determined, any process served on him will be effectual in spite of the pleader's endorsement thereon that he is no longer appearing for the party. AIR 1957

(2) A pleader appointed to act shall be bound to receive notice on behalf of his client in all proceedings in the suit as defined in sub-rule (3) of Rule 4. Where, however, such pleader having been served with notice reports to Court absence of instructions from his client under sub-rule (4) of Rule 4, the Court shall direct that notice shall be issued and served personally on the party in the manner prescribed for service of summons on a defendant under Order V of this Code." (30-3-1967.)

Rajasthan

Same as that of Gujarat. (14-8-1954.)

HIGH COURT AMENDMENTS

Rule 5B

Orissa

Same as that of Patna.

Patna

Add the following rule:—

"5B. Notwithstanding anything contained in Order 3, sub-rules (2) and (3) of Rule 4 of the First Schedule of the Code of Civil Procedure, no pleader shall act for any person in the High Court unless he has been appointed for the purpose in the manner prescribed by sub-rule (1) and the appointment has been filed in the High Court."

R. 6. Agent to accept service.—(1) Besides the recognized agents described in Rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

Appointment to be in writing and to be filed in Court.

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court.

[1882 and 1877, S. 41; 1859, Ss. 50, 51.]

HIGH COURT AMENDMENTS

Bombay: Dadra and Nagar Haveli[a]

In O. 3, Rule 6, the following marginal note and sub-rule 3 shall be added as new sub-rule.—

Court may order appointment of agent for service within its jurisdiction.

(3) The Court may at any stage of a suit order any party to the suit not having a recognised agent residing within the jurisdiction of the Court to appoint within a specified time an agent within the jurisdiction of the Court to accept service of process on his behalf. [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Gujarat

Same as that of Bombay, except the marginal note [17-8-1961].

Order 3 Rule 5 — Note 1 (contd.)

Raj 391 (392): ILR (1957 7 Raj 154 ** AIR 1950 Ajmer 40 (41) ** AIR 1928 Lah 426 (426).

(2) Where an ex parte decree is passed and the suit comes to an end, a service on the pleader is not equivalent to a service on his client. (1921) 63 Ind Cas 47 (48) (DB) (Pat).

(3) The pleader may waive the correct formalities in effecting service. AIR 1927 Pat 135 (139) (DB) ** AIR 1927 Cal 619 (621) (DB).

(4) If there is a special provision relating to a particular kind of process and this rule conflicts with such provision the special provision will prevail. AIR 1942 Mad 403 (403) (DB).

[But see AIR 1934 Pat 592 (592).]

(5) The rule applies only when the Court orders that process be served on the pleader. (1921) 63 Ind Cas 47 (48) (DB) (Pat).

(6) The provision relating to the service of notice to the parties in Section 14 (2) of the Arbitration Act is complied with when notice is served upon a counsel of a party. AIR 1957 All 265 (266).

(7) Notice on an advocate would be effective as regards the party only if the former does represent the latter in the proceedings; that is to say so long as the relative vakalath remains in force. 1965 Ker LT 383.

(8) Advocate served with notice of date of hearing for recording party's

ORDER IV
INSTITUTION OF SUITS

R. 1. Suit to be commenced by plaint.—(1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

[1882 and 1877, S. 48; 1859, S. 25. See S. 26.]

HIGH COURT AMENDMENTS

Allahabad

(a) For sub-rule (1), substitute the following:

"1. (1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf, a plaint, together with a true copy for service with the summons upon each defendant, unless the Court for good cause shown allows time for filing such copies.

(2) The court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other preceedings when the process is applied for."

(b) Re-number the present sub-rule (2) as sub-rule (3) [24-7-1926].

Bombay: Dadra and Nagar Haveli

For R. 1, substitute the following with marginal note, namely.—

Suit to be commenced by a plaint.

"1. (1) (a) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

(b) The plaintiff shall file as many true copies on plain paper of the plaint with annexures as there are defendants for service with the summons upon each defendant. Such copies shall be filed along with the plaint, unless the Court, for good reason shown, allows time for filing such copies.

Order 3 Rule 5 — Note 1 (contd.)

statement — Advocate informing party — Both party and advocate not present — Court imposing fine on advocate — Order not showing that fine was imposed as result of disciplinary action — Order, held, not justified — Advocate was not responsible for party's failure to appear in time in Court. AIR 1966 Goa 47 (48) (DB).

(9) Oral intimation by Court of filing award to pleader of party is service of notice under Section 14 (2) of Arbitration Act, 1940. **AIR 1962 SC 666 (668): (1962) 2 SCR 551 **** 1961 Raj LW 521.

ORDER 4, RULE 1 — SYNOPSIS

1. "Suit."
2. Presentation of plaint.
3. Place of presentation of the plaint.
4. Plaint to whom to be presented.
5. Time of presentation.
6. Mode of presentation.
7. Presentation of plaint in revenue Court.
8. Sub-rule (2).

1. "Suit." — (1) Claim against company in liquidation not made by presentation of plaint is not suit. AIR 1933 PC 63 (64): 60 Ind App 13: 54 All 1067.

(2) Probate proceedings becoming contentious are not regular suit but assume such form under Section 295 of Succession Act. AIR 1967 Orissa 41 (43): 33 Cut LT 13.

(3) Objection under Order 21, Rule 58 in executing Court is not a suit — Executing Court cannot stay proceedings and refer issues to revenue Court for decision. 1967 Mah LJ 877: 70 Bom LR 59. (Case under Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (XCIX of 1958), S. 125.)

(4) Order 4. R. 1 not applicable to presentation of election petition under Rajasthan Panchayat and Nyaya Panchayat Election Rules, R. 78. 1966 Raj LW 614: ILR (1967) 17 Raj 535.

2. Presentation of plaint. — (1) Suit is ordinarily instituted by presentation of plaint to Court or such officer as it appoints in this behalf. Time of such presentation is time of institution for Limitation Act. AIR 1934 Bom 91 (93) (DB) ** AIR 1929 Mad 480 (480) ** (1935) 62 Cal 1115 (1117).

(2) Where plaintiff has complied with all requirements of Orders 4, 6 and 7 and has nothing more to do than tendering of plaint to proper officer should be treated as institution and he should not be made liable for any delay in office. AIR 1952 Vindh Pra 12 (13).

(3) Suit commenced on plaint with some defect to be removed, or some deficiency in court-fee to be made up be

(2) The court-fee chargeable for such service shall be paid when the plaint is filed.

(3) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable" [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Madhya Pradesh

(a) Substitute the following for sub-rule (1):

"1. (1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf a plaint, together with as many true copies on plain paper as there are defendants, for service with the summons upon each defendant, unless the Court, for good cause shown allows time for filing such copies."

(b) Add the following as sub-rule (2) and re-number the present sub-rule (2) as sub-rule (3):

"(2) The court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed, and in the case of all other proceedings when the process is applied for" [16-9-1960].

Rajasthan

For sub-rule (1) substitute :—

"1. (1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf a plaint, together with as many true copies on plain paper of the plaint as there are defendants for service with the summons upon each defendant, unless the Court, for good cause shown allows time for filing such copies" [14-8-1954].

Order 4 Rule 1 — Note 2 (contd.)

deemed, on removal of defect within time allowed, to have been instituted on day of original presentation itself. AIR 1952 Vindh Pra 12 (13) ** 1969 All LJ 59.

(4) Defects in presenting, signing and verification of plaint — Not fatal — Can be cured by amendment even after limitation — Date of institution of suit not changed thereby. AIR 1961 Bom 292 (296 to 299): 62 Bom LR 251 (DB).

(5) Physical act of presentation is not of much importance and defective presentation of an application of plaint is at the most an irregularity which is easily curable. AIR 1959 All 487 (489): ILR (1958) 1 All 64 (DB). (An absence of signature on the objection, of the objector or his only authorised agent, if filed with his knowledge, is not fatal but is curable — Case under U. P. Consolidation of Holdings Act, 1953 (5 of 1954), S. 12.)

(6) Date of institution of suit is date on which plaint is presented to proper Court. AIR 1956 Punj 30 (32). (**OVERRULED** on a different point in AIR 1963 Punj 208 (DB).)

(7) Plaint filed in Court of principal civil jurisdiction with application for transfer to Subordinate Court — Plaint transferred to Subordinate Court and registered there — Date of filing suit held to be date when plaint was filed before Court of principal civil jurisdiction. AIR 1963 Punj 208 (211): ILR (1962) 2 Punj 915 (DB). (AIR 1956 Punj 30, **OVERRULED.**)

(8) Amendments made when some of plaintiffs had gone out of suit — Date of institution of suit remains unaltered. AIR 1967 Mad 410 (413): (1967) 2 Mad LJ 265.

(9) Where plaintiff paid court-fee on pauper application being dismissed and prayed for application being treated as plaint, but Court registered a suit, without taking plaint from application and fresh copies of application were filed only subsequently it was held date of institution was date of registration of suit. AIR 1953 Sau 145 (146).

(10) Limitation for suit expiring on 28th — Civil Court picketed from 19th to 29th — Plaint filed on 30th, held filed in time. AIR 1968 Assam 57 (58, 59) (DB).

(11) Proceedings under Section 45-B, Banking Companies Act — Debtor claiming set-off in reply — As proceedings originated not in plaint but in an application, reply filed must be treated as an application and not written statement. AIR 1963 All 90 (92): 1962 All LJ 958 (DB).

(12) In a suit where there are two or more plaintiffs, presentation of the plaint by one of the plaintiffs, or his pleader would be a proper presentation. AIR 1961 Bom 292 (298, 299): 62 Bom LR 251 (DB).

(13) Where the plaint is signed by the plaintiff and his advocate and though the vakalatnama is not filed, the plaint is held to be validly presented. AIR 1968 Assam 57 (59) (DB) ** AIR 1966 Bom 126 (131, 132): 67 Bom LR 644 (DB). (Third party notice in Form No. 13 and Rules 151 to 155 of Bombay High Court

Order 4 Rule 1 — Note 2 (contd.)
Original Side Rules is not plaint for purposes of Court Fees Act.)

(14) The filing of petition under Section 13 of Hindu Marriage Act (1955) is a part of proceeding governed by Civil P. C. 1962 All LJ 432 (DB).

3. Place of presentation of the plaint.— (1) Plaint has to be presented in Court of lowest grade competent to try matter under Sections 15 to 20. (1864) 2 Bom HCR (OC) 40 (45) (DB) ** (1873) 10 Bom HCR 495 (496) (DB) ** AIR 1929 Mad 29 (30, 31): 52 Mad 2.

4. Plaint to whom to be presented. — (1) Plaint must be presented either to Court or such officer as it appoints in that behalf. AIR 1918 Mad 1152 (1153) (DB).

(2) Delegation under Order 4, Rule 1 (1) need not be made to a ministerial officer only. The power can be delegated to a Subordinate Judge as well. The word "appoint" means to designate or to nominate. AIR 1961 Him Pra 2 (4).

(3) Presentation of plaint to person not authorized to receive it is not valid presentation. (1872) 18 Suth WR 172 (173) (DB) ** (1872) 4 NWPHCR 35 (36) (DB) ** (1869) 6 Bom HCR (AC) 254 (256) (DB) ** AIR 1916 Mad 3 (4): 38 Mad 295 (FB) ** AIR 1921 Mad 654 (655): 44 Mad 817 (DB).

(4) Presentation of plaints, out of office hours, to officer authorized to receive them only within office hours, is not valid unless such presentation is ratified by Court on that very day. AIR 1914 Mad 376 (376) (DB).

(5) Mere registration of plaint not validly presented subject to objections does not cure defect. (1910) 5 Ind Cas 330 (331) (All).

5. Time of presentation. — (1) Plaint may be validly received on Court holiday. (1871) 16 Suth WR 230 (231) (DB) ** 1870 Pun Re No. 43, p. 103 (108) (DB).

(2) Plaints may be received out of office hours at Judge's club or at his private residence. AIR 1953 All 609 (610) ** AIR 1922 Nag 167 (167) ** (1912) 34 All 482 (486) (FB). **(OVERRULING** 7 NWPHCR 5 — Appeal.) ** AIR 1924 Mad 448 (448): 47 Mad 312 (FB) ** AIR 1965 Andh Pra 386 (387, 388): (1965) 2 Andh WR 109. (If it is the last day of limitation, he should accept it and direct it to be put up before him the next day in Court for further orders.)

(3) Judge by accepting plaint at his club or residence constitutes himself "an officer appointed in this behalf." AIR 1924 Mad 448 (448): 47 Mad 312 (FB).

(4) Court is not bound to accept plaint outside Court precincts. (1912) 34 All 482 (486) (FB) ** AIR 1953 All 609 (610) ** AIR 1924 Mad 448 (448): 47 Mad 312 (FB).

(5) Appellate Court will not interfere with the refusal of lower Court to accept plaint outside Court precincts. AIR 1925 Mad 201 (201).

6. Mode of presentation. — (1) Word "presenting" implies delivery to Court or its officer in person or by recognised agent or pleader. AIR 1953 Punj 160 (160) ** AIR 1951 Ajmer 5 (6) ** AIR 1934 Bom 91 (93) (DB) ** (1892) 15 Mad 137 (138) (DB) ** (1896) 19 Mad 354 (355). (Petition placed in a petition box is not properly presented.) ** AIR 1939 Nag 242 (244): ILR (1939) Nag 515 (DB) ** AIR 1939 Rang 1 (5, 6): 1939 Rang LR 108 (DB). (Plaint drawn up and signed by authorised pleader presented by another pleader delegated to do so — Plaint must be deemed to have been presented by pleader signing it.) ** (1935) 39 Cal WN 534 (537). (Plaint presented by pleader — Vakalatnama not signed by plaintiff — Presentation is irregular — Matter can be regularised only by order of condonation — Party cannot correct defect without reference to Court.)

[See AIR 1941 Oudh 169 (171) (DB). (Application under Sch. 2, para. 20 presented by party's counsel whose certificate of practice expired before the date of presentation and was renewed only afterwards — Presentation is irregular — Irregularity cannot be cured at the appellate stage when application was time barred.)]

[See however AIR 1931 All 507 (511): 54 All 57 (SB). (Oral authority to agent to present sufficient.)]

(2) Sending of a plaint by post is not proper presentation. (1900) 1900 Pun Re No. 38, p. 141 (DB).

(3) Placing plaint on officer's table when he is not present is not proper presentation. (1871) 3 NWPHCR 342 (342) (DB).

(4) Presentation of plaint by servant who is not recognized agent of plaintiff is not valid presentation. AIR 1922 Bom 113 (113): 46 Bom 150 (DB).

(5) Presentation of plaint through next friend in case of major plaintiff is not invalid if mistake is bona fide. AIR 1931 All 507 (511): 54 All 57 (SB). (AIR 1924 All 54: 45 All 701, **OVERRULED.)**

(6) Presentation of plaint by person having no power of attorney is mere irregularity. AIR 1949 All 499 (500) (DB).

(7) Absence of presentation of plaint by some plaintiffs does not affect jurisdiction of Court. Suit must be deemed to have been instituted on their behalf as well if it was filed with their knowledge and authority. AIR 1951 Pat 323 (324) (DB). ((1890) 17 Cal 580 (PC), Foll.)

7. Presentation of plaint in revenue Court. — (1) Revenue Courts have no authority to specify certain days on which plaints shall not be received. (1869) 11 Suth WR 537 (538).

R. 2. Register of suits.—The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

[1882 and 1877, S. 58; 1859, S. 38.]

HIGH COURT AMENDMENTS

Assam and Nagaland

Same as that of Calcutta.— Assam High Court Order, 1948, Cl. 6 [5-4-1948]; Act 27 of 1962, Ss. 13 and 15 [w. e. f. 1-12-1963].

Calcutta : Andaman Nicobar Islands

Insert the following words after the words "particulars of every suit".

"Except suits triable by a Court invested with the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887" [1-1-1939].

ORDER V

ISSUE AND SERVICE OF SUMMONS

[See Ss. 27 to 29 and 133.]

ISSUE OF SUMMONS

R. 1. Summons.—(1) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified :

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

Order 4, Rule 1 — Note 7 (contd.)

(2) Institution of suit by presentation of plaint to Collector instead of Deputy Collector is not void for want of jurisdiction but is only voidable by defendant. (1874) 21 Suth WR 450 (452) (FB).

8. Sub-rule (2). — (1) Where plaint has not been signed and verified in accordance with Order 6, Rule 14 and Order 6, Rule 15, suit cannot be regarded as instituted. AIR 1952 Vindh Pra 12 (13) ** AIR 1950 Bom 130 (134).

(2) Court has discretion to allow defect relating to signing and verification of plaint to be remedied even after expiry of limitation for suit. AIR 1952 Vindh Pra 12 (13) ** AIR 1950 Bom 130 (134).

Order 4, Rule 2 — Note 1

(1) Two or more suits filed on same day will be presumed to have been filed in the order in which they appear in the register. (1894) 16 All 165 (173, 175) (FB) ** (1935) 62 Cal 1115 (1116).

(2) Practice of Calcutta High Court is to place ordinary mortgage suits on list of suits for liquidated claims for purpose of their expeditious disposal. (1900) 27 Cal 355 (357).

ORDER 5, RULE 1 — SYNOPSIS

1. Scope.
2. Proviso to R. 1 (1).

1. Scope. — (1) It cannot be said that a person is not a defendant to a suit until the summons has been taken out and served. AIR 1930 Bom 567 (568).

(2) The summons should show what claim the defendant is called upon to answer and on what date he is to be heard. (1913) 35 All 163 (164) (DB).

(3) An appearance by the defendant in an interlocutory application before the registration of a suit itself is no appearance within the meaning of the proviso. (1913) 35 All 163 (164) (DB).

(4) It is not the duty of the plaintiff to take out summonses to the places where the defendant might have gone from his place of residence. AIR 1915 Mad 342 (343).

[See however AIR 1916 Mad 761 (762) (DB).]

(5) If on the date fixed in the summons the pleader alone appears and is unable to answer questions relating to the suit there is no appearance as contemplated by sub-rule (2). AIR 1956 Nag 179 (182): ILR (1956) Nag 132 (DB). (AIR 1948 Nag 810: ILR (1948) Nag 462, **OVERRULED.**)

(6) Principle of the rule applies also to plaintiff appearing by pleader. AIR 1964 Raj 197 (200): 1964 Raj LW 290 (DB).

(7) Where summons is issued under this Rule and R. 5 for settlement of issues only, the expression 'first hearing' used in R. 1, O. 8, means the date of settlement of issues. AIR 1961 Pat 152 (155): 1961 BLJR 478.

(8) Notice under S. 34, I. T. Act must bear the signature of the Income-tax Officer when it is served as if it were a summons. AIR 1966 Cal 438 (443): (1966) 62 ITR 109 (DB).

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear—

(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.

[1882, S. 64; 1877, Ss. 64, 68; 1859, S. 41. See O. 3, Rr. 1, 3, 4 and 5.]

R. 2. Copy or statement annexed to summons.—Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

[1882 and 1877, S. 65.]

HIGH COURT AMENDMENTS

Allahabad

Omit the words "or, if so permitted, by a concise statement" [24-7-1926].

Bombay: Dadra and Nagar Haveli

In Order V, for the existing Rule 2 and its marginal note, substitute the following as Rule 2 and marginal note :—

Order 5, Rule 1 — Note 1 (contd.)

(9) Date given in summons is its essential ingredient. AIR 1964 Madh Pra 261 (261).

(10) Summons mentioning wrong date for appearance or appearance on a day when Court is closed, is not a summons as required under O. 5, R. 1 — No law or procedure requires defendant to appear on the next following date in such cases. AIR 1964 Madh Pra 261 (261, 262).

(11) Orders passed without notice to defendant are void unless express legislation provides otherwise. AIR 1959 Madh Pra 359 (362): 1959 MPLJ 841 (DB).

(12) Simultaneous issue of the guardian notice and also the summons on behalf of the minors are not prohibited. The acceptance by the guardian of notice along with the summons is legal and proper. AIR 1959 Ker 169 (171): 1958 Ker LT 1028 (DB).

(13) Notice by Court of filing of award under S. 14 (2) of Arbitration Act 1940 need not be in writing and is properly served by oral information to parties or pleaders. Provisions of O. 5 do not apply. 1961 Raj LW 521.

(14) Objections against compensation under U. P. Zamindari Abolition and Land Reforms Act 1950, (1 of 1951) — Notice of objection to State under O. 5 is not necessary. AIR 1962 All 590 (599, 600): 1962 All LJ 501 (DB).

(15) There is no penalty for failure or omission to appear in response to a summons under S. 27. AIR 1955 SC 425 (430): (1955) 2 SCR 1.

(16) Summons cannot be refused for default of plaintiff in producing original account books. (1898) ILR 22 Bom 971 (972) (DB).

(17) The use of the word 'may' in this Rule cannot be taken to mean that it is optional with the Court to issue summons or not, unless the case comes within the Proviso. AIR 1960 Cal 538 (539) (DB) •• (1913) ILR 35 All 163 (164) (DB).

(18) District Judge has no power to issue directions to Subordinate Courts in the matter of issuing notices and summons which has the effect of interfering with discretion of Courts in fixing date of hearing in cases before them. AIR 1962 Manipur 24 (26). (Proper procedure is to get Rules framed under Art. 227, Constitution of India and State Courts Act for regulating the practice and procedure of Subordinate Courts.)

2. Proviso to R. 1 (1). — (1) Appearance of defendant at hearing of pauper application — Application registered as suit — Defendant entitled to service of summons after such registration — Admission by defendant of plaintiff's claim in pauper application — Claim subsequently amended — Case does not come under proviso to O. 5, R. 1. AIR 1960 Cal 538 (539) (DB).

Order 5, Rule 2 — Note 1

(1) O. 5, R. 2 (as framed by Bombay High Court under S. 122) applies to proceedings on the Original Side. AIR 1969 Bom 117 (118, 119): 70 Bom LR 546.

(2) Summons not acccompanied by copy of plaint cannot be regarded as duly served. AIR 1959 Punj 467 (468): 60 Pun LR 374.

(3) Copy of the plaint was not served along with the Chamber Summons,

Copy of plaint to accompany summons.

2. Every summons shall be accompanied by a copy of the plaint with annexures [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Kerala : Laccadive, Minicoy and Amindivi Islands

Omit the words "or, if so permitted, by a concise statement" from Rule 2 and the words "or statement" in the marginal note [9-6-1959]; Reg. 8 of 1965, S. 3.

Rajasthan

Same as that of Allahabad [14-8-1954].

R. 3. Court may order defendant or plaintiff to appear in person.—(1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day it shall make an order for such appearance.

[1882, S. 66; 1877, Ss. 66, 67; 1859, S. 42; See O. 9, R. 12.]

R. 4. No party to be ordered to appear in person unless resident within certain limits.—No party shall be ordered to appear in person unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the court-house.

[1882 and 1877, S. 67; 1859, S. 42.]

HIGH COURT AMENDMENTS

Rule 4A

Allahabad

Add the following Rule 4A :—

"4A. Except as otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement" [24-7-1926].

Orissa

Add new Rule 4A :—

"4A. Where there is no express provision to the contrary the Court may, in any interlocutory proceeding and any proceeding after decree in the trial Court, either on the application of a part or of its own motion, dispense with the service of any further notice upon any defendant who has not appeared or has not filed a written statement" [7-5-1954].

Order 5, Rule 2 — Note 1 (contd.)

Held summons was not properly served under O. 5, R. 2, Bombay. AIR 1969 Bom 117 (119): 70 Bom LR 546.

Order 5, Rule 3 — Note 1

(1) The Court may require the defendant or a pro forma party, when necessary, to appear in person. AIR 1916 Mad 445 (446) (DB).

(2) The party is bound to appear in person only on the date fixed therein. He is not bound to appear in person on any other date to which the suit is adjourned. AIR 1917 All 95 (96): 39 All 476.

(3) A Court cannot order the personal appearance of a party under this rule after the case has passed the stage of service of summons to the defendants. AIR 1932 Nag 135 (136): 28 Nag LR 146 °° AIR 1933 All 551 (553): 55 All 666 (DB).

(4) This rule is subject to exception in favour of a pardanashin lady. AIR 1933 All 551 (553): 55 All 666 (DB).

Order 5, Rule 4 — Note 1

(1) Consideration of mere distance, inconvenience and expenses of a defendant are not sufficient to sustain an application for issue of commission to examine

R. 5. Summons to be either to settle issues or for final disposal.—The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

[1882 and 1877, S. 68; 1859, S. 41.]

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta—See Assam High Court Order, 1948, Cl. 6 [5-4-1948]; Act 27 of 1962, Ss. 13 and 15 [w. e. f. 1-12-1963].

Bombay: Dadra and Nagar Haveli[a]

In Order V, for the existing Rule 5 and its marginal note, substitute the following as Rule 5 and marginal note :—

Summons to be either to settle issues or for final disposal.

5. (i) The Court shall determine at the time of issuing the summons whether it shall be for the filing of written statement and the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly,

Provided that in every suit heard by a Court of Small Causes the summons shall be for final disposal of the suit [1-11-1966];

(ii) In the proviso insert the words "the Bombay City Civil Court or by" between the words "every suit heard by" and "a Court of Small Causes" [16-8-1948].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Calcutta: Andaman and Nicobar Islands

Insert the words "for the ascertainment whether the suit will be contested" after the words "issues only" [25-8-1927].

Kerala: Laccadive, Minicoy and Amindivi Islands

For R. 5 the following rule shall be substituted, namely :—

"5. The Court shall determine, at the time of issuing the summons, whether it shall be—

(i) Summons to be either (1) to ascertain whether the suit is contested or not or (2) for the final disposal of the suit.— For the defendant to appear and state whether he contests or does not contest the claim and directing him, if he contests, to receive directions as to the date on which he has to file his written statement, the date of trial and other matters and if he does not contest, for final disposal of the suit at once; or

(ii) For the final disposal of the suit at once; and the summons shall contain a direction accordingly:

Order 5, Rule 4 — Note 1 (contd.)

the defendant. AIR 1963 Mad 103 (104): (1962) 2 Mad LJ 490.

Order 5, Rule 5 — Note 1

(1) It is desirable to issue summons for the final disposal of the suit only in simple cases. AIR 1914 Bom 46 (47): 38 Bom 377 (DB).

(2) It is not proper to issue summons for the final disposal in mortgage suits. AIR 1914 Bom 46 (47): 38 Bom 377 (DB). (**OVERRULED** by AIR 1959 Cal 231.)

(3) Although O. 5, R. 5, is expressed in mandatory language, the omission to follow the prescriptions of O. 5, R. 5, does not invalidate the summons and consequently the service of a composite writ (in which all the three alternatives are combined) amounts to service of summons within the meaning of S. 17 (1) of the West Bengal Tenancy Act of 1956. AIR 1959 Cal 231 (235): 63 Cal WN 216 (DB). (62 Cal WN 718, **OVERRULED.**)

(4) The expression 'first hearing' used in R. 1, O. 8, means the date of settlement of issues. AIR 1961 Pat 152 (155): 1961 BLJR 478.

(5) As the Court has to determine, at the time of issuing summons, whether

Provided that in every non-appealable case the summons shall be for the final disposal of the suit" [9-6-1959]: Reg. 8 of 1965 [w. e. f. 1-10-1967].

Madras and Pondicherry

Delete the first paragraph and substitute the following in lieu thereof.

"R. 5. The Court shall determine, at the time of issuing the summons, whether it shall be—

(1) for the settlement of issues only, or (2) for the defendant to appear and state whether he contests or does not contest the claim and directing him, if he contests, to receive directions as to the date on which he has to file his written statement, the date of trial and other matters, and if he does not contest, for final disposal of the suit at once; or (3) for the final disposal of the suit; and the summons shall contain a direction accordingly". [P. Dis. No. 7 of 1927] and Act 26 of 1968, S. 3 and Sch. Pt. II [w. e. f. 5-9-68].

Mysore

Delete Rule 5 and substitute the following :—

5. The Court shall determine, at the time of issuing the summons, whether it shall be—

(a) for the settlement of issues only, or

(b) for the defendant to appear and state whether he contests or does not contest the claim and directing him if he contests to receive directions as to the date on which he has to file his written statement, the date of trial and other matters, and if he does not contest for final disposal of the suit at once, or

(c) for the final disposal of the suit;

and the summons shall contain a direction accordingly :

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for final disposal of the suit [30-3-1967].

Orissa

For Rule 5 substitute the following :

"The Court shall determine at the time of issuing the summons whether the summons shall be (1) for the settlement of issues; or (2) for the defendant to appear and state whether he contests the claim or not and, if he contests, to receive directions as to the date on which he shall file the written statement, the date on which the suit shall be tried and other necessary matters, and, if he does not contest, for the final disposal of the suit at once; or (3) for the preliminary disposal of the suit; and the summons shall contain directions accordingly :

Provided that in every suit heard by the Court of Small Causes, the summons shall be for the final disposal of the suit" [7-5-1954].

R. 6. Fixing day for appearance of defendant.—The day for the appearance of defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

[1882 and 1877, S. 69; 1859, S. 45.]

Order 5, Rule 5 — Note 1 (contd.)

the date to be specified therein will be for settlement of issues only or for final disposal of the suit. Process fees, etc. must be put in before date to be specified in summons is to be fixed. AIR 1968 Pat 110 (111): 1968 BLJR 155 (DB).

Order 5, Rule 6 — Note 1

(1) It is not open to a plaintiff to obtain an ex parte decree before the returnable date mentioned in the summons. (1908) 32 Bom 534 (539) (DB).

(2) A defendant is entitled to sufficient time to enable him to appear and answer in person or by pleader. (1866) 3 Mad HCR 167 (168) (DB) °° (1870) 7 Bom HCR 138 (139) (DB).

(3) The date of service is prima facie that shown in the return. (1896) 23 Cal 573 (575).

R. 7. Summons to order defendant to produce documents relied on by him.—The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case.

[1882 and 1877, S. 70; 1859, S. 43.]

HIGH COURT AMENDMENTS

Bombay: Dadra and Nagar Haveli[a]

Substitute for R. 7, the following:

"7. The summons to appear and answer and/or filing a written statement within a time specified therein shall order the defendant to produce all documents in his possession or power upon which he bases his defence, claim for set-off or counter claim, and shall further order that where he relies on any other documents (whether in his possession or power or not) as evidence in support of his defence, claim for set-off or counter claim, he shall file a list of such documents" [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965].

Delhi and Himachal Pradesh

Same as in Punjab — Act 26 of 1966, S. 7 proviso and S. 13.

Punjab, Haryana and Chandigarh

Substitute for Rule 7 the following:

"The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he bases his defence or any claim for set-off and shall further order that where he relies on any other documents (whether in his possession or power or not) as evidence in support of his defence or claim for set-off, he shall enter such documents in a list to be added or annexed to the written statement." [24-7-1936]: Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

R. 8. On issue of summons for final disposal, defendant to be directed to produce his witnesses.—Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case.

[1882 and 1877, S. 71.]

R. 9. Delivery or transmission of summons for service.—(1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

[1882 and 1877, S. 72; 1859, S. 47.]

Order 5, Rule 6 — Note 1 (contd.)

(4) Notice of application under S. 15 of Payment of Wages Act, 1936 served only three days prior to date of hearing.

Held time allowed to the employer Railway was not sufficient and prayer for adjournment should have been allowed as per O. 27, R. 5. AIR 1963 Punj 122 (123): (1963-64) 25 FJR 414.

Order 5, Rule 9 — Note 1

(1) It is not enough to show that the defendant had knowledge of the suit otherwise. (1953) 6 Sau LR 343 (345).

(2) It is the service of summons in accordance with law that gives jurisdiction to the Court over the person summoned. If the Court does not have jurisdiction, it is immaterial whether the defendant knows about a suit going on without jurisdiction. ILR (1955) 1 Cal 119 (120).

(3) A permanent absentee cannot be described as a resident in a place merely by virtue of ownership. (1911) 38 Cal 394 (400) (DB).

(4) The empowering of an agent to accept service of summons under this rule can be done only in the manner indicated

HIGH COURT AMENDMENTS

Allahabad

Add the following as sub-rule (3) to Rule 9—

"(3) In lieu of, or in addition to, the procedure indicated in sub-rule (1), such summons may be served by registered post addressed to the defendant at the place where he resides or carries on business or works for gain or to the agent at the place where he resides. Unless the cover is returned undelivered by the post office on account of want of proper address or any other sufficient reason, the summons may be deemed to have been delivered to the addressee at the time when it should have reached him in the ordinary course" [14-4-1962].

Andhra Pradesh

Same as was in Madras, that is, add the following as sub-rule (3)—

"(3) Where the defendant resides in India, whether within the jurisdiction of the Court in which the suit is instituted or not, the Court may direct the proper officer to cause a summons under this Order to be addressed to the defendant at the place where he ordinarily resides or carries on business or works for gain and sent to him by registered post, acknowledgment prepaid. An acknowledgment purporting to be signed by the defendant shall be deemed to be sufficient proof of service of such summons" [1-11-1951].

Note: Provisions of O. V, Rr. 9 to 13, 15 to 30; O. IX; O. XIII, Rr. 3 to 10; O. XVI, Rr. 2 to 21; O. XVII and O. XXIII, Rr. 1 to 3 are made applicable to proceedings before claims tribunal by virtue of R. 531 of the Andhra Pradesh Motor Vehicle Rules, 1964 — see A. P. Gaz., 27-8-1964, Pt. I, R. S., p. 356.

Kerala: Laccadive, Minicoy and Amindivi Islands[a]

Same as that of Madras given under Andhra Pradesh [9-6-1959]: Reg. 8 of 1965 [w. e. f. 1-10-1967].

Madras and Pondicherry

For Rule 9 substitute the following rule, namely,—

"9. (1) Where the defendant resides in India, whether within or without the jurisdiction of the Court in which the suit is instituted, the Court may direct the proper officer to cause a summons under this Order to be addressed to the defendant at the place, where he ordinarily resides or carries on business or works for gain, and sent to him by registered post pre-paid for acknowledgment.

(2) Where the summons is returned unserved or the defendant does not appear on the day fixed in the summons, the Court may direct that the summons shall be delivered or sent to the proper officer to be served by him or one of his subordinates on the defendant.

(3) The proper Officer may be an Officer of a Court other than that in which the suit is instituted and where he is such an Officer, the summons may be sent to him by post, or in such other manner as the Court may direct.

Order 5, Rule 9 — Note 1 (contd.)

in O. 3, R. 6 and a verbal authority is not sufficient for the purpose. AIR 1952 Cal 781 (787) °° AIR 1965 Mys 255 (257): (1964) 1 Mys LJ 503. (A servant not duly authorised is not an agent.)

(5) These words have been added to give the Court power to order service in any other way it thinks proper, e. g., by post. AIR 1916 Cal 600 (602) (DB).

(6) Service of summons outside the jurisdiction of the Court issuing it, without sending it to the Court having jurisdiction, is irregular. AIR 1925 Rang 325 (326): 3 Rang 239.

(7) It is within the discretion of the Court to serve a public servant either personally under this rule or through the head of the office in which he is employed. AIR 1932 Oudh 326 (326, 327) (DB).

[But see (1909) 1 Ind Cas 163 (163, 164) (All).]

(8) The provisions relating to affixture under O. 5, R. 17, would apply on refusal

(4) Notwithstanding anything contained in sub-clause (1), where proceedings in Court are taken for—

(i) issue of an injunction, or

(ii) punishment of a party for contempt of Court, or

(iii) bringing to sale any property in execution of a decree or order of Court,

notice shall be served only in the manner provided for in sub-clause (2)" [27-3-1963].

For application to Pondicherry, see Act 26 of 1968, S. 3 and Sch., Part II.

R. 10. Mode of service.—Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

[1882 and 1877, S. 73; 1859, S. 48.]

HIGH COURT AMENDMENTS

Delhi and Himachal Pradesh

Same as that of Punjab—see Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Mysore

Add the following proviso to Rule 10—

Provided that, in any case the Court may either on its own motion or on the application of the plaintiff, either in the first instance or when summons last issued is returned unserved direct the service of summons by registered post prepaid for acknowledgment, instead of the mode of service laid down in this rule. The postal acknowledgment purporting to contain the signature of the defendant may be deemed to be prima facie proof of sufficient service of the summons on the defendant on the day on which it purports to have been signed by him. If the postal cover is returned unserved, any endorsement purporting to have been made thereon by the delivery peon or either an employee or officer of the Postal Department shall be prima facie evidence of the statements contained therein. [30-3-1967].

Orissa

Same as that of Patna.

Order 5, Rule 9 — Note 1 (contd.)

of the notice in cases of service through post under O. 5, R. 9 (3) Madras Amendment Act, 1951. (1960) 1 Andh WR 1 (2) (DB).

(9) Where the two judgment-debtors were brothers, living in the same house and both of them were served by affixture but only one judgment-debtor puts in his appearance:

Held, that in the circumstances there was prima facie no reason to think that the service by affixture was not sufficient for the other judgment-debtor. AIR 1962 Andh Pra 156 (156, 157): 1961 Andh LT 136.

(10) Refusal on the part of the defendant to accept postal notice issued under O. 5, R. 9 (3) (Madras), Civil P. C. cannot be deemed to be as effective a service as a refusal of such notice when personally tendered and is not a due service of summons so as to enable the Court to pass an ex parte decree. Order 5, R. 9 (3) (Madras), Civil P. C. confers a power on the Court to send the first summons in a suit by registered post. The sub-rule does not concern itself with the sufficiency of service of summons in case the addressee were to refuse to accept notice. AIR 1963 Mad 198 (199, 200): 76 Mad LW 24 (DB).

(11) Service by post to a person living outside the jurisdiction of Court but within India, is valid — Return of summons with an endorsement of refusal by addressee, is prima facie proof of service. 1967 Ker LT 322: 1967 Ker LJ 651.

ORDER 5, RULE 10

1. Mode of service.— (1) This rule prescribes the mode of service that should normally be adopted unless it is not possible to do so. AIR 1924 Cal 1000 (1004) (DB) °° AIR 1925 Cal 627 (630): 52 Cal 179.

2. Service by post. — (1) Although the Court may, in a particular case, direct that the summons should be sent by post, the normal mode of service is personal service. AIR 1954 Bom 159 (160): ILR (1954) Bom 243 °° (1906) 29 Mad 324 (325).

(2) Service by registered post is allowed to a litigant as a matter of convenience and very slight evidence is enough to displace the presumption of service raised by it. AIR 1922 Bom 377 (377): 46 Bom 130 (DB) °° AIR 1928 Pat 568 (571) (DB).

Patna

Add the following :

"Provided that in any case the Court may, of its own motion, or on the application of the plaintiff, send the summons to the defendant by post in addition to the mode of service laid down in this rule. An acknowledgment purporting to be signed by the defendant or an endorsement by postal servant that the defendant refused to take delivery may be deemed by the Court issuing the summons to be prima facie proof of service".

Note—Provisions of O. V, Rr. 9 to 13, 15 to 30; O. IX; O. XIII, Rr. 3 to 10; O. XVI, Rr. 2 to 21; O. XVII and O. XXIII, Rr. 1 to 3 have been made applicable to proceedings before M. V. Claims Tribunal—See R. 20 of Bihar Motor Vehicles Accidents Claims Tribunal Rules, 1961, Bih. Gaz., 7-4-61, Ext.

Punjab, Haryana and Chandigarh

Add the following proviso :

"Provided that in any case if the plaintiff so wishes, the Court may serve the summons in the first instance by registered post (acknowledgment due) instead of in the mode of service laid down in this rule". [As amended on 24-11-1927]: Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

Rajasthan

Add the following proviso :

"Provided that in any case the Court may in its discretion send the summons to the defendant by registered post in addition to the mode of service laid down in this rule. An acknowledgment purporting to be signed by the defendant or an endorsement by postal servant that the defendant refused to take the delivery may be deemed by the Court issuing the summons to be prima facie proof of service" [14-8-1954].

Order 5, Rule 10 — Note 1 (contd.)

(3) Where a summons sent by post was returned as "refused" by a person who was not shown to have been the defendant, it was not a good service. AIR 1954 Bom 159 (160): ILR (1954) Bom 243 °° (1894) 18 Bom 606 (607) (DB) °° ILR (1960) Cut 522.

[See however (1897) 21 Bom 412 (418, 419).]

(4) Where a summons is sent by registered post, e. g., under the provisions of Rule 25, properly addressed and is returned endorsed "refused," the Court can treat the service as sufficient. 1955-28 ITR 478 (484) (All) °° AIR 1940 Cal 536 (537, 538) °° (1911) 35 Bom 213 (215, 216).

(5) When notice is sent by registered post the presumption even as regards service is not conclusive but rebuttable. AIR 1932 All 374 (374, 375): 54 All 548 (DB) °° AIR 1968 Bom 387 (387): 70 Bom LR 253.

(6) Where a summons sent by registered post was returned as refused the case would fall under Rule 17 and therefore in the absence of the affixture of a copy of the summons as required by that rule there was no due service. AIR 1958 Mad 522 (523) °° 1956-2 Mad L Jour 86 (87) °° (1960) 1 Andh WR 1 (2) (DB).

(7) Summons by registered post returned "refused" — Statement on oath by defendant that summons was not tendered — Failure to summon postman — Sufficient ground for setting aside ex parte decree. AIR 1968 Bom 387 (388): 70 Bom LR 253.

(8) As per Proviso (Punjab) to this Rule the summons shall be sent by registered post only in the first instance, if it is so wished by the plaintiff. Subsequent service by registered post is not due service. AIR 1959 Punj 467 (468): 60 Pun LR 374.

(9) Sending of notice by registered post in rent control proceedings under the Andhra Pradesh (Buildings (Lease, Rent and Eviction) Control Act, 1960, is not by itself service of notice. To be effective notice, it must reach the person concerned. Mere refusal of postal notice cannot be considered as a service of notice. Even in case of refusal to receive notice service cannot be presumed. AIR 1964 Andh Pra 314 (316, 317): (1962) 2 Andh WR 148.

(10) Endorsement by a postal employee of refusal of summons sent by registered post cannot be even prima facie proof of service except in a case where the summons so sent is the second one after refusal of the initial summons also sent by registered post. ILR (1959) Andh Pra 1386.

(11) An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused to take delivery may be deemed by the Court issuing the summons to be prima facie proof of service. But where there is no proof as to what the letter contained, the service cannot be held to be sufficient. AIR 1962 Orissa 15 (16) °° ILR (1960) Cut 522.

R. 11. Service on several defendants.—Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.

[1882, S. 74, para. 1; 1877, S. 74; 1859, S. 48.]

R. 12. Service to be on defendant in person when practicable, or on his agent.—Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

[1882 and 1877, S. 75; 1859, S. 49.]

Order 5, Rule 10 — Note 1 (contd.)

(12) Service by post to a person living outside the jurisdiction of Court but within India, is valid. If the mistake in the address is not material, service by registered post would be due service. 1967 Ker LT 322: 1967 Ker LJ 651.

(13) The mere refusal of summons sent by registered post without the proof of the existence of unserved summons and the order of the Court deeming it to be proof of service, would not entitle the plaintiff to invoke the provisions of R. 20-A of O. 5 to seek to justify the ex parte decree. AIR 1960 Andh Pra 383 (383): (1959) 2 Andh WR 369.

(14) Provision under Proviso to O. 5, R. 10, permissive — Court finds summons has been duly served — Court need not wait for service by registered post. AIR 1969 Pat 246 (248).

Order 5, Rule 11 — Note 1

(1) In a suit against the principal debtor and surety, the omission of the creditor to effect a service of summons on the principal debtor does not discharge the surety from his liability. (1890) 14 Bom 267 (269) (DB).

(2) One summons against several defendants without duplicate is improper where the defendants were mother, son and two daughters, service on mother only was held of no avail. AIR 1967 J. & K. 120 (126): 1967 Kash LJ 251.

Order 5, Rule 12 — Note 1

(1) The serving officer must make some substantial effort and proper enquiries to find out the person to be served in the place where he ordinarily resides or carries on business — Mere affixing of the summons on the door without any such attempt is not sufficient. AIR 1954 Assam 223 (224) (DB) °° (1954) 33 Pat 1025 (1041, 1050) °° AIR 1922 Cal 128 (128) (DB).

(2) The same rules which apply to adults apply to minors also. (1908) 35 Cal 182 (184) (DB) °° (1897) 2 Cal WN 100 (103, 105) (DB).

(3) Where a guardian has been appointed in the suit for the minor, notice of an appeal from a decree in that suit need only be served on the guardian. AIR 1926 Cal 1106 (1107) (DB).

(4) When the summons has to be served upon a pardanashin lady, the summons may be served on any adult male member of the family or on her agent empowered to receive summons — If there is no agent so empowered, it can be affixed to the outer door of the house in which she ordinarily resides. (1840) 2 Moo Ind App 263 (268) (PC) °° AIR 1923 Pat 433 (433) (DB) °° AIR 1916 Cal 600 (602) (DB).

[But see AIR 1935 All 660 (661, 662).]

(5) Gumastas and servants and managers merely looking after the affairs of the defendant or holding general powers-of-attorney cannot accept service. ILR (1955) Hyd 80 (91, 92) °° AIR 1954 Assam 223 (224) (DB) °° AIR 1918 Mad 589 (590) (DB).

(6) To ensure that every effort is made to effect personal service, Court has a duty to pay personal attention to matters connected with issue and service of processes — It will be dereliction of duty to leave such important function exclusively to ministerial staff of the Court. AIR 1967 Delhi 28 (29, 30) °° 67 Pun LR 643 (647): ILR (1965) 2 Punj 274. (Principle behind is rule of natural justice.)

(7) Service of notice on servant under Sections 148, 282 (1), Income-tax Act (1961) is no service in law. AIR 1965 Mys 255 (257): (1964) 1 Mys LJ 503 (DB).

(8) Land held by A — On A's death it was recorded in the name of his son — On some dispute in connection with the land a notice was served on the agent who had worked for A instead of on his son — Agent absent — Son not represented — Proceedings ex parte — **Held**, the notice was not correctly served and violated the principle of Natural justice. (1968) 70 Pun LR 458 (459): 1968 Cur LJ 412.

(9) Where an assessee resided at place 'T' but had his business at place 'K', a notice served at 'K' by affixture with a report of the notice server that the assessee permanently resided at T is not warranted. (1962) Ker LJ 961 (964) (DB).

R. 13. Service on agent by whom defendant carries on business.—(1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer.

[1882 and 1877, S. 76.]

R. 14. Service on agents in charge in suits for immoveable property.—Where in a suit to obtain relief respecting, or compensation for wrong to, immoveable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

[1882 and 1877, S. 77; 1859, S. 61.]

R. 15. Where service may be on male member of defendant's family.—Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Explanation :—A servant is not a member of the family within the meaning of this rule.

[1882 and 1877, S. 78; 1859, S. 53.]

Order 5, Rule 13 — Note 1

(1) The manager or agent contemplated by the rule is one who has an initiative and independent discretion, though possibly subject to general orders for guidance. (1880) 4 Bom 416 (422).

(2) In order that a service on an agent of a foreign corporation may be valid, the agent must have power to enter into contracts on behalf of such corporation. AIR 1926 Cal 1030 (1030).

(3) The procedure prescribed in this rule for the service of summons can be followed only where service cannot be effected according to Rule 12. (1954) 33 Pat 1025 (1038).

(4) Before a Court can accept that the process could not be served on the agent of the defendant, process-server should be examined on the facts and the circumstances of the case. AIR 1967 Delhi 28 (30).

(5) Where a party was known to be residing permanently at place 'T' and had his business at place 'K' service of notice of reassessment under S. 34, Income-tax Act (1922) by affixture at 'T' because the assessee was not available at 'K' is not warranted. (1962) Ker LJ 961 (964) (DB).

Order 5, Rule 14 — Note 1

(1) Where in a suit for foreclosure, it was found that the mortgagor had conveyed his properties in trust to a body of persons, service on one trustee's agent who was in charge of the properties was sufficient. (1883) 9 Cal 733 (734).

(2) Service can be effected under this rule only where it is impossible to effect service according to the procedure prescribed by Rule 12. (1954) 33 Pat 1025 (1038) °° ILR (1955) 1 Cal 119 (120).

Order 5, Rule 15 — Note 1

(1) It is the duty of the process server to take pains to find out the person to be served and for this purpose he should make inquiries not only of the relations of the defendant but also of the neighbours. AIR 1956 Cal 208 (211) (DB) °° 1946 Jaipur LR 497 (500) (DB) °° (1897) 21 Bom 223 (225) (DB) °° AIR 1921 Cal 638 (639) (DB).

(2) In the absence of an attempt at personal service on the defendant the service on a member of the family is not sufficient. AIR 1953 Trav-Co 494 (514): ILR (1953) Trav-Co 405 (FB) °° (1913) 35 All 556 (557) (DB).

(3) The question whether service on an adult member of the defendant's family is proper is a question of law. AIR 1946 Pesh 7 (8) (DB).

(4) A person above the age of sixteen years is an "adult" within the meaning of this rule. (1908) 35 Cal 286 (291, 292) (SB).

(5) Where service was effected on an adult male member of the family under Rule 15 and the defendant was in communication with his family members, the service was sufficient. AIR 1914 Cal 845 (845): 42 Cal 67 (DB).

(6) The adult male member on whom service is made must be one who is residing with the defendant. AIR 1953 Trav-Co 494 (514): ILR (1953) Trav-Co 405 (FB) °° AIR 1933 Lah 797 (798).

(7) As Section 37 read with R. 8 of U. P. Imposition of Ceiling on Land Hold-

HIGH COURT AMENDMENTS

Allahabad

For the words "Where in any suit the defendant cannot be found," read "When the defendant is absent or cannot be personally served" [24-7-1926].

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta.— Assam High Court Order, 1948, Cl. 6 [5-4-1948] and Act 27 of 1962, S. 15.

Bombay: Dadra and Nagar Haveli[a]

Substitute the following for R. 15—

"15. When the defendant cannot for any reason be personally served and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965].

Calcutta : Andaman and Nicobar Islands

Substitute the following :

"R. 15. Where in any suit the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time, then unless he has an agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him :

Provided that where such adult male member has an interest in the suit and such interest is adverse to that of the defendant, a summons so served shall be deemed for the purposes of the third column of Art. 164 of Schedule I of the Limitation Act, 1908,[a] not to have been duly served.

Explanation.—A servant is not a member of the family within the meaning of this rule" [25-7-1928].

[a] Now Art. 123 of Limitation Act 1963.

Delhi and Himachal Pradesh

Same as that of Punjab, see Act 26 of 1966, Ss. 7 and 17. [31-10-1966 and 1-5-1967].

Kerala : Laccadive, Minicoy and Amindivi Islands

In Rule 15, for the word 'male' in the marginal note, substitute the word 'adult' and omit the word "male" in the rule [9-6-1959]: Reg. 8 of 1965, S. 3 and Sch. [w. e. f. 1-10-1967].

Madhya Pradesh

Substitute the words "when the defendant is absent or cannot be personally served" for the words "where in any suit the defendant cannot be found" [16-9-1960].

Order 5, Rule 15 — Note 1 (contd.)

ings Act (1 of 1967) makes provisions of Civil P. C. applicable to proceedings under the Act, service of a notice on any male member of the family would be sufficient service, as per O. 5, R. 15. 1967 All LJ 48 (50): 1967 All WR (HC) 141.

(8) Notice under S. 33-B, Income-tax Act — Service on adult son of assessee — Assessee and son residing together — Service held, was good. AIR 1964 Cal 367 (370): 68 Cal WN 1144.

(9) In enacting O. 5, R. 15, there is no discrimination between a woman and a man simply on ground of sex in receiving notice on behalf of some other member of family. It does not contravene Art. 15 (3) of Constitution of India. AIR 1967 J. & K. 120 (127): 1967 Kash LJ 251.

(10) Service of notice on servant is no service in law — Notice served held, wholly invalid. AIR 1965 Mys 255 (257): (1964) 1 Mys LJ 503 (DB).

(11) Summons intended for pardanashin lady tendered to a male member of family who was separate — Service of summons held invalid. ILR (1960) Cut 522 (523).

(12) Notice issued to two judgment-debtors, father and son — Notice served personally on son who was joint with his father — Son accepting both notices on his own behalf and on behalf of his father held was sufficient service. AIR 1960 Pat 171 (172): 1959 BLJR 695.

Madras and Pondicherry

Delete the words "the defendant cannot be found" and in lieu thereof insert the words "the defendant is absent". [R. O. C. No. 1810 of 1926 — 20-12-1927] and Act 26 of 1968, S. 3 and Sch., Part II.

Mysore

Delete Rule 15 and substitute the following —

15. Where in any suit the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time, then unless he has an agent duly empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant (not being a servant) who is residing with him:

Provided that where such adult male member has an interest in the suit and such interest is adverse to that of the defendant, summons so served shall be deemed for the purposes of Rule 13 of Order IX of this Code or of the 3rd Column of Article 123 of the Schedule of the Limitation Act, 1963, not to have been duly served [30-3-1967].

Punjab, Haryana and Chandigarh

After the words "where in any suit the defendant cannot be found," insert the following words "or is absent from his residence" [24-11-1927]: Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

Rajasthan

Substitute the words "When the defendant is absent or cannot be personally served" for the words "Where in any suit the defendant cannot be found" [14-8-1954].

R. 16. Person served to sign acknowledgment.—Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

[1882, S. 79; 1877, Ss. 79, 80; 1859, S. 54.]

R. 17. Procedure when defendant refuses to accept service, or cannot be found.—Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due

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Order 5, Rule 16 — Note 1

(1) This rule contemplates an agent duly empowered to accept service — A person having a mere verbal authority is not an agent for the purposes of this rule. AIR 1952 Cal 781 (787).

(2) The serving officer delivering or tendering a copy of the summons should require the person served to sign an acknowledgment of service under this rule, and on his refusal to do so, should affix a copy of the summons to the outer door or other conspicuous part of his residence as prescribed by Rule 17. AIR 1956 Cal 208 (211) (DB) °° AIR 1933 All 165 (166).

(3) Where a copy of the summons is tendered or delivered to the defendant but the later refuses to sign the acknowledgment of service and the process-server does not affix the copy as per R. 17, the defendant cannot be taken to have been validly served. ILR (1955) Hyd 80 (91) (DB) °° 1951 Raj LW 170 (171) °° AIR 1933 All 165 (166).

[See however AIR 1964 Cal 241 (246) (DB). (AIR 1952 Cal 10, Overruled.) °° AIR 1957 Punj 38 (38) °° AIR 1953 Pat 346 (350) (DB).]

(4) Words "Any other person" in R. 16, refers to those other persons mentioned in preceding rules of O. 5. Therefore unless and until, it is shown that person accepting the service was entitled to accept it under any of the rules under O. 5, service on such person cannot be considered as valid. AIR 1959 Bom 178 (179): 60 Bom LR 482.

(5) Where there has not been valid service of notice under S. 22 (2) Income-tax Act (1922), the condition precedent to make an ex parte assessment is missing and assessment if made would be without jurisdiction. AIR 1960 Assam 162 (173): (1960) 1 Assam LR 35 (DB).

ORDER 5, RULE 17 — SYNOPSIS

1. Scope.
2. Refusal to sign acknowledgment.
3. Where the defendant cannot be found.
4. "After using all due and reasonable diligence."
5. Return of service.

and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

[1882, S. 80; 1877, S. 18; 1859, S. 55.]

HIGH COURT AMENDMENTS

Assam and Nagaland

Same as that of Calcutta—see Assam High Court Order 1948, Cl. 6 [5-4-1948]; Act 27 of 1962, Ss. 13 and 15 [w. e. f. 1-12-1963].

Calcutta : Andaman Nicobar Islands

Substitute the following :

"R. 17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous

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Order 5, Rule 17 (contd.)

1. Scope. — (1) The rule is of a highly penal nature and must be strictly complied with in order to give validity to the service purporting to be effected thereunder. AIR 1956 Cal 208 (211) (DB) °° AIR 1944 Pat 297 (298): 23 Pat 442 (DB).

[See however AIR 1953 Trav-Co 494 (507): ILR (1953) Trav-Co 405 (FB) °° AIR 1953 Mad 528 (528).]

[But see AIR 1964 Cal 241 (245) (DB). (Defendant accepting notice without signing acknowledgment — Serving officer not having additional copy — Service is complete without affixation. Failure to affix copy does not render service invalid. AIR 1952 Cal 10, **Overruled.**)]

(2) This rule has no application to the case of a defendant who is actually in prison during the time of the service of the summons. ILR (1952) 1 Cal 254 (255).

(3) Where the house on which notice was affixed was not the residence of the appellant and the Company which occupied it and with which appellant was connected had gone into liquidation before the affixture, the service was invalid. (1967) 66 ITR 414 (434) (DB) (Cal).

(4) So far as Calcutta High Court is concerned the validity of a service of a summons or a notice under O. 5, R. 17, must be tested on the terms of the rule as amended and cannot and should not be tested according to the terms of the said rule without such amendment. AIR 1967 Cal 359 (366): 70 Cal WN 414 (DB).

(5) When two attempts were made to find an assessee and to serve a notice at each of the two different addresses but she was found to be absent at both the places and the information was that the assessee had gone to Rajasthan with no possibility of return within a reasonable time, then service by affixture was within O. 5, R. 17 as amended by Calcutta High Court. AIR 1967 Cal 359 (367): 70 Cal WN 414 (DB).

2. Refusal to sign acknowledgment. — (1) Where there is a refusal to accept service there is no due service and therefore in such a case substituted service has to be effected. AIR 1953 All 317 (318) °° 1956 Madh B LJ 255 (257).

(2) Where the defendant or his agent or other persons referred to in Rr. 13 to 16 refuse to sign the acknowledgment and the service is effected by affixture to the outer door of the defendant's dwelling the Court is perfectly justified in treating the service as good. AIR 1931 Cal 546 (549) (DB) °° AIR 1928 Nag 80 (81): 23 Nag LR 166.

(3) Where a servant of the defendant who was not shown to be authorized to receive summons refused to take it, service by affixing copy under this rule was insufficient. AIR 1944 Pat 41 (47, 48): 23 Pat 31 (FB).

(4) Where one of the partners refuses to acknowledge the notice and the employee who receives it is neither an agent nor a person authorised to receive the summons, the notice must be affixed as provided by this rule. ILR (1955) Hyd 80 (91) (DB).

(5) Where postal service of summons to the defendants was taken out under O. 5,

part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to the Court from which it was issued with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed" [25-7-1928].

Madhya Pradesh

The following proviso shall be added at the end of the rule:

"Provided that where a special service has been issued and the defendant refused to sign the acknowledgment, it shall not be necessary to affix a copy as directed hereinbefore" [16-9-1960].

Mysore

Delete Rule 17 and substitute the following:—

17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is not present at the house in which he ordinarily resides or carries on business or personally works for gain at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf nor any other person upon whom service can be made under Rule 15, the serving officer shall affix a copy of the summons on the outer door of or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person, if any, by whom the house was identified and in whose presence the copy was so affixed [30-3-1967].

Order 5, Rule 17 — Note 2 (contd.)

R. 9 (3) (Madras Amendment) and the endorsement read that he had refused to receive the registered summons and no affixture of the copy of the summons was effected as required by O. 5, R. 17 it must be held that there was no due service of summons in accordance with law. AIR 1958 Mad 522 (523).

(6) Service of summons resisted by defendant — Process-server driven away by him making service as contemplated by R. 17 impossible — It must be deemed to be sufficient service. AIR 1969 Andh Pra 67 (67).

(7) Service of summons on agent of defendant ordered — In case of refusal summons directed to be served by affixation — Summons affixed — None attested it — Affidavit by Process server that agent had refused service — Process server not examined by Court in dereliction of its duty to attend to the matter personally — Direction of service by affixation was contrary to instructions in High Court Rules and Orders. AIR 1967 Delhi 28 (30).

(8) Proof of service — Peon's report and evidence showing that notice was sent inside house to minor's guardian, his mother, through maid-servant and though guardian accepted notice refused to give receipt therefor — Held, non-examination of maid-servant could not wipe out effect of peon's report which was duly proved in evidence. AIR 1966 Pat 383 (386): 1966 BLJR 571 (DB).

(9) Under O. 5, R. 17 of the Civil Procedure Code the exercise of due and reasonable diligence with a view to trace out the party arises only when he was not found by the process-server. If, however, he was met by the process-server and he refused to accept the notice when tendered by the process-server, it is sufficient if the process-server affixes a copy of the summons at a conspicuous part of his house. O. 5, R. 17, does not say that where there is a refusal by the defendant to accept the notice the process-server should forthwith serve the notice by affixture. Some reasonable time may elapse between the actual tender of the notice by the process-server to the defendant, his refusal to accept the same and the subsequent affixture of the notice at his residence. AIR 1968 Pat 126 (127): 1967 BLJR 699 (DB).

(10) Service of notice on pardanashin lady — Process server unable to find her in spite of due diligence — Adult members of her family refusing to accept service — No agent empowered to accept service — Service effected under R. 17 by affixing copy of notice before witnesses on front door of house, is valid. ILR (1960) 10 Raj 1088 (1093) (DB).

(11) Sending of notice by registered post

Order 5 Rule 17 — Note 2 (contd.)
in rent control proceedings is not by itself service of notice. To be effective service notice sent by post must actually reach the person sought to be served. Mere refusal of postal notice without more cannot be considered as service and there cannot be a presumption of service even where there is a refusal to receive the same. AIR 1964 Andh Pra 314 (316): (1962) 2 Andh WR 148.

3. Where the defendant cannot be found.— (1) A person cannot be said to be "not found" within the meaning of this rule merely by reason of his being temporarily absent from his usual place of residence. AIR 1952 Cal 781 (784) °° ILR (1953) 3 Raj 179 (181) °° (1898) 21 Mad 419 (421) (DB) °° AIR 1931 Nag 119 (119, 120): 27 Nag LR 53 °° 1962 Jab LJ 875 (875). (It is the duty of the process server to find out when the defendant is likely to return and to await his arrival. 19 Cal 201, Foll.)

(2) The serving officer, before he can take advantage of the provisions of this rule, must use all due and reasonable diligence to find the defendant. (1954) 33 Pat 1025 (1044) (DB) °° AIR 1918 All 331 (331, 332) (DB) °° (1910) 6 Ind Cas 283 (283) (DB) (All) °° AIR 1931 Nag 119 (120): 27 Nag LR 53.

(3) Where either by reason of the custom of the country or for some other reason, it is impossible for the serving officer to obtain access to the person to be served, the case will be covered by the description where the defendant cannot be found by the serving officer. AIR 1916 Cal 600 (601) (DB) °° (1886) 10 Bom 202 (204) °° Madh BLJ 1954 HCR 1144 (1149) °° (1954) 33 Pat 1025 (1041) (DB) °° AIR 1923 Pat 433 (433) (DB).

(4) The words "where the serving officer, after using all due and reasonable diligence, cannot find the defendant" will also cover a case where the absence of the defendant is for an indefinite period. AIR 1926 Mad 31 (32) °° AIR 1915 Mad 342 (343) °° AIR 1915 Mad 338 (339) °° AIR 1914 Mad 216 (217, 218).

(5) If the serving officer did not find a party to be served at the address given, it does not establish that he could not be found. It must be shown not only that the serving officer went to the place at a reasonable time when he would be expected to be present but also that if he was not found, proper and reasonable attempts were made to find him either at that address or elsewhere. If after such reasonable attempts the party is not found then and then only can it be said that he cannot be found. Mere fact that witnesses in whose presence the notice was affixed were not examined did not affect validity of service. (1968) 1 SCJ 91 (95): (1967) 66 ITR 147 °° (1963) 2 Mys LJ 482. (Where not only no investigation or attempt to find out the person to be served was made by the process-server but even the requirements of O. 5, R. 17, that there should be an affixment of the summons on the outer door or conspicuous part of the defendant's house were not complied with, the necessity for publication of a proclamation under O. 5, R. 20 does not arise.) °° AIR 1959 Cal 420 (423): (1959) 37 ITR 493 (DB).

(6) Provision relating to affixture under O. 5, R. 17 also apply in case of service through post under O. 5, R. 9 (3) (Madras 1951 amdt.) when a notice is refused by a party to be served. (1960) 1 Andh WR 1 (2) (DB).

(7) Refusal to accept postal notice does not amount to due service — Ex parte decree cannot be passed. AIR 1963 Mad 198 (200): 76 Mad LW 24.

(8) Notice under O. 21, R. 22 — Service of — Non-compliance with O. 5, R. 17 amounts to material irregularity. AIR 1966 Orissa 166 (168): 32 Cut LT 646.

4. "After using all due and reasonable diligence." — (1) The serving officer will not to be deemed to have exercised due and reasonable diligence unless he has made a real and substantial effort after proper inquiries to find the defendant. AIR 1957 Trav-Co 257 (258) °° AIR 1949 East Punj 295 (296) °° AIR 1916 Cal 181 (183): 43 Cal 447 (SB) °° AIR 1934 Pat 274 (276): 13 Pat 467 (DB).

(2) The serving officer must attend at the right place and time at which he may expect to find the defendant, and, if he is absent, must make reasonable inquiries and take steps to discover where he is. AIR 1952 Cal 781 (788) °° AIR 1926 Cal 327 (332) (DB) °° 21 Bom 223 (226) (DB) °° AIR 1939 All 180 (181).

(3) If the defendant has two residences, inquiries must be made at both the places. AIR 1925 Cal 801 (802): 52 Cal 453.

(4) The question whether the process-server affixed the summons after using all due and reasonable diligence to find the party to be served is one of pure fact. AIR 1952 Pat 65 (65, 66) (DB) °° AIR 1952 Cal 781 (784).

(5) The serving officer must try to serve an assessee at the address disclosed by him in the return. There is no duty cast upon the department to pursue the assessee excepting so far as the rules for service of notice require. Merely sending of a notice to the admitted address and by not causing service according to law is failure in performing duty. (1966) 70 Cal WN 141 (145) : (1965) 58 ITR 419.

(6) Refusal to sign acknowledgment — Service of summons attempted to be effected while petitioner was boarding bus — Summons refused alleging urgent business — Summons affixed without making further attempts at personal service — Refu-

R. 18. Endorsement of time and manner of service.—The serving officer shall, in all cases in which the summons has been served under Rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

[1882 and 1877, S. 81; 1859, S. 56.]

HIGH COURT AMENDMENTS

Rule 18-A

Madras and Pondicherry

In Order 5, for Rule 18-A, the following rule shall be substituted, namely :—

"18-A. A District Judge, a Subordinate Judge and a District Munsif within the meaning of the Madras Civil Courts Act, 1873, and a City Civil Judge within the meaning of the Madras City Civil Court Act, 1892, may delegate to the Chief Ministerial Officer of their respective Courts the power to issue fresh summons to a defendant when (i) the return on the previous summons is to the effect that the defendant was not served and (ii) the plaintiff does not object to the issue of fresh summons within seven days after the return has been notified on the Notice Board."

—Fort St. Geo. Gaz., 9-11-1955, Pt. II—R.S., p. 169 and Act 26 of 1968, Sec. 3 and Schedule Pt. II

Mysore

In Order 5 add the following as Rule 18-A:—

"18-A. The Presiding Officer of a Civil Court may delegate to the Chief Ministerial Officer of the Court, the power to order issue of fresh summons to a defendant when the return on the previous summons is to the effect that the defendant was not served and the plaintiff does not object to the issue of fresh summons within 7 days after he has been required to deposit the necessary process fee for the issue of fresh summons. If the plaintiff objects, the matter shall be placed before the Presiding Officer for his orders. (30-3-1967.)

Order 5, Rule 17 — Note 4 (contd.)

sal, held, was not such as to warrant service by affixture. AIR 1967 Mad 5 (6): (1966) 1 Mad LJ 81.

(7) Sommons sent by registered post returned unserved as addressee not found — No further attempt at personal service — Service by affixture is not justifiable. AIR 1967 Mad 5(6): (1966) 1 Mad LJ 81.

5. Return of service. — (1) The action of the person charged with the service of summons should be set out in full and must be supported by an affidavit. AIR 1952 Cal 781 (786) °° (1954) 33 Pat 1025 (1049) (DB).

(2) A return that the defendant was not in the village or that the summons was served on the defendant's paternal uncle who was a member of a joint family is defective in the absence of an endorsement that the defendant could not be found. AIR 1914 Mad 159 (159) (DB) °° (1913) 35 All 556 (557) (DB).

(3) The report must show that at the time of service the house was the ordinary residence of the defendant, state the circumstances under which the affixture was made, and also state the names and addresses of persons, if any, in whose presence the copy of the summons was affixed. AIR 1952 Assam 45 (45): ILR (1951) 3 Assam 233 (DB) °° (1892) 16 Bom 117 (119) (DB) °° AIR 1928 Nag 80 (80): 23 Nag LR 166.

(4) Where there is no sworn statement or an affidavit by the notice server as enjoined under O. 5 R. 19 service under O. 5 R. 17 cannot be treated as service at all. (1962) Ker LJ 961 (964) (DB).

ORDER 5, RULE 18

1. Scope. — (1) It is not incumbent on a party to provide an identifier for the purpose of identifying the person served. AIR 1923 Pat 114 (114, 115) (DB).

(2) There is a presumption of service as stated in the process-server's report. AIR 1923 Pat 327 (329) (DB) °° AIR 1936 Mad 660 (661): 59 Mad 1049. (If the fact of service is denied the process-server should be put into the witness-box.)

(3) Proceedings under the Pepsu Tenancy and Agricultural Lands Act — Mode of service of notice is governed by R. 35 of Pepsu Tenancy Rules and not R. 33. 1969 Punj LJ 107.

R. 19. Examination of serving officer.—Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

[1882 and 1877, S. 82; 1859, S 57.]

HIGH COURT AMENDMENTS

Assam and Nagaland

Same as that of Calcutta.—Assam High Court Order, 1948, Cl. 6 (5-4-1948) and Act 27 of 1962, Ss. 13 and 15 (w.e.f. 1-12-1963).

Calcutta: Andaman and Nicobar Islands.

Substitute the following:—

"R. 19. Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the declaration of the serving officer, and may, if it has been so verified, examine the serving officer, on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit." (25-7-1928.)

ORDER 5, RULE 19 — SYNOPSIS

1. "Shall declare that the summons has been duly served."
2. "Or order such service as it thinks fit."

1. "Shall declare that the summons has been duly served." — (1) Where it appears from the return of the serving officer that there is no likelihood that the summons will come to the defendant's knowledge in due time or a probability that it will not so come to his knowledge, the Court should not declare the summons as duly served. (1897) 21 Bom 223 (225) (DB) °° AIR 1914 Mad 159 (159) (DB) °° (1910) 6 Ind Cas 282 (283) (DB) (All).

(2) The Code in the matter of service of summons does not take into account the female members of the defendant's family and does not rely upon the presumption that they will take steps to inform the defendant of what takes place in his absence. (1897) 21 Bom 223 (226) (DB) °° (1912) 16 Oudh Cas 83 (84).

[But see AIR 1922 Mad 93 (94): 45 Mad 875 (DB) °° (1912) 13 Ind Cas 127 (128) (DB) (Cal).]

(3) The declaration of due service under this rule should be express. AIR 1933 Mad 466 (470) (DB) °° AIR 1937 Mad 84 (87) (DB) °° AIR 1918 All 331 (331, 332) (DB).

[But see AIR 1940 Mad 213 (213, 214) (DB) °° AIR 1943 Mad 55 (56) (DB) °° AIR 1950 Assam 6 (11): ILR (1949) 1 Assam 222 (DB).]

(4) When the summons is not returned on the date fixed for hearing the Court cannot declare the summons duly served even though the summons subsequently returned in fact contains an endorsement that the summons had been tendered and refused much before that date. AIR 1949 Mad 396 (397).

(5) Where summonses are served after the date which is fixed for appearance has expired, though the mode of service is perfect, it can hardly be said that it is due service. AIR 1957 All 76 (76, 77) (DB).

(6) Due service has reference not merely to the mode of service but to the propriety of the summons where it fixes a date for hearing on which date by reason of the delay in service or of some action of the Court itself or of its officer or by reason of a Governmental order it is not possible for the defendant to do what he is asked to do and the case cannot be taken up. AIR 1957 All 76 (77) (DB).

(7) Refusal to acknowledge service is not due service. (1960) 1 Andh WR 1 (2) (DB).

(8) Refusal to receive notice sent by post as permitted under O. 5 R. 9 (3) (Madras) cannot be treated as equivalent to refusal to receive notice when tendered personally so as to apply the provisions of O. 5, R. 19 under which alone the service can be declared as sufficient. AIR 1963 Mad 198 (200): 76 Mad LW 24 (DB).

(9) Service of summons by affixture — Non-examination of serving officer amounts to procedural irregularity and order passed ex parte can be set aside in revision. AIR 1967 Mad 5 (6): (1966) 1 Mad LJ 81.

(10) Where an ex parte decree was challenged on ground of non-service of summons, the burden of proof of non-service is on the defendant. Where however the defendant examines two attesting witnesses who has witnessed the service under R. 17 and they support the defendant, the Court should not discard their evidence without examining the process server on oath. ILR (1963) Cut 864 (868). (AIR 1940 Pat 289, Rel.)

(11) Where there is no verification of service of notice under O. 5, R. 17 by an

Rule 19A **HIGH COURT AMENDMENTS**

Assam and Nagaland

Same as that of Calcutta.— Assam High Court Order 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 [w. e. f. 1-12-1963].

Calcutta : Andaman and Nicobar Islands

Insert the following :

R. 19A. A declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons". [25-7-1928].

R. 20. Substituted service.—(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain or in such other manner as the Court thinks fit.

(2) **Effect of substituted service.**—Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) **Where service substituted, time for appearance to be fixed.**—Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

[1882, S. 82, Para 2 and Ss. 83 and 84; 1877, Ss. 82, 83, 84; 1859, Ss. 57, 58, 85.]

Order 5, Rule 19 — Note 1 (contd.)

affidavit of a serving officer as enjoined by O. 5, R. 19, both the rules are violated, the service is improper and even illegal. (1962) Ker LJ 961 (964) (DB).

2. "Or order such service as it thinks fit." — (1) Even where the provisions of Rule 17 have been technically complied with, the Court may order fresh summons to another address or order service in another mode where it considers that the defendant could not get knowledge of the suit by the service effected. AIR 1916 Cal 600 (602) (DB).

(2) The Court has no power under the rule to issue a summons by registered post in the first instance when the defendant resides without the jurisdiction of the Court but within the State. AIR 1954 Sau 84 (86).

Order 5 Rule 19A (Cal)

(1) Return of bailiff as to service of summons — If Court of facts having weighed return and evidence in its rebuttal finds as a fact that the return stands, High Court cannot interfere therewith in revision. AIR 1967 Cal 185 (186).

(2) The evidence admissible to prove proper service of notice is an affidavit by peon who is said to have effected service. AIR 1960 Assam 162 (172) (DB).

ORDER 5, RULE 20 — SYNOPSIS

1. Scope.
2. "Where the Court is satisfied."
3. Evasion of service by the defendant.
4. Non-possibility of service for other reasons.
5. "Or in such other manner as the Court thinks fit."
6. Substituted service is as effective as personal service.

1. Scope. — (1) A notice to show cause why a person should not be appointed guardian of an infant, cannot be served by substituted service under this rule. AIR 1930 All 609 (609, 610) (DB).

2. "Where the Court is satisfied." — (1) Before ordering substituted service the Court should be satisfied that the conditions on which alone it can be ordered exist. AIR 1954 Punj 174 (175) °° (1873) 19 Suth WR 353 (356) (PC) °° AIR 1932 Mad 472 (472, 473).

[But see AIR 1936 Pat 593 (594) (DB).]

(2) The Court is not bound to order substituted service merely because the defendant has refused to accept service. AIR 1935 Lah 171 (172).

(3) Where the plaintiff has done his best to get the defendant served personally and fails or the Court is satisfied from the affidavit of the serving officer that the defendant is purposely evading service, an order for substituted service can properly be made. AIR 1930 Lah 397 (399) °° 1868 Pun Re No. 35, p. 92 (93) (DB) °° AIR 1931 Pat 420 (421).

(4) The advisability of effecting substituted service is a matter primarily for the trial Court, and the Appellate Court has no jurisdiction to consider whether the order of the trial Court is based on sufficient grounds. AIR 1927 Mad 507 (507) °° AIR 1933 Lah 288(289) °°AIR 1967 Bom 361 (362): 68 Bom LR 857.

Order 5, Rule 20 — Note 2 (contd.)

[See however AIR 1940 Oudh 81 (83): 15 Luck 150.]

[But see AIR 1935 Lah 169 (170).]

(5) The legality of the order of substituted service or of service cannot be questioned by another Court. AIR 1955 Sau 28 (29) (DB).

(6) Where a summons is not served on the defendant personally but is deemed to be served under any of the provisions of O. 5 or where a service is substituted under R. 20, the defendant can show that the service was not really effected as reported or that condition prerequisite for ordering that mode of service did not exist. AIR 1960 Madh Pra 378 (379): 1960 MPLJ 1074.

(7) No evidence to show that process server made all possible atempts to ascertain place where defendant could be found or, if out of town, when he would return — Requirements of O. 5, R. 17 held not complied with — Necessity for proclamation under O. 5, R. 20 held did not arise. (1963) 2 Mys LJ 482.

(8) Court need not record reasons for 'satisfaction' before ordering substituted service — Satisfaction of trial Court and not that of appellate Court is a condition pre-requisite for ordering substituted service AIR 1967 Pat 280 (280, 281): ILR 46 Pat 653 (DB).

(9) For substituted service under O. 5, R. 20, first of all there should be an order of the authority concerned directing the service of notice under R. 20 and then only a notice might be served by affixture both at the residence of the assessee and also at a conspicuous part of the office of the Court. AIR 1968 Pat 126 (128): 1967 BLJR 699 (DB).

(10) Where the question referred to High Court related to validity of notice under S. 34 Income-tax Act (1922) all aspects of the validity of notice can be considered by the High Court. The High Court can consider the validity of notice served by registered post even though the tribunal confined itself to the consideration of O. 5, R. 20 alone. AIR 1967 Punj 103 (106): 61 ITR 194 (FB).

(11) Before ordering notice by substituted service the Court must satisfy itself that there is reason to believe that the person to be served was either avoiding service or that a summons could not be served in normal way. (1966) 2 Mys LJ 708 (709): (1966) 6 Law Rep 657 (DB).

3. Evasion of service by the defendant.— (1) The question when the defendant must be deemed to be keeping out of the way has to be determined according to the circumstances of each case. (1898) 21 Mad 324 (326) (DB) °° (1897) 1 Cal WN 104 (104) (DB).

(2) Process-server not going to defendant's village on ground of the village not being within jurisdiction of Court — Summons returned unserved — Substituted service held not proper. 1958 Jab LJ 263 (264).

(3) A person who for most part of the month resided in place 'A' but visited place 'B' occasionally where he had hired a house, was sued for ejectment in Court at 'B'. Substituted service was effected at his residence at 'B' and yet he remained absent and facts disclosed that he was totally unaware either of the suit or of substituted service and was paying rent, his absence held could be said to be for good and sufficient reason, and did not indicate that he was avoiding service. AIR 1967 Bom 361 (362): 68 Bom LR 857.

4. Non-possibility of service for other reasons. — (1) Even though the defendant is not keeping out of the way, the Court has got power to order substituted service if it is satisfied that for any other reason the summons cannot be served in the ordinary manner. AIR 1952 Cal 781 (786) °° AIR 1952 Cal 10 (14): ILR (1952) 1 Cal 196 °° 94 Ind Cas 395 (395) (Nag).

(2) Where a person on account of his being in enemy-occupied country cannot be served the proper course is to issue process for substituted service under this rule and then proceed in the ordinary way with the trial of the suit. AIR 1945 All 45 (46): ILR (1945) All 18.

[But see AIR 1943 Lah 327 (329) (DB).]

5. "Or in such other manner as the Court thinks fit." — (1) The words "or in such other manner as the Court thinks fit" give a Court jurisdiction to have the service of summons through registered post. AIR 1951 Orissa 312 (312, 313): ILR (1949) Cut 511 (DB) °° AIR 1954 Sau 84 (86) °° AIR 1967 Bom 361 (362): 68 Bom LR 857.

(2) The summons should be in compliance with O. 5, R. 1 (3) and the form prescribed in Appendix B, Form No. 1. AIR 1951 Orissa 312 (312, 313): ILR (1949) 1 Cut 511 (DB).

(3) The legislature has cast no duty on the plaintiff to take the summons by hand and to have the service effected on the defendant although the Court is at liberty to ask the plaintiff to assist the process-server in effecting service. AIR 1954 Punj 174 (175).

(4) Process-server not going to defendant's village on ground of village not being within jurisdiction of Court — Summons returned unserved — Court ordering substituted service first by registered post and subsequently by publication in newspapers — Both the methods, held were wrong and were not provided by Order 5, Rule 20. 1958 Jab LJ 263 (264).

[But see AIR 1965 Raj 79 (80): 1964 Raj LW 446. (Where a person was resi-

[a]**R. 20A. Service of summons by post.**—(1) Where, for any reason whatsoever, the summons is returned unserved, the Court may, either in lieu of, or in addition to, the manner provided for service of summons in the foregoing rules, direct the summons to be served by registered post addressed to the defendant or his agent empowered to accept service at the place where the defendant or his agent ordinarily resides or carries on business or personally works for gain.

(2) An acknowledgment purporting to be signed by the defendant or the agent or an endorsement by a postal employee that the defendant or the agent refused to take delivery may be deemed by the Court issuing the summons to be prima facie proof of service.

[a] Inserted by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 14 (1-1-1957).

Order 5, Rule 20 — Note 5 (contd.)

ding at two places and chose to evade normal mode of service and the Court finally got notice published in newspapers held notice was not defective.)]

(5) Last ten words of Order 5, R. 20 (1) confer a discretion on Court to adopt any other manner of service, but such other manner of service must be such as gives notice to the person served. Substituted service of notice under Section 34 of Income Tax Act (1922) by affixture of copy on some conspicuous part of assessee's residence is valid service even though no copy is affixed in Court house. **AIR 1967 SC 1552 (1554): (1967) 3 SCR 298.** (AIR 1963 Punj 486, **OVERRULED**; 1964 Cur LJ 523, (Punj), **REVERSED**; AIR 1967 All 170, **IMPLIEDLY OVERRULED.**)

(6) Mode of effecting substituted service — Rule prescribes a normal method of effecting substituted service — But it does not make it obligatory on the Court to prescribe only in normal way — Court can order service in any other manner which it deems fit — Court ordering copy of summons to be pasted on premises of defendant — Another copy ordered to be sent to defendant by registered post — Order is not illegal and is in conformity with Order 5, Rule 20. AIR 1967 Bom 361 (362): 68 Bom LR 857.

[But see AIR 1961 Orissa 67 (69): (1962) 32 Com Cas 480. (Normal mode of service of summons though available not resorted to — Substituted service is not due service.)]

6. Substituted service is as effective as personal service.— (1) The words "as effectual" mean "as effectual for the purpose of enabling the Court to proceed with the suit." AIR 1957 All 805 (808) °° AIR 1957 J and K 18 (18) °° Madh B LJ 1954 HCR 858 (860) °° AIR 1969 Pat 112 (114) (DB). (AIR 1957 Andh Pra 1 (FB), Followed.)

(2) Where service has been effected under this rule and an ex parte decree is passed the defendant is entitled to show that the circumstances justifying the order for such service did not exist. AIR 1957 J and K 18 (18) °° AIR 1953 Trav-Co 101 (102) °° AIR 1934 Cal 745 (746) (DB).

(3) A defendant can be said to be duly served by substituted service only if there is compliance with Order 5, Rule 20 (1). When the substituted service on the defendant is not effective it cannot be said that the defendant was duly served. The words "or in such other manner as the Court thinks fit" in Order 5, Rule 20 no doubt give a wide discretion to the Court as regards the mode of substituted service. The question whether in case of substituted service, the summons is or is not duly served depends upon the facts of each particular case. Merely because the court had ordered substituted service under Order 5, R. 20, it cannot be taken that the defendant was duly served. AIR 1959 Madh Pra 193 (194): 1959 MPLJ 352.

(4) If substituted service under Order 5, Rule 20 is to be deemed to be as effectual as personal service, then in fairness to the defendants who are not actually made parties in a representative suit filed under O. 1, R. 8 and the interests of justice, the Courts should always satisfy themselves that such substituted service has actually been properly and lawfully effected. Further, this provision does not dispense with or do away with the provisions of Law which lays down that the defendant is entitled to receive a copy of the plaint or, in certain circumstances, a concise statement. AIR 1960 Punj 26 (27, 28, 29). (AIR 1927 Lah 376 and AIR 1951 Orissa 312, Rel. on.)

Order 5, Rule 20A — Note 1

(1) It is clear from R. 20-A that it is only in case where the first summons is returned unserved it is permissible to serve the summons on the defendant by registered post. Where no attempt is made to serve the defendant through Court, Rule 20-A cannot be put into effect. Even de hors this rule, postal service should not be usually ordered, unless the Court is satisfied that every possible step was taken to effect personal service. In divorce proceedings or proceedings connected with matrimonial affairs, in the interest of justice, service should be effected personally. AIR 1962 Andh Pra 430 (431): (1962) 1 Andh WR 182 (DB) °° AIR 1969 Pat 246 (248): 1959 BLJR 82.

(2) Summons not duly served — Substituted service — Service by post to a person living outside the jurisdiction of Court but within India, is valid — Substituted service

HIGH COURT AMENDMENTS

Gujarat

In sub-rule (2), between the words "or an endorsement" and "by a postal employee" insert the words "purporting to be" (17-8-1961.)

Madras and Pondicherry

Rule 20A (1) and (2) shall be omitted (27-3-1963) and Act 26 of 1968, S. 3 and Schedule Pt. II [w. e. f. 5-9-68].

Mysore

Delete Rule 20A. (30-3-1967.)

R. 21. Service of summons where defendant resides within jurisdiction of another Court.—A summons may be sent by the Court by which it is issued, whether within or without the [a][State], either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

[1882 and 1877, S. 85; 1859, S. 59.]

[a] Substituted for "Province" by A.L.O., 1950.

HIGH COURT AMENDMENTS

Allahabad

Re-number R. 21 as sub-rule (1) and add the following as sub-rule (2):—

"(2) In lieu of, or in addition to, the procedure indicated in sub-rule (1), such summons may also be served by sending it by registered post addressed to the defendant at the place where he ordinarily resides or carries on business or works for gain. Unless the cover is returned undelivered by the post office on account of want of proper address or other similar reason, the summons may be deemed to

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Order 5, Rule 20A — Note 1 (contd.)

by publication in newspapers has the same effect as personal service — Return of summons with an endorsement of refusal by addressee, is prima facie proof of service. 1967 Ker LT 322 (324): 1967 Ker LJ 651.

(3) An endorsement made by postal employee that the defendant refused to take delivery may be deemed by the Court issuing the summons to be prima facie proof of service. The burden to prove that there has been no proper service and that the endorsement of the postal peon is false is on the person who alleges it. The amendment made in 1956 does not affect substantive rights but only lays down a rule of procedure and applies to pending proceedings. AIR 1959 Ker 297 (297): 1958 Ker LT 899. (AIR 1958 Mad 522 and AIR 1957 Trav-Co 208, **DISSENTED.**)

(4) Rule 20-A gives a discretion to Court to order service by registered post. The condition precedent for the application of this rule is "where the summons is returned unserved". Where order of service by registered post is without justification, when a defendant refuses a summons, the summons cannot be held as duly served. AIR 1960 Madh Pra 378 (379, 380): 1960 MPLJ 1074.

(5) Rule 20-A cannot apply to service of notice under Order 5, Rule 9 (3) (Madras). AIR 1963 Mad 198 (200): 76 Mad LW 24 (DB).

(6) Proof of service according to Order 5, Rule 20A is only prima facie proof which is rebuttable — Defendant denying endorsement of refusal on postal envelope — Plaintiff failing to adduce evidence about truth of endorsement — Presumption of service under Order 5, Rule 20A disappears. (1963) 2 Mys LJ 482 (485) °° AIR 1960 Andh Pra 383 (383): (1959) 2 Andh WR 369.

(7) Service of summons by post — Defendant illiterate purdanashin lady — Acknowledgment bearing thumb impression — Identity of thumb impression not proved — Postal peon not examined — Fact that she did not categorically deny that it was her thumb impression is not sufficient to hold that there was tender of registered letter to her especially when she had categorically denied that the letter was ever tendered to her or that she had accepted it. ILR (1960) Cut 522 (524).

(8) Witness summoned by registered post to produce original sale deed in her possession — Witness refusing summons — Certified copy of sale deed is admissible by virtue of Order 5, Rule 20. ILR (1961) Cut 635 (663) (DB).

(9) Where in a case the summons against defendant never returned unserved to the Court, the trial Court had no power to have recourse to substituted method of service, unless that condition was complied with. So any report of refusal to accept service by the postman on the registered cover sent to such a defendant under that rule was not service in law upon her. No proceedings in the nature of ex parte could be taken against her and in the circumstances no ex parte decree could be made against her. 1965 Cur LJ 709 (Punj).

have been delivered to the addressee at the time when it should have reached him in the ordinary course." (1-6-1957).

Andhra Pradesh

Add the following proviso to Rule 21 :—

"Provided that summons intended for service in the twin cities of Hyderabad and Secunderabad shall be sent to the City Civil Court, Hyderabad, at Secunderabad." (23-3-1967.)

HIGH COURT AMENDMENTS

Rule 21-A (Bombay: Dadra and Nagar Haveli[a])

The following shall be inserted:—

"R. 21-A. Service of summons by pre-paid post wherever the defendant may be residing if plaintiff so desires.—Notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, (the Court may, in addition to or in substitution for, any other mode of service,) cause the summons to be addressed to the defendant at the place where he is residing, (or where he ordinarily carries on business) and sent to him by registered post, pre-paid for acknowledgment, provided that at such place there is a regular daily postal service. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be prima facie proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and declare the summons to have been duly served or order such further service as may in its opinion be necessary." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965].

Gujarat

As in Bombay save that the rule begins with the words "the Court may" and the words put in brackets are omitted. (17-8-1961.)

Order 5, Rule 21A (Bombay) — Note 1

(1) Service of summons by registered post — Endorsement of refusal — Ex parte decree passed — Application to set aside decree on ground that summons not duly served — Normally Court would set aside decree and restore suit — But where interests of third party have intervened Court must, before setting aside decree, hold enquiry and come to conclusion whether in fact summons was not served on defendant. AIR 1956 Bom 144 (145).

(2) Order 5, Rule 21A is an enabling rule and it permits the Court to cause a summons to be served by registered post. When a registered packet is returned marked 'refused,' it is not prima facie evidence of proof of service. Even where the Court holds an enquiry under the rule and declares that the summons has been duly served, the declaration is not conclusive and it is open to the defendant to challenge the ex parte decree on ground that the summons had not been duly served. AIR 1954 Bom 159 (160): ILR (1954) Bom 243.

(3) Where an ex parte decree is passed after the writ of summons has been sent to a defendant, by registered post and the cover containing the summons has been returned with the postal endorsement "refused", it is undoubtedly for the defendant to satisfy the Court that the letter was not tendered to him. But the defendant can only do so by making a statement on oath. This must usually remain uncontroverted, unless the postman, who tendered the letter to him, is summoned and makes a statement that he tendered the cover containing the summons to the defendant and after cross-examination, his evidence is believed. If the plaintiff does not summon the postman, the statement on oath of the defendant remains uncontroverted and, in such a case there is sufficient ground for setting aside the ex parte decree. AIR 1968 Bom 387 (388): 70 Bom LR 253.

(4) The facility of postal service given by Order 5, Rule 21-A does not take away or affect the provisions of Order 30, Rr. 3 and 5, which must be complied with. If a process is addressed to a partner by registered post, he must also be informed in what capacity it is addressed to him. Similarly, if the process is addressed to a person in his capacity as manager of the business in charge of it at the time of service, he must be so informed even if the service is by registered post.

Where a notice of filing the award in Court issued under Section 14 (2), Arbitration Act was sent by registered post to the defendant firm but the acknowledgment of receipt of the notice was signed by a person who did not state therein whether he was signing as a partner of the firm or as the manager in charge of the business.

Held, that in the absence of enquiry by the Court that the person signing the acknowledgment was the proper person to receive the notice, the service must be held to be bad in law. AIR 1968 Bom 443 (445): 70 Bom LR 219.

R. 22. Service, within Presidency-towns, of summons issued by Courts outside.—Where a summons issued by any Court established beyond the limits of the towns of Calcutta, Madras [a][and Bombay] is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served.

[1882 and 1877, S. 86.]

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Bombay and Rangoon".

HIGH COURT AMENDMENTS

Bombay : Dadra and Nagar Haveli[a]

Add the following proviso:—

"Provided that where any such summons is to be served within the limits of Greater Bombay, it may be addressed to the defendant at the place within such limits where he is residing (or where ordinarily carries on business) and may be sent to him by the Court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be prima facie proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Gujarat

Same as that of Bombay except for the words "endorsement by a postal servant" the words "endorsement purporting to be by a postal servant" are substituted and words put in brackets are omitted. (17-8-1961.)

Rajasthan

Add the following Proviso:—

"Provided that any such summons may instead be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be prima facie proof of service. In all other cases the Court shall hold such inquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary." (25-7-1957.)

R. 23. Duty of Court to which summons is sent.—The Court to which a summons is sent under Rule 21 or Rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto.

[1882 and 1877, S. 85, 1859, S. 59.]

R. 24. Service on defendant in prison.—Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant.

[1882 and 1877, Ss. 87, 88.]

R. 25. Service where defendant resides out of India and has no agent.—Where the defendant resides out of [a][India] and has no agent in [a][India] empowered to accept service, the summons shall be addressed to the defendant at the

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Order 5, Rule 23 — Note 1

(1) Court to which the summons has been transmitted for the service has power to declare as to the sufficiency of service and such a declaration raises a strong presumption of due and proper service. (1911) 33 All 649 (652) (DB) °° (1886) 10 Bom 202 (205) °° AIR 1924 Oudh 237 (238).

[But see (1895) 22 Cal 889 (891).]

(2) The certificate of return must be signed by the Judge himself and not by the munsarim. AIR 1924 Oudh 237 (238).

Order 5, Rule 25 — Note 1

(1) Where the defendant is a resident of India but is out of India only temporarily, this rule does not apply. (1911) 12 Ind Cas 420 (421) (DB).

place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate:

[b][Provided that where any such defendant resides in Pakistan, the summons, together with a copy thereof, may be sent for service on the defendant, to any Court in that country (not being the High Court) having jurisdiction in the place where the defendant resides:

Provided further that where any such defendant is a public officer in Pakistan (not belonging to the Pakistan military, naval or air forces) or is a servant of a railway company or local authority in that country, the summons, together with a copy thereof, may be sent for service on the defendant, to such officer or authority in that country as the Central Government may, by notification in the official Gazette, specify in this behalf.]

[1882, S. 89.]

[a] Substituted by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), Section 3. (1-4-1951.)

[b] Added by the Code of Civil Procedure (Amendment) Act, 1951 (19 of 1951), Section 2. (1-9-1951.)

HIGH COURT AMENDMENTS

Allahabad

Omit the present entry under Allahabad and substitute the following for Rule 25:—

"25. Where the defendant resides out of India and has no agent in India empowered to accept service, the summons, unless the Court otherwise directs, be addressed to the defendant at the place where he is residing and sent to him by registered post if there is postal communication between such place and the place where the Court is sitting. Unless the cover is returned undelivered by the post office on account of want of proper address or any other sufficient reason, the summons may be deemed to have been delivered to the addressee at the time when it should have reached him in ordinary course." (29-3-1958 and 14-4-1962.)

Andhra Pradesh

Same as that of Madras. except—

(i) omit the words 'British' wherever it occurs; and

(ii) delet existing first proviso (29-8-1957.)

Bombay : Dadra and Nagar Haveli[a]

"25. Where the defendant resides out of India and has no agent in India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situated :

"Provided that where any such defendant resides in Pakistan, the summons, together with a copy thereof, may be sent for service on the defendant, to any Court in that country (not being the High Court) having jurisdiction in the place where the defendant resides:

"Provided further that where such defendant is a public officer in Pakistan (not belonging to the Pakistan military, naval or air forces) or is a servant of a railway company or local authority in that country, the summons, together with a copy thereof, may be sent for service on the defendant, to such officer or authority in that country as the Central Government may, by notification in official Gazette, specify in this behalf." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Order 5, Rule 25 — Note 1 (contd.)

(2) In cases where the defendant resides out of India service of process is to be effected by registered post. AIR 1917 Mad 415 (415) •• (1897) 21 Bom 412 (418) •• AIR 1922 Pat 376 (377): 1 Pat 48 (DB).

(3) Where the respondent had left for England, service on him was ordered to be made through an agent in England appointed for the purpose. (1909) 36 Cal 226 (232) (DB).

Kerala: Laccadive, Minicoy and Amindivi Islands

(i) Before the existing provisos, add the following proviso, namely :—

"Provided that, if by any arrangement between the Government of the State in which the Court issuing summons is situate and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon:"

(ii) In the last proviso, for the word "company", substitute the word "Administration". (9-6-1959); Reg. 8 of 1965 (w. e. f. 1-10-1967).

Madhya Pradesh

Substitute "may" for "shall". (16-9-1960.)

Madras and Pondicherry

(i) Substitute the following for Rule 25 :—

"25. Service where defendant resides out of British India and has no agent.—

Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate :

Provided that if, by any arrangement between the Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon. (as amended on 2-3-1942.)

(ii) Omit first proviso to Rule 25. (23-12-1964.)

Mysore

Substitute the following for Rule 25:—

"25. (1) Where the defendant resides outside the State of Mysore but within the territories of India, the Court may direct the proper officer within the meaning of Rule 9 to cause the summons to be addressed to the defendant at the place where he ordinarily resides or carries on business, or works for gain and sent to him by registered post prepaid for acknowledgment. When it is so sent by registered post, the provisions of the proviso to Rule 10 shall apply thereto.

(2) Where the defendant resides out of India and has no agent in India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate:

Provided that, if by any arrangement between the Central Government and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in the same manner as by the said arrangement may have been agreed upon :—

Provided further that, where any such defendant resides in Pakistan, the summons together with a copy thereof, may be sent for service on the defendant to any Court in that country (not being the High Court) having jurisdiction in the place where the defendant resides:

Provided further that, where any such defendant is a public officer in Pakistan (not belonging to Pakistan military, naval or air forces) or is a servant of a railway

company or local authority in that country, the summons, together with a copy thereof, may be sent for service on the defendant, to such officer or authority in that country as the Central Government may, by notification in the Official Gazette specify in that behalf. (30-3-1967.)

HIGH COURT AMENDMENTS

Rule 25A

Allahabad

Add the following:—

"25A. Where the defendant resides out of India but has an agent empowered to accept service of summons on his behalf residing in India but outside the jurisdiction of the Court, the summons, unless directed otherwise by the Court, may be addressed to such agent and sent to him by registered post if there is postal communication between such place and the place where the Court is sitting. Unless the cover is returned undelivered for want of proper address or any other sufficient reason, the summons may be deemed to have been delivered to the addressee at the time when it should have reached him in ordinary course." (14-4-1962.)

Madhya Pradesh

Add the following as Rule 25-A:—

"25-A. Service where defendant resides in India but outside Madhya Pradesh.—Where the defendant resides in India but outside the limits of Madhya Pradesh, the Court may, in addition to any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by him or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be prima facie proof of service." (16-9-1960.)

R. 26. Service in foreign territory through Political Agent or Court.—Where—

(a) in the exercise of any [a][foreign [b][• •] jurisdiction vested in the Central Government], a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

[c][(b) [d][The [e][State] Government] has, by notification in the [f][Official Gazette], declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons [g][issued under this Code by a Court of the [h][State]] shall be deemed to be valid service,]

the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant; and if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

[1882, S. 90; 1877, Ss. 90, 92; 1859, S. 66.]

[a] The words "foreign or extra-provincial jurisdiction vested in the Central Government" were substituted by A.C.A.O., 1948, for the words "foreign jurisdiction vested in His Majesty or in the Central Government or the Crown Representative".

[b] The words "or extra-provincial" were omitted by A. L. O., 1950.

[c] Sub-rule (b) substituted by the Second Repealing and Amending Act, 1914, Sec. 2 and Schedule I for the original sub-rule.

[d] Substituted by A.O., 1937, for "the Governor-General in Council".

[e] Substituted for "Provincial" by A.L.O., 1950.

[f] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Gazette of India".
[g] Substituted by ibid, for "issued by a Court under this Code".
[h] Substituted for "Province" by A.L.O., 1950.

HIGH COURT AMENDMENTS

Allahabad

After the words "the summons may" insert the words "in addition to, or in substitution for the method permitted by rule 25." (24-7-1926.)

Andhra Pradesh

Same as that of Madras as amended in 1958. (29-8-1957.)

Bombay: Dadra and Nagar Haveli[a]

For Rule 26, the following rule is substituted:—

"26. Service in foreign territory through Political Agent or Court.—Where—

(a) and (b) (Same as in Kerala except that the words 'or process' and 'or' at the end of clause (b) and clause (c) are omitted.)

the summons may, in addition to or in substitution for the method prescribed by R. 25, be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in the manner hereinbefore directed, such endorsement shall be deemed to be evidence of service." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Gujarat

Between the words "may" and "be sent", insert the words "in addition to or in substitution for the method permitted by Rule 25". (17-8-1961.)

Kerala: Laccadive, Minicoy and Amindivi Islands.

For Rule 26, substitute the following, namely:—

'26. Service in foreign territory through Political Agent or Court or by special arrangement.—Where—

(a) in the exercise of any foreign jurisdiction vested in the Central Government, a Political Agent has been appointed or a Court has been established or continued with power to serve a summons or process issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) the State Government has by notification in the Official Gazette declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons or process issued under this Code by a Court of the State shall be deemed to be valid service, or

(c) by any arrangement between the Government of the State in which the Court issuing the summons or process is situate and the Government of the foreign territory in which the defendant resides, the summons or process can be served by an officer of the Government of such territory,

the summons or process may be sent to such Political Agent or Court in such manner as may have been agreed upon or to the proper officer of the Government of the foreign territory by post or otherwise for the purpose of being served upon the defendant; and, if the summons or process is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory, that the summons or process has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service. (9-6-1959.)

Provided that the Court issuing the summons shall, if the Government by a notification in the Official Gazette so directs, send the summons to the Government or other officer specified in that behalf of the foreign territory in which the Court in respect of which a declaration has been made by the State Government under clause (b) is situated and in which the defendant resides, through the Ministry of the Central Government dealing with external affairs, or such officer as may be specified in the notification in this behalf for causing the summons to be served upon the defendant by such Court or other officer specified and if such Court or other officer returns the summons with an endorsement signed by the Judge or other officer of such Court or by the other officer specified that the summons has been served upon the defendant in the manner hereinbefore directed, such endorsement shall be deemed to be evidence of service." (22-9-1964); see Reg. 8 of 1965 (w. e. f. 1-10-1967).

Madhya Pradesh

Insert the words "in addition to or in substitution for the method permitted by Rule 25" between the words "may" and "be sent". (16-9-1960.)

Madras and Pondicherry

Substitute the following:—

"26. Service in foreign territory through Political Agent or Court or by special arrangement.—Where—

(a) in the exercise of any foreign jurisdiction vested in the Central Government, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons or process issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) the Central Government has, by notification in the Official Gazette, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid that service by such Court or any summons or process issued under this Code by a Court in India shall be deemed to be valid service,

the summons or process may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant; and, if the summons or process is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons or process has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service."

[As amended on 2-3-1942 and 28-5-1958]; Act 26 of 1968, S. 3 and Schedule Pt. II.

Mysore

For Rule 26, substitute the following:—

"26. Where—

(a) in the exercise of any foreign jurisdiction vested in the Central Government, a Political Agent has been appointed, or a Court has been established or continued with power to serve a summons or process issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) the State Government has, by notification in the Official Gazette declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons or process issued under this Code by a Court of the State shall be deemed to be valid service, or

(c) by any arrangement between the Central Government and the Government of the foreign territory in which the defendant resides, the summons or process may be served by an officer of the Government of such territory,

the summons or process may be sent to such Political Agent, Court or officer through the Ministry of the Central Government dealing in the external affairs, or such officer as may be specified in the notification in this behalf by the State Government in the Official Gazette, and if such Political Agent, Court or other officer specified returns the summons with an endorsement signed by the Judge or other officer of such Court or by the other officer specified that the summons has been served on the defendant in the manner hereinbefore directed, such endorsement shall be deemed to be evidence of service. (30-3-1967.)

Rajasthan

Proviso added to R. 26 in Rajasthan is the same as introduced in Kerala in 1964, (11-3-1965.)

R. 27. Service on civil public officer or on servant of railway company or local authority.—Where the defendant is a public officer (not belonging to [aa][the Indian]military, [a][naval or air] forces [b][° ° °]), or is the servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant.

[1882, S. 423; 1877, Ss. 422, 468; 1859, Ss. 62, 68.]

[aa] Substituted for "His Majesty's" by A. L. O., 1950.

[a] Substituted by the Repealing and Amending Act, 1927, S. 2 and Sch. I for "or naval."

[b] The words "or His Majesty's Indian Marine Service" were repealed by the Amending Act, 1934, Section 2 and Schedule.

HIGH COURT AMENDMENTS

Allahabad

Add the following note:

"Note to Order 5, Rule 27.—(1) A list of heads of offices to whom summonses shall be sent for service on the servants of Railway Companies working in whole or in part in these States is given in Appendix II of the General Rules (Civil).

(2) In every case where a Court sees fit to issue a summons, direct to any public servant other than a soldier under Order 16, simultaneously with the issue of summons, notice shall be sent to the head of the office in which the person concerned is employed, in order that arrangements may be made for performance of the duties of such persons.

Illustration

If the Court sees fit to issue a summons to a Kanungo or Patwari it shall inform the Collector of the district, and if to a Sub-Registrar it shall inform the District Registrar to whom the Sub-Registrar is subordinate."

Andhra Pradesh

Same as that of Madras.

Bombay: Dadra and Nagar Haveli[a]

Same as that in Mysore [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Kerala: Laccadive, Minicoy and Amindivi Islands

For Rule 27, the following rule shall be substituted, namely:—

"27. Service on civil public officer or on servant of railway administration or local authority.—Where the defendant is a public officer (not belonging to the

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Order 5, Rule 27 — Note 1

(1) Where a railway servant attended a Court on being issued a Muchalka warrant directly against him and where the railway servant requested the Court to be relieved early and not being so relieved finally left the Court without permission the Court could not direct him to pay on his bond as the Court itself had not followed the procedure laid down by Rule 27. AIR 1960 Madh Pra 5 (6, 7): 1958 MPLJ 738.

Indian Military, Naval or Air Forces) or is the servant of a Railway Administration or local authority, the Court may, if it appears to it that the summons may be most conveniently so served, send it by registered post pre-paid for acknowledgment for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant" [9-6-1959] : Reg. 8 of 1965 [w. e. f. 1-10-1967].

Madras and Pondicherry

After the words "send it" insert the words "by registered post pre-paid for acknowledgment" [Dis. No. 209 of 1912]; Act 26 of 1968, S. 3 and Sch., Pt. II.

Mysore

For R. 27 substitute the following :—

27. Where the defendant is a public officer (not belonging to the Indian military, naval or air forces) or is a servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served, send it by registered post pre-paid for acknowledgment for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant [30-3-1967].

R. 28. Service on soldiers, sailors or airmen.—Where the defendant is a soldier, [a][sailor] [b][or airman], the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant.

[1882 and 1877, S. 468; 1859, S. 62.]

[a] Inserted by the Amending Act, 1934, S. 2 and Schedule.

[b] Inserted by the Repealing and Amending Act, 1927, S. 2 and Schedule I.

HIGH COURT AMENDMENTS

Allahabad

The present Rule 28 shall be numbered 28 (1).

Add the following as Rule 28 (2), (3), (4) and (5).

"(2) Where the address of such Commanding Officer is not known, the Court may apply to the Officer Commanding the station in which the defendant was serving when the cause of action arose to supply such address, in the manner prescribed in sub-rule (4) of this rule.

(3) Where the defendant is an officer of the Indian military forces, whenever it is practicable, service shall be made on the defendant in person.

(4) Where such defendant resides outside the jurisdiction of the Court in which the suit is instituted, or outside the States, the Court may apply over the seal and signature of the Court to the Officer commanding the station in which the defendant was residing when the cause of action arose for the address of such defendant, and the Officer commanding to whom such application is made shall supply the address of the defendant or all such information that it is in his power to give as may lead to the discovery of his address.

(5) Where personal service is not practicable the Court shall issue the summons to the defendant at the address so supplied by registered post."

Andhra Pradesh

Same as that of Madras.

Bombay: Dadra and Nagar Haveli[a]

Same as that in Mysore [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras [9-6-1959]: Reg. 8 of 1965 [w. e. f. 1-10-1967].

Order 5, Rule 28 — Note 1

(1) When a summons is sent to a Commanding Officer for service on a soldier under him, he is bound to cause the summons to be served upon him. He cannot refuse to have the same served, on the ground that under Section 144 of the Army Act of 1881 (44 and 45 Vict., Ch. 58) the soldier was entitled to protection. (1888) 11 Mad 475 (477) (DB) °° (1887) 10 Mad 319 (322) (DB).

(2) A mechanic serving in the Indian marine is subject exactly to the same rules as every other person under the Code as regards service. AIR 1914 Cal 845 (845, 846): 42 Cal 67 (DB).

Madras and Pondicherry

After the words "shall send" insert the words "by registered post pre-paid for acknowledgment" [Dis. No. 209 of 1912]; Act 26 of 1968, S. 3 and Sch., Pt. II.

Mysore

For Rule 28, substitute the following :—

28. Where the defendant is a soldier, sailor or airman the Court shall send by registered post pre-paid for acknowledgment the summons for service on the defendant to his commanding officer together with a copy to be retained by the defendant [30-3-1967].

R. 29. Duty of person to whom summons is delivered or sent for service.—(1) Where a summons is delivered or sent to any person for service under Rule 24, Rule 27 or Rule 28, such person shall be bound to serve it, if possible, and to return it under his signature, with the written acknowledgment of the defendant, and such signature shall be deemed to be evidence of service.

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

[1882, Ss. 87, 88 and 468; 1877, S. 468; 1859, S. 62.]

HIGH COURT AMENDMENT

Allahabad

In sub-rule (1), line 3, for the word and figures "Rule 28" read "Rule 28 (1)."

HIGH COURT AMENDMENTS

Rule 29A

Andhra Pradesh

Same as that of Madras—as amended in 1958. [29-8-1957.]

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras [9-6-1959]: Reg. 8 of 1965 [w. e. f. 1-10-1967].

Madras and Pondicharry

Insert as Rule 29A :

"29A. Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to the Military, Naval or Air Forces of India) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post pre-paid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons". [Dis. No. 209 of 1912 as amended on 28-5-1958]; Act 26 of 1968, S. 3 and Sch., Pt. II.

Mysore

Add the following as Rule 29-A :—

29A. Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to military, naval or air forces) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post pre-paid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons [30-3-1967].

R. 30. Substitution of letter for summons.—(1) The Court may notwithstanding anything hereinbefore contained, substitute for a summons a letter signed by

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Order 5, Rule 29 — Note 1

(1) There are five rules viz., Order 5, Rules 9, 19, 20, 25 and 30 (3) under which a Court can possibly order service of summons by post to be sent direct to the defendant but condition mentioned therein must be satisfied before such service can be effected. AIR 1954 Sau 84 (86): 6 Sau LR 277.

the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; and, where the defendant has an agent empowered to accept service the letter may be delivered or sent to such agent.

[1882 and 1877, Ss. 91, 92; 1859, Ss. 64, 65.]

HIGH COURT AMENDMENTS

Rules 31 and 32

Allahabad

Insert the following as Rules 31 and 32 :

"31. An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose. No other forms shall be received by the Court."

"32. Ordinarily every process, except those that are to be served on Europeans, shall be written in the Court Vernacular. But where a process is sent for execution to Court of a district where a different language is in ordinary use, it shall be written in English and shall be accompanied by a letter in English requesting its execution.

In cases where the return of service is in a language different from that of the district from which it is issued it shall be accompanied by an English translation".

Rule 31

Andhra Pradesh

Same as that of Madras R. 31 [29-8-1957].

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras [9-6-1959]: Reg. 8 of 1965 [w. e. f. 1-10-1967].

Madras and Pondicherry

Add the following after Rule 30 :

'31. (1) The Court may, on the application of the plaintiff and on such terms as to security or otherwise as the Court thinks fit, dispense with the service of summons on a defendant who is resident in territory belonging to or occupied by a State at war with India :

Provided that an order dispensing with service of summons shall not be made unless the Court is satisfied that the defendant is resident in such territory and that service of summons on him in the mode prescribed by the Code is not possible.

(2) The Court may before making the said order direct such publication of the application as it considers necessary in the circumstances.

(3) Where in any suit an order dispensing with service of summons on a defendant is made under this rule and a decree or order is passed against him, the Court may on his application and on such terms as may be just set aside such decree or order and appoint a day for proceeding with the suit.

(4) The provisions of the first proviso to Rule 13 of Order IX and the provisions of Rule 14 of the said Order shall apply to an order setting aside a decree or order under sub-rule (3).

(5) The application under sub-rule (3) shall be filed within one year from the date of cessation of hostilities with the said State.

(6) The provisions of Section 5 of the Indian Limitation Act shall apply to applications under sub-rule (3).

(7) The provisions of this rule shall apply mutatis mutandis to a respondent in an appeal or a civil revision petition who is resident in such territory as is referred to in sub-rule (1)."

R. D. C. No. 2108/44, dated 29-3-1944, as amended on 28-5-1958; Act 26 of 1968, S. 3 and Sch., Pt. II.

Rules 31, 32, 33 and 34

Mysore

Add the following as Rr. 31, 32, 33 and 34—

31. (1) The Court may on the application of the plaintiff and on such terms as to security or otherwise as the Court thinks fit, dispense with service of summons on a defendant who is a resident in a territory belonging to or occupied by a State at war with the Central Government:

Provided that an order dispensing with the service of summons shall not be made unless the Court is satisfied that the defendant is a resident in such territory and that the service of summons on him in the manner prescribed by this Code is not possible.

(2) The Court may before making any such order direct such publication of the application as it considers necessary in the circumstances.

(3) Where in any suit an order dispensing with the service of summons on a defendant is made under this rule and a decree or order is passed against him, the Court may on his application and on such terms as may be just set aside such decree or order and appoint a day for proceeding with the suit.

(4) The provisions of the first proviso to Rule 13 of Order IX of this Code and the provisions of Rule 14 of the said order shall apply to an order setting aside the decree or order made under sub-rule (3).

(5) The application under sub-rule (3) shall be filed within one year from the date of cessation of hostilities with the said State.

(6) The provisions of Section 5 of the Limitation Act, 1963 shall apply to applications under sub-rule (3).

(7) The provisions of this rule shall apply mutatis mutandis to a respondent in an appeal or a civil revision petition who is resident in such territory as is referred to in sub-rule (1).

32. Where any party in a suit is represented by a pleader, the plaint or the written statement as the case may be, shall give the address of the pleader within the local limits of the city, town or place where the Court is situate and the said address of the pleader shall be the address for service on the party represented by the said pleader for purposes of all notices and processes issued in the suit. All such notices and processes in the suit or in any interlocutory matter in the suit shall be sufficiently served if left by a party or pleader or by a person employed by the defendant or by an officer or employee of the Court at the said address for service on the party intended to be served.

33. Unless the Court otherwise directs, notice of an interlocutory application in the suit need not be served on a party who having been duly served with summons in the main suit has failed to appear and has been declared ex parte by the Court:

Provided that the Court shall direct such notice to be issued and served on any such party in applications for the amendment of any pleading in the suit, if the Court is of the opinion that such party may be interested in or affected by the proposed amendment.

34. The provisions of Rules 32 and 33 shall also apply mutatis muntandis to appeals and revision petitions.

ORDER VI

PLEADINGS GENERALLY

R. 1. Pleading.—"Pleading" shall mean plaint or written statement.

[Cf. Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V, C. 49), S. 225.]

R. 2. Pleading to state material facts and not evidence.—Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.

[R. S. C. O. 19, R. 4. Cf. S. 114, 1882.]

Order 6, Rule 1

1. Scope and object of the order.— (1) An application to sue as pauper is not a pleading. AIR 1914 Mad 256 (258) °° AIR 1932 Lah 548 (549).

(2) A statement by a pleader or a petition for leave to execute the decree is not a pleading. AIR 1929 Oudh 204 (206) (DB) °° AIR 1916 Pat 39 (41): 2 Pat LJ 24 (DB).

(3) Question of court-fee raised by way of a petition is pleading. (1958) 1 Mad LJ 308 (309).

(4) Parties are to be confined to their pleadings — It is in the context of his principle that pleadings are regarded as important. AIR 1967 Goa 118 (119).

(5) An application for the amendment of a plaint is not a 'pleading' as that term is defined in Order 6, Rule 1 and is not bad because it was signed only by counsel for plaintiffs and not by plaintiffs themselves. 1960 Ker LJ 744: 1960 Ker LT 731.

2. Purpose of pleading — (1) When pleadings are not clear and the parties have no opportunity to meet the cases of their opponents there would evidently be a miscarriage of justice. AIR 1953 Trav-Co 35 (36) (DB).

(2) A plaintiff who is purposely vague ought to be carefully examined and tied down to definite pleadings. AIR 1930 All 321 (322).

ORDER 6, RULE 2 — SYNOPSIS

1. Scope.
2. Pleadings must state only facts and not law.
3. The facts stated must be material facts.
4. Facts to anticipate opponent's answer not to be pleaded.
5. Alternative and inconsistent allegations.
6. Matters affecting damages.
7. Pleadings should not state the evidence by which the facts are to be proved.
8. The facts should be stated in a concise form.
9. Variance between pleading and proof.
10. Construction of pleadings.

1. Scope. — (1) Where the pleadings filed by the parties are defective, the trial Court should insist on their being improved before it embarks on the case. But a suit will not be dismissed in appeal merely on the ground of defects in the pleadings where it is evident that there has been no misunderstanding in the minds of the parties as to what the issues really were. AIR 1942 All 170 (171): ILR (1942) All 289 (DB).

(2) Court has to look to the substance and not the form of the pleading. Even if a plea is not properly worded it would make no difference if the substance is clear and the other side is not likely to be misled thereby. The object of the pleading is to bring parties to an issue and if the pleading fulfils this purpose no objection can be entertained merely on the ground that it is not expressed in particular terms. AIR 1969 Madh Pra 110 (112): 1969 Jab LJ 420 (DB).

(3) If the parties go to trial despite the defect in pleadings and evidence of both parties is tendered on the issues raised by those pleadings the election petition cannot be dismissed for that defect because such defects will not relate to jurisdiction but may pertain to procedure only. AIR 1965 All 552 (558) (DB).

(4) Rules of pleadings are not opposed to common sense. AIR 1966 Mys 40 (48): (1965) 2 Mys LJ 571 (DB).

(5) Defendant can plead that a purchase was of benami nature to the extent of half the property. AIR 1960 Punj 575 (579) (DB). (AIR 1922 Bom 107 and AIR 1944 All 130, Distinguished.)

(6) The general principle of pleadings in suits including the maxim 'secundum allegata et non probata' applies to writ petitions. ILR (1968) 2 Punj 318 (325).

(7) In the trial of election petitions the rules as to pleadings as embodied in the Civil P. C. are attracted. AIR 1965 Punj 457 (458) (DB).

(8) The object of pleadings is, firstly, to narrow down the parties to definite issues and to confine the trial within due limits so as to save time and expense which might otherwise be needlessly thrown away. In the second place, the object is to prevent the other party from being caught by sur-

Order 6, Rule 2 — Note 1 (contd.)
prise. ILR (1959) 9 Raj 276: 1959 Raj LW 405 (411).

(8) Where it was contended that the plaintiff had not pleaded that the public trust was a religious or charitable trust and that it was a person under disability within the meaning of Section 2 (f) and S. 3 (4) of the Berar Regulation of Agricultural Leases Act and thus the pleadings were insufficient and unsatisfactory, it was held that it was a case from mofussil and mofussil pleadings should not be construed strictly. 1963 Mah LJ 633: ILR (1964) Bom 80.

2. Pleadings must state only facts and not law.— (1) A pleading must state only facts and not law. AIR 1957 Cal 198 (199) °° ('55) ILR (1955) Punj 797 (809) °° AIR 1966 Bom 160 (163): 67 Bom LR 919 °° (1964) 2 Andh WR 39 °° AIR 1963 All 535 (536). (Mention of section in plaint not necessary.) °° 1963 All LJ 1110 (1113) °° 1962 Raj LW 455. (Plaint basing liability of defendants as "universal donee" — It cannot be said that no plea under S. 128, T. P. Act was raised in pleading.) °° AIR 1961 Punj 414 (415, 416): 63 Pun LR 90 (DB) °° 1968 All LJ 1133 (DB).

(2) It is for the Court itself to find out and examine all pleas of law that may apply to the facts. **AIR 1952 SC 47 (51): 1952 SCR 179** °° AIR 1957 Punj 307 (309) °° ('55) ILR (1955) Punj 797 (809) °° AIR 1950 All 212 (222): ILR (1950) All 1222 (DB) °° AIR 1966 Bom 160 (163): 67 Bom LR 919 (DB) °° AIR 1963 Mad 71 (72): (1962) 2 Mad LJ 450 °° ILR (1960) 1 Punj 303: 1961 (2) Cr LJ 272 (278) °° ILR (1959) 9 Raj 276: 1959 Raj LW 405 (411).

(3) These rules equally apply to the defendant. ILR (1959) 9 Raj 276: 1959 Raj LW 405 (411).

(4) The parties can urge pleas of law at any time before judgment is pronounced. AIR 1926 Nag 265 (265).

(5) It is not enough to plead that the notice under Section 80 is illegal. AIR 1956 Ajmer 68 (2) (69).

(6) Plea of want of notice under S. 80 Civil P. C. cannot be taken by private individuals. It is open only to the Govt. and the officers mentioned in Section 80, Civil P. C. AIR 1969 All 161 (162).

(7) State Government pro forma defendant, not putting in appearance — Any objection with regard to notice under Section 80 must be deemed to have been waived. AIR 1969 All 161 (162)

(8) The facts which establish the pleas must be stated in each case. But it is not necessary to state the legal effect of the facts stated. AIR 1956 Andhra 235 (236, 237) °° AIR 1955 Cal 465 (467) (DB) °° AIR 1955 Madh B 49 (52): ILR (1954) Madh B 237 (DB) °° AIR 1955 Pat 66 (68) °° AIR 1943 PC 147 (151): ILR (1944) Kar (PC) 85 °° AIR 1962 Pat 64 (65): 1961 BLJR 752 (DB) °° 1961 MPLJ (Notes) 194: 1961 Jab LJ 1349.

(9) Where the plaintiff sets up a case that a document relied upon by the defendants in support of their case is a fabrication, it is not necessary for him either by his original plaint or by amendment therein to formally plead that the document is a fabrication and still he is entitled to ask the Court to try that plea. **AIR 1967 SC 1124 (1129): (1967) 1 SCR 93.**

(10) In a suit for possession the plaintiffs cannot found their case on defects, if any, in the title of the defendants. The law is the other way. (1962) 1 Andh LT 442 (444) (DB).

3. The facts stated must be material facts. —(1) All facts upon which the plaintiff's cause of action or the defendant's defence depends are material. AIR 1954 Vindh Pra 53 (55) °° ILR (1951) 1 Cal 443 (464) °° AIR 1916 Cal 658 (659) (DB) °° AIR 1933 Nag 29 (31): 28 Nag LR 320 °° AIR 1924 PC 216 (217): 51 Ind App 357.

(2) Plaintiff basing his case on custom — He must actually plead custom in his plaint. AIR 1961 SC 1374 (1376): (1962) 1 SCR 470 °° AIR 1963 Raj 95 (96): 1962 Raj LW 568 °° AIR 1959 J and K 52 (54).

(3) It is a fundamental rule of law that plaintiff must plead all material facts in the plaint. ILR (1959) 9 Raj 276: 1959 Raj LW 405 (411).

(4) All facts which, though not necessary to establish the cause of action or defence, but which the party pleading them is entitled to prove at the trial are material facts. AIR 1955 Bhopal 18 (19).

(5) Suit by civil servant challenging order of dismissal on ground of absence of reasonable opportunity — Report of inquiry officer supplied to plaintiff referring to confidential document sent to Government — Fact that copy of confidential document was not supplied to plaintiff is material to question of reasonable opportunity. AIR 1963 Guj 244 (249).

(6) It is essential that all the material facts should be stated so as not to embarrass the opposite party and so as to put him on his guard and tell him what he has to meet when the case comes on for trial. AIR 1950 PC 73 (75) ° AIR 1947 PC 132 (133): 74 Ind App 182 °° AIR 1955 Trav-Co 199 (200) (DB) °° AIR 1948 Bom 20 (23) °° AIR 1967 Cal 390 (398) °° (1965) 69 Cal WN 1: (1964) 2 Comp LJ 178 °° AIR 1965 Pat 279 (282-283) (DB). (The importance of stating the material facts in the pleadings in connection with fraud that one may plead cannot be gainsaid, as the other party will be required to meet such allegation.) °° AIR 1963 Orissa 189 (198): (1964) 1 Comp LJ 117 (DB).

[See also (1962) 3 Guj LR 787.]

(4) If a party omits to state a material fact he will not be allowed to give evidence of that fact at the trial unless the pleading is amended under Rule 17. AIR 1958 Punj 351 (355): ILR (1958) Punj 244

Order 6, Rule 2 — Note 3 (contd.)

(DB) ** AIR 1955 Bhopal 18 (19) ** AIR 1954 Mad 116 (117).

(5) A distinction must be made between "omission to state material facts" and "omission to give full particulars". In the first case a party is not allowed to raise a contention on a particular point even if some materials are available in the evidence. In the latter case the Court may permit the point to be raised on the basis of evidence unless thereby the opposite party is materially prejudiced. AIR 1968 Orissa 99 (106): 34 Cut LT 328.

(6) Election petition based on improper rejection or reception of ballot papers — Specification of numbers of such ballot papers in the petition not necessary under Section 83 (1) of the Representation of the People Act — Only such particulars as the Court might consider adequate having regard to the facts of the case may be given. Section 83 does not require anything more or less than what would be required under Order 6, Rule 2. AIR 1969 Bom 177 (183): 70 Bom LR 466.

(7) It is for the plaintiff in a suit to determine his own cause of action. If he wishes not to allege certain facts, it is not for the court to ask him to do it. AIR 1960 All 573 (577): 1960 All LJ 314. (The jurisdiction of the Court is not barred simply because the plaintiff could have by alleging the additional facts obtained relief under Section 180 of the U. P. Tenancy Act.)

(8) A party relying on an exemption from the operation of the provisions of law has to plead and prove it. 1965 BLJR 774 (777) (DB).

(9) Questions of age or time vitally affecting rights of parties should be specifically raised. 1965 All LJ 324.

4. Facts to anticipate opponent's answer not to be pleaded. — (1) A party should not plead to facts which have not become material at the stage of filing his pleading. AIR 1923 Lah 475 (476) (DB) ** 1961 Jab LJ 1263.

5. Alternative and inconsistent allegations.— (1) Inconsistent facts can be pleaded. AIR 1951 SC 177 (179): 1951 SCR 277 ** AIR 1950 Trav-Co 66 (69): 1950 Trav-Co LR 289 (FB) ** 1955 Raj LW 316 (317) ** AIR 1968 Punj 479 (483): ILR (1968) 1 Punj 10 (DB) ** AIR 1964 Raj 50 (54): 1963 Raj LW 491.

[But see AIR 1925 Pat 674 (675) (DB).]

(2) A party who has inconsistent contentions to make must raise them by way of alternative contentions. AIR 1959 Ker 116 (119): 1958 Ker LT 782 (DB).

(3) The object of permitting alternative reliefs to be claimed in one litigation is to obviate the necessity of another litigation, to dispose of the same controversy or the subject-matter of the same relief though the ground upon which the relief is claimed may be different. AIR 1918 Oudh 463 (464): 20 Oudh Cas 192 ** AIR 1964 Raj 50 (54): 1963 Raj LW 491.

(4) Plea that a deed was executed under undue influence held not to be inconsistent with the plea that it was sham on account of some other reasons. AIR 1962 Pat 168 (173) (DB).

(5) The following inconsistent pleas have been held not to be prohibited by the Code:

(a) A plea of forgery and a plea of execution under undue influence or fraud, or a plea of want of consideration. ('10) 7 Ind Cas 166 (168, 169) (DB) (Cal) ** ('10) 8 Ind Cas 845 (845) (Mad).

(b) A claim of ownership and right of easement. AIR 1953 All 591 (592) ** AIR 1946 Bom 266 (270): ILR (1946) Bom 184 (FB) ** ('07) 34 cal 51 (53, 56) (FB) (Overruling 16 Suth WR 198.) ** AIR 1930 All 877 (879): 53 All 16 (DB).

(c) Claim as a shebait or in the alternative as an owner. AIR 1918 Cal 870 (874) (DB).

(d) Plea of grant of perpetual tenancy or in the alternative acquisition of such tenancy by adverse possession. ILR (1951) Hyd 74 (76) (DB) ** AIR 1925 Pat 216 (221, 227): 4 Pat 139 (DB).

(e) Plea that the plaintiff is the owner by an initial title or in the alternative that the plaintiff is an owner having acquired title by adverse possession. AIR 1958 Bom 152 (153, 154): ILR (1957) Bom 548.

(6) If the inconsistent pleas will lead to the prejudice and embarrassment of the trial, they cannot be allowed. AIR 1956 Sau 20 (24) (DB) ** ('57) 61 Cal WN 970 (977) (DB) ** AIR 1955 Punj 83 (88): ILR (1955) Punj 740 (DB) ** AIR 1955 Trav-Co 134 (137) (DB) ** ILR (1953) Mys 591 (597) ** AIR 1968 Andh Pra 336 (344): (1969) 1 Andh LT 9 (DB).

[See also 1964 Ker LJ 676.]

(7) The Court can where it is necessary require the plaintiff to remove the inconsistency by giving further and better particulars or by setting out his pleas in the alternative. AIR 1951 Nag 412 (413): ILR (1951) Nag 496.

(8) Though law of pleadings allows inconsistent pleas to be raised, mutually destructive alternative pleas can be taken only at one's own peril. AIR 1967 Punj 64 (71).

(9) Evidence adduced in support of two absolutely inconsistent cases which are mutually destructive cannot secure confidence. Madh B LJ 1954 HCR 824 (825) ** AIR 1952 Kutch 55 (57) ** AIR 1942 All 308 (310): ILR (1942) All 478 (DB).

[See AIR 1967 Bom 355 (358): 68 Bom LR 474 (DB). (Plea that the petition should be dismissed on the ground of delay and

Order 6, Rule 2 — Note 5 (contd.)
the plea that it is pre-mature are mutually destructive pleas.)

(10) Where there is no inconsistency in the facts alleged alternative pleas in law are always permissible. AIR 1951 Nag 412 (413): ILR (1951) Nag 496 °° AIR 1946 Pat 316 (325): 25 Pat 58 (DB) °° AIR 1968 Punj 479 (483): ILR (1968) 1 Punj 10 (DB) °° AIR 1965 Ker 288 (291): 1965 Ker LT 341 °° AIR 1963 Andh Pra 94 (105): (1962) 2 Andh WR 401 °° AIR 1960 Madh Pra 111 (112): 1959 MPLJ 1205.

(11) A plea not pleaded or not raised in issue can be entertained at a later stage, even sometimes in appeal, provided the party concerned is not prejudiced and provided further that all materials and facts to supply the cases for such plea are on record. Alternative plea in such circumstances can be entertained. AIR 1966 Pat 383 (386): 1966 BLJR 571 (DB).

(12) Though a litigant can take alternative pleas, it is well settled that so far as constructive res judicata is concerned a litigant is not bound to take a plea which will be incongruous to the subject matter of the earlier litigations and inconsistent with the earlier plea. 1968 PLJR 91 (95) (DB).

(13) Where a party has once taken up a certain position and the Court has passed a decision on the footing of such position being correct the party cannot subsequently take up an inconsistent position with regard to the same matter. AIR 1951 Assam 68 (70): ILR (1950) 2 Assam 275 (DB) °° 42 Punj LR 140 (141, 142) °° AIR 1936 Pat 10 (10) (DB) °° AIR 1935 Mad 367 (368) °° AIR 1959 J and K 70 (72).

6. Matters affecting damages.— (1) In collision cases the plaint should be so framed as to set out the circumstances of the collision with clearness and accuracy in order to enable the adversary to know the case he has to meet. AIR 1921 Cal 543 (544) (DB).

(2) Where special damages are claimed, the plaint should give full particulars showing the nature and extent of the damage and showing with dates and items how the amount claimed is made up. AIR 1949 Nag 60 (61): ILR (1947) Nag 955 (DB).

(3) General damages can be claimed in a lump sum without giving particulars. AIR 1933 Nag 29 (31): 28 Nag LR 320 °° AIR 1966 Ker 172 (178): 1965 Ker LJ 142. (General and special damages — No specific pleading is necessary for general damages.)

7. Pleadings should not state the evidence by which the facts are to be proved.— (1) A pleading should not contain facts which are merely evidence to prove the material facts. AIR 1958 Manipur 22 (25) °° AIR 1950 All 109 (114) °° AIR 1925 Pat 410 (412) (DB) °° AIR 1916 Cal 658 (659) (DB)

(2) When the plaintiff alleged that certain of his windows were ancient, the defendant should not plead that in a previous suit the plaintiff had admitted that the windows were not ancient, inasmuch as that fact is only evidence disproving the plaintiff's case. AIR 1921 Sind 159 (162): 16 Sind LR 207 (FB).

[But see AIR 1926 Mad 1052 (1052) (DB) °° AIR 1933 Mad 43 (46) (DB).]

(3) Suit for damages for loss of consignment — Averment in written statement that a protest note by the Godown keeper mentoned the circumstances under which the loss occurred — Protest note, held not part of the written statement. AIR 1967 Assam and Nagaland 74 (76): ILR (1964) 16 Assam 395 (DB).

8. The facts should be stated in a concise form.— (1) Pleadings must be drafted with sufficient definiteness to enable the opposite party to understand the case he is called upon to meet. (92) 19 Cal 507 (512): 19 Ind App 90 (PC) °° AIR 1953 Trav-Co 447 (449) °° AIR 1925 Pat 168 (172) (DB) °° AIR 1932 All 467 (467) (DB) °° 1966 Jab LJ 807 (818): 1966 MPLJ 1139 (DB) °° 1963 MPLJ 28. (Plaintiff need not refer to Article 331 (2), if necessary facts are given.)

(2) The material facts must be stated precisely and coherently and as briefly as is consistent with clearness. ('72) 5 NWPHCR 25 (28) (DB) °° AIR 1931 Cal 458 (460): 58 Cal 418 °° AIR 1939 Rang 189 (192): 1939 Rang LR 1 (DB).

(3) Allegations couched in vague and nebulous manner — Court can safely ignore them. AIR 1968 Goa 53 (56).

(4) Since the duty of framing issues rests on the Court the trial Judge should insist on clear pleadings, and if the pleadings on any point are vague, he should order the party concerned to clear it. AIR 1959 Manipur 27 (27).

(5) Vagueness or lack of particularisation of averments is not to be judged by reading relevant pleadings in petition with counter pleadings in written-statement. AIR 1965 All 552 (558) (DB).

(6) Plea of undue influence — Court must scrutinise pleadings and find out whether facts constituting the plea have been stated and particulars thereof given before examining whether undue influence was exercised or not. **AIR 1967 SC 878 (881): (1967) 1 SCR 331.**

(7) General rules of pleadings are applicable to all suits relating to easements. The plaintiff resting his cause of action upon the existence of an easement in his favour must in seeking support to his title, state it with sufficient clarity and detail in his plaint. The object of detailed pleadings is to enable the opposite party to know what case he has to meet at the trial, and to save unnecessary expense and to avoid the party being taken by surprise. AIR 1962 Punj 299 (302): ILR (1962) 2 Punj 255.

(8) In a suit for recovery of rent and eviction if the tenant alleges in his written

Order 6, Rule 2 — Note 8 (contd.)
statement that he has paid rent to the landlord that is his case and he need not give details of the time and manner of payment. He is entitled to prove facts relating to these details. (1965) All LJ 298.

(9) Claim based on adverse possession must be clearly made and proved. AIR 1964 SC 1254 (1256): (1964) 6 SCR 837 °° AIR 1969 Raj 31 (35): 1968 Raj LW 580. (Where well-known custom exists, it is not necessary to set up existence of customary right in any great detail or with particular emphasis.) °° AIR 1959 Punj 147 (149): 61 Pun LR 374 (FB) °° (1956) 60 Cal WN 257. (Suit for recovery of rent — Defendant denying claim and payment of rent — Defendant asserting Possession in niskar rights — Plea amounts to adverse possession though that term has not been specifically used.)

(10) Intention is a question of fact which must be specifically raised in the pleading. AIR 1965 Pat 39 (44).

(11) Pleadings and proof under S. 70 of Contract Act — Compensation or reasonable value of goods is a question of fact — There must be pleadings for compensation and proof as to what the reasonable value of goods would be. AIR 1959 Cal 247 (252): 1958 Cal LJ 341.

9. Variance between pleading and proof.— (1) A party can only succeed according to what was alleged and proved. AIR 1958 Madh Pra 304 (306) (DB) °° AIR 1958 Mys 10 (12): ILR (1957) Mys 72 (DB) °° AIR 1958 Pat 571 (573, 574) °° AIR 1958 Punj 5 (9): ILR (1957) Punj 1306 °° AIR 1957 Pat 586 (595): 36 Pat 633 (DB) °° AIR 1969 Orissa 184 (186) °° AIR 1968 Andh Pra 291 (294) °° AIR 1965 Ker 241 (246): 1965 Ker LT 198 °° 1961 Raj LW 274 °° AIR 1960 Manipur 16 (17).

[See also AIR 1968 SC 1083 (1086): (1968) 3 SCR 111. (The ordinary rule of law is that evidence is to be given only on a plea properly raised and not in contradiction of the plea.)]

(2) Where a claim had never been made in the pleadings presented, no amount of evidence could be looked into upon a plea which was never put forward. AIR 1960 Cal 214 (218) °° AIR 1968 Guj 229 (233): 9 Guj LR 1066 °° AIR 1965 Pat 224 (227) °° AIR 1965 Punj 457 (458) (DB) °° (1965) 67 Punj LR 362 (365, 366). (The document should not have been admitted.) °° AIR 1964 Manipur 14 (15) °° AIR 1964 Pat 348 (350): 1964 BLJR 19 (DB) °° AIR 1964 Pat 301 (303) (DB) °° AIR 1964 Pat 127 (130, 131) (DB) °° (1963) 4 Guj LR 439 °° AIR 1962 All 111 (112) °° AIR 1962 Pat 384 (388): 1962 BLJR 77 (DB). (In absence of particulars of fraud defendant cannot be allowed to lead evidence in excess of plea — Defendant allowed to lead such evidence — Prejudice to plaintiff.) °° AIR 1962 Punj 299 (302): ILR (1962) 2 Punj 255 °° AIR 1961 Cal 166 (169) °° AIR 1961 J and K 34 (36) °° AIR 1961 Madh Pra 179 (180): 1960 MPLJ 1146 °° AIR 1960 Punj 62 (64) (DB) °° AIR 1959 Punj 297 (303): 61 Pun LR 683 (DB).

[See also AIR 1967 Ker 63 (67): 1966 Ker LJ 327.]

(2) A party will not be allowed to succeed on a case not so set up by him and cannot be allowed at the trial to change his case or set up a case inconsistent with what he has alleged in his pleading, except by way of amendment of the pleading under O. 6, R. 17. AIR 1954 SC 758 (760) °° AIR 1951 SC 177 (179, 180): 1951 SCR 277 °° AIR 1957 All 219 (232) °° AIR 1967 Cal 557 (558) (DB) °° 1957 Jab LJ 753 (756) °° AIR 1957 Pat 482 (485): 36 Pat 715 (DB) °° AIR 1956 Cal 138 (144) °° AIR 1953 SC 235 (240): 1953 SCR 789 °° AIR 1956 Bhopal 16 (16) °° AIR 1956 Nag 261 (263, 264): ILR (1956) Nag 591 (DB) °° AIR 1943 PC 34 (37): 70 Ind App 35 °° AIR 1942 PC 64 (67): 69 Ind App 137 °° AIR 1964 SC 24 (28): (1964) 2 SCR 885 °° AIR 1959 SC 504 (510): 1959 SCJ 560 °° AIR 1959 SC 31 (46): 1958 Ker LT 721 °° AIR 1966 Ker 96 (97): 1965 Ker LT 1208 (FB) °° AIR 1968 Andh Pra 291 (294) °° AIR 1968 Assam 48 (50) (DB) °° AIR 1968 Madh Pra 10 (12): 1967 MPLJ 442 (DB) °° (1968) 10 Orissa JD 65: 34 Cut LT 524 °° AIR 1967 Bom 147 (153): 68 Bom LR 749 (DB) °° AIR 1967 Madh Pra 280 (283): 1967 MPLJ 499 (DB) °° AIR 1966 Andh Pra 225 (226) °° ILR (1965) 2 All 343 °° AIR 1963 Cal 647 (659) °° 1962 Ker LT 354:1962 Ker LJ 273 °° (1962) 4 OJD 334 (Orissa) °° 1961 Jab LJ 1205 °° 1961 Jab LJ 1199 (1200) °° AIR 1961 Mad 298 (299): (1961) 1 Mad LJ 140 °° AIR 1960 Punj 614 (617): ILR (1959) Punj 1157 (DB) °° AIR 1959 Cal 585 (592, 593, 595): ILR (1960) 1 Cal 776 (DB) °° AIR 1959 Cal 195 (199): 61 Cal WN 970 (DB) °° AIR 1959 J and K 28 (29) (DB).

[See AIR 1965 Punj 107 (110) °° AIR 1963 Madh Pra 197 (199): 1964 MPLJ 848 (DB).]

[See also AIR 1967 Guj 198 (208) (DB) °° AIR 1963 Orissa 42 (44): ILR (1962) Cut 554 (DB) °° AIR 1959 All 393 (397) (DB). (No specifications in the plaint that the rules were not laid before the two houses of parliament — The plaintiff cannot be allowed to raise this question of fact for the first time at the stage of argument.)]

[See however AIR 1964 Raj 184 (193): ILR (1964) 14 Raj 107 (DB). (Evidence was not ruled out of consideration because the Cour took a lenient view.) °° AIR 1930 All 877 (879): 53 All 16 (DB) °° AIR 1927 Cal 49 (50) (DB).]

(3) To prove the details and manner of payment after pleading that payment had been made is not creating a new case. (1965) All LJ 298.

[See also AIR 1960 Manipur 16 (17).]

Order 6, Rule 2 — Note 9 (Contd.)

(4) If evidence is not in consonance with pleadings, it may be thrown out. If the conflict is not of serious nature and oath can be reconciled it may be accepted. But in no circumstances amendment of pleadings should be allowed merely because the evidence and pleadings do not tally. AIR 1967 Orissa 58 (59): 33 Cut LT 65 °° AIR 1968 Punj 416 (430): 1968 Cri LJ 1199: ILR (1968) 1 Punj 496 (FB) °° 1968 Raj LW 167: ILR (1967) 17 Raj 879 °° 1962 Raj LW 554: ILR (1962) 12 Raj 957 °° 1961 Raj LW 274.

(5) Where a certain plea was raised for the first time by the defendant in defence, any material relevant to meet the defence could be validly relied upon by the plaintiff in the course of evidence and that without any material relevant to meet that defence AIR 1959 Pat 540 (545): 1959 BLJR 425 (DB).

(6) The rule that a party will not be allowed any relief on a case not set up by him and cannot be allowed to set up a case at a trial stage inconsistent with the one alleged by him in his pleading is not applicable in an application for probate. 1968 Ker LJ 123 (DB).

(7) Defendant in written statement setting up title to disputed land as nearest reversioner — Relief not to be given on the basis that he is a shikmi tenant under the nearest reversioner. **AIR 1954 SC 758 (760).**

(8) The rule of secondum allegata et probata (according to the matter alleged and proved) is based mainly on the principle that no party should be taken by surprise by the change of case introduced by the opposite party. AIR 1958 Punj 190 (200, 201): ILR (1958) Punj 481 (DB) °° AIR 1957 Andh Pra 784 (790, 791, 792) (DB) °° AIR 1940 Pat 187 (190) (DB) °° ('09) 3 Ind Cas 408 (414, 415) (DB) (Cal) °° AIR 1959 Punj 147 (153): 61 Punj LR 374 (FB) °° AIR 1960 Punj 500 (507): 62 Pun LR 624 (DB).

(9) The test, when an objection of change of case is taken, is to see whether the party aggrieved has really been taken by surprise, or is prejudiced by the action of the opposite party. AIR 1957 Cal 360 (362, 363) (DB) °° AIR 1948 Nag 236 (239): ILR (1948) Nag 662 (DB) °° AIR 1947 Pat 356 (361) (DB).

(10) The whole of the circumstances must be taken into account, and carefully scrutinised to find out whether there has been such surprise or prejudice as will disentitle a party to relief. **AIR 1915 PC 89 (91, 92)** °° AIR 1952 Vindh Pra 51 (55) °° AIR 1927 Sind 248 (250) (DB).

(11) Every variance, between pleading and proof is not necessarily fatal to the suit or defence. AIR 1920 Cal 26 (32) (DB) °° AIR 1933 Pesh 37 (37) °° AIR 1923 Cal 142 (145): 50 Cal 292 (DB) °° AIR 1959 Punj 147 (153): 61 Pun LR 374 (FB) °° (1967) 71 Cal WN 51 (77).

(12) Rule of secondum allegata et probata will not be strictly applied where there could be no surprise and the opposite party is not prejudiced thereby. AIR 1951 Orissa 11 (14): ILR (1950) Cut 322 (DB) °° ('03) 25 All 498 (506) (FB). (**OVERRULING** 15 All 186.) °° ('03) 25 All 256 (260) (FB) °° **AIR 1930 PC 205 (208)** °° AIR 1968 Punj 416 (430): 1968 Cri LJ 1199: ILR (1968) 1 Punj 496 (FB) °° AIR 1959 Punj 147 (153): 61 Pun LR 374 (FB) °° AIR 1966 All 39 (41): 1965 All LJ 339 °° AIR 1963 Orissa 155 (158) °° AIR 1960 Madh Pra 78 (79, 80): 1959 Jab LJ 559 °° AIR 1960 Punj 500 (507): 62 Pun LR 624 (DB).

[See also AIR 1963 Cal 405 (408-409) (DB) °° (1962) 64 Punj LR 372. (Burden of proving statutory breach is on plaintiff — Hence Court can justifiably draw an inference from evidence on record that such occupation is a mere licence even if defendant has not taken such plea in his written statement.)]

(13) Where a ground though not raised in the pleadings is expressly put in issue, or where the new claim set up is not inconsistent with the allegations made in the pleadings and is based on facts alleged therein, there is no question of surprise to the opposite party. AIR 1953 Tripura 10 (10, 11) °° AIR 1952 Raj 72 (73) °° **AIR 1930 PC 205 (208)** °° AIR 1955 Madh B 49 (52): ILR (1954) Madh B 237 (DB) °° AIR 1954 Pat 128 (129) (DB) °° AIR 1932 Nag 23 (26): 27 Nag LR 327 °° AIR 1963 Cal 198 (203, 204) (DB).

[See also AIR 1964 Andh Pra 412 (414): (1963) 2 Andh WR 1 °° AIR 1965 All 552 (554) (DB).]

(14) Where, although there was no specific plea or specific issue on a particular question, the parties have gone to trial with the full knowledge that the question was in issue and adduced evidence, there can be no prejudice. **AIR 1956 SC 593 (598): 1956 SCR 451** °° AIR 1958 Madh Pra 209 (211) (DB) °° AIR 1957 Pat 656 (658, 659) (DB) °° **AIR 1964 SC 164 (169): (1964) 3 SCR 634** °° AIR 1969 Andh Pra 294 (297) °° 1968 Ker LT 626: ILR (1968) 2 Ker 471 °° AIR 1967 Cal 390 (398) °° 1967 Raj LW 273 °° AIR 1966 Punj 282 (288) (DB) °° AIR 1965 Madh Pra 275 (282): 1967 MPLJ 711 (DB) °° 1964 Raj LW 213: ILR (1964) 14 Raj 819 °° AIR 1963 MP 202 (205): 1962 MPC 44 (DB) °° 1962 MPLJ (Notes) 160: 1963 Jab LJ 772: (1964-65) 26 FJR 162 °° (1963) 1 Lab LJ 44 (Mad) °° 1963 Raj LW 90: ILR (1963) 13 Raj 458 °° AIR 1962 Pat 168 (173) (DB) °° AIR 1960 Orissa 119 (121): 26 Cut LT 74 (DB) °° AIR 1959 Mys 173 (175): 35 Mys LJ 266.

[See also (1966) ILR 46 Pat 977 (986) (DB).]

(15) Where the defendant makes an admission, a finding in favour of the plaintiff based on such admission is not incompetent even though it is at variance with the case set up by the plaintiff in his pleadings. **AIR**

Order 6, Rule 2 — Note 9 (contd.)
1951 SC 177 (180): 1951 SCR 277 °° AIR 1953 Him Pra 91 (93) °° ('53) 32 Pat 1017 (1027) °° (1967) 71 Cal WN 51 °° AIR 1965 All 223 (224, 225) °° AIR 1963 Madh Pra 51 (53, 56): 1962 MPLJ 1102 (DB) °° AIR 1963 Orissa 104 (106): (1962) 4 OJD 271 °° AIR 1962 Pat 296 (298, 299): 1962 BLJR 261 °° 1962 Raj LW 345: ILR (1962) 12 Raj 733. (In such a case, there can be no question of the defendant being taken by surprise or being put to any prejudice.) °° AIR 1961 Raj 21 (24): 1960 Raj LW 321 (DB).

(16) The rule that even though a plaintiff fails on the case that he made out in his plaint he can still succeed on the case admitted by the defendant is confined to cases where the liability is clearly admitted without reservations. The principles cannot be applied to a case where the liability is not admitted at all. AIR 1968 Cal 532 (537, 538) (DB).

(17) A party cannot be allowed to abandon his own case, adopt that of the defendant and claim relief on that footing where the latter is prejudiced by such a course. AIR 1940 Pat 187 (190) (DB) °° ('80) 5 Cal 602 (605) °° AIR 1915 Cal 339 (341): 43 Cal 103 (DB) °° AIR 1968 Andh Pra 291 (294).

[See however AIR 1943 Cal 22 (24) (DB).]

(18) Where a party avers that A and his family who were udasis migrating from the Punjab had adopted the lex loci of Berar and the evidence given was to the effect that not only A and his family but the entire udasi community had adopted the lex loci of Berar.

Held, that it was not a case of variance between the pleading and the proof, but it was really a case where the proof was more pervasive than the case that was pleaded. AIR 1959 Bom 282 (283): 60 Bom LR 1154.

(19) In a partition suit in which partition by metes and bounds is alleged but if a plea of severance of joint status is not pleaded in the written statement a finding thereon can be given if the materials on record justify it. AIR 1967 Orissa 139 (140): 33 Cut LT 1163.

(20) Sale of Patni by A to B — B resettling some lands with A — A paying rent to B and treated by him as tenant — Subsequent purchase by C at revenue sale of the touzi — C attempting to put an end to all under-tenures and take over lands on the claim of being the purchaser of a whole estate — A seeking declaration of his right against C not raising a specific plea as to resettlement — Facts from which resettlement could be inferred alleged in the plaint — **Held** that C was not prejudiced by such inference made by Court by reason of the absence of specific plea. **AIR 1953 SC 42 (47): 1953 SCR 277.**

(21) The rule of secundum allegata et probata is applicable only to questions of fact and not to pure questions of law arising out of the facts alleged and proved. AIR 1954 Orissa 7 (10): ILR (1952) Cut 309 °° ('10) 8 Ind Cas 41 (43, 44) (DB) (Cal).

(22) A question of law based on facts can be taken at any time except where the plea necessitates the taking of further evidence or depends upon new facts not alleged and proved. AIR 1955 Bom 55 (57): °° **AIR 1921 PC 228 (229)** °° ('04) 27 All 266 (270) °° ('13) 7 Sind LR 11 (17) (DB) °° ('09) 4 Ind Cas 569 (570, 571) (Bom) °° AIR 1916 Cal 924 (925) (DB) °° ('04) 31 Cal 195 (201) (SB).

[See also AIR 1967 Ker 63 (66): 1966 Ker LT 1114.)]

(23) A mixed question of law and fact cannot be raised at the stage of arguments in the absence of pleadings and proof. AIR 1960 Mys 222 (224): 38 Mys LJ 323 (DB) °° 1962 Raj LW 588.

(24) While considering the validity of the law the Court will not restrict the pleadings of the State and would be free to satisfy itself whether under any provision of the Constitution the law can be sustained. **AIR 1961 SC 954 (963): (1962) 1 SCR 44.**

(25) In cases under the Arbitration Act no party can be allowed to raise a point, if he has not given sufficient notice of it in his affidavits. AIR 1954 Cal 606 (609) (DB).

(26) Plaintiff expressly pleading that certain temple was dedicated for worship of general public — Defendant merely pleading temple and idol to be private — No averment by defendant that temple was for benefit of members of family — Defendant's witnesses also merely deposing that temple was for founder's own use and for his puja only — Finding of the lower Court that temple was dedicated to the members of the family goes beyond the pleadings and the evidence. **AIR 1957 SC 133 (142): 1956 SCR 756.**

(27) Subsequent events — T. P. Act (1882), S. 51 — Kerala Compensation for Tenants Improvements Act (29 of 1958), S. 1 — Provisions of the Kerala Act (29 of 1958) do not supersede S. 51 — Preliminary decree in suit for redemption of mortgage passed — Plaintiff is not precluded from taking point under S. 51 till final decree is passed — S. 51 applies to mortgagee believing in good faith to be absolutely entitled to the property. 1963 Ker LT 219.

10. Construction of pleadings. — (1) Pleadings in this Country have to be construed liberally. AIR 1964 Pat 250 (253): 1963 BLJR 426 (DB) °° 1968 Lab IC 1487 (Pat) °° AIR 1966 Punj 282 (287) (DB) °° AIR 1964 Raj 250 (253): 1964 Raj LW 302. (Structure of pleadings not to be stressed too strictly, where fair notice of case is given.) °° (1964) 66 Pun LR 1126. (Not to be construed literally.)

(2) Law of pleadings should not be so rigidly construed as to be inappropriate and

R. 3. Forms of pleading.—The forms in Appendix A when applicable, and where they are not applicable forms, of the like character, as nearly as may be, shall be used for all pleadings.

[R. S. C., O. 19, R. 5.]

R. 4. Particulars to be given where necessary.—In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

[R. S. C., O. 19, R. 6.]

HIGH COURT AMENDMENT

Mysore

Renumber R. 4 as R. 4 (1) and add the following as R. 4 (2):—

"(2) In a suit for infringement of a patent, the plaintiff shall state in his plaint or annex thereto the particulars of the breaches relied upon, and the defendant if he disputes the validity of the patent shall state in his written statement or annex thereto the particulars of the objections on which he relies in support of such invalidity; at the hearing of any such suit no evidence shall, except with the leave of the Court (to be given upon such terms as to the Court may seem just), be admitted in proof of any alleged infringement or objections not raised in the particulars of breaches or objections respectively" [30-3-1967].

Order 6, Rule 2 — Note 10 (contd.)

not calculated to serve the cause of justice. AIR 1969 Delhi 120 (126) (DB).

(3) Liberal construction of pleadings has to be confined within reasonable limits. 1968 Lab IC 829 (Delhi).

(4) The rule that in this country pleadings are extremely lax does not apply to a plaint drawn up in English by a distinguished lawyer. AIR 1963 Pat 221 (222) (DB) °° AIR 1959 Cal 380 (382).

(5) Pleadings have to be read as a whole — It is not right to pick out one or two words out of their context and draw inferences therefrom. AIR 1967 Bom 382 (395): 69 Bom LR 559 °° AIR 1960 Pat LR 226: ILR (1960) 39 Pat 89.

(6) A plaint must be read as it stands, and no oral evidence is admissible for the purpose of showing the intention which prompted or underlay that document. AIR 1963 Bom 179 (182): 64 Bom LR 541 (DB).

(7) Deed — Construction — Pleadings of parties cannot affect nature of document executed before date of pleadings. (1966) 68 Pun LR 858 (860).

ORDER 6, RULE 4 — SYNOPSIS

1. Scope and object.
2. Fraud.
3. Misrepresentation.
4. Undue influence and coercion.
5. "Other cases in which particulars may be necessary."
6. Contract.
7. Negligence — Nuisance.
8. Recovery of land.
9. Particulars of defence.

1. Scope and object. — (1) When a party fails to ask for particulars at the proper time, he cannot afterwards be heard to say that he was taken by surprise. AIR 1942 All 170 (171): ILR (1942) All 289 (DB) °° AIR 1930 Cal 621 (622) (DB).

(2) Where a plaint contains averments indicating with reasonable definiteness what the nature of the claim is, the claim will not be defeated by a small error in one particular. AIR 1928 Mad 940 (941) (DB).

(3) Where fraud, misrepresentation, undue influence, etc., are alleged as a matter of an objective fact, this rule applies. But where a mental condition is alleged, such as a fraudulent intention, etc., Rule 10 will apply. AIR 1951 Bom 72 (77) (DB).

(4) When an improper conduct is alleged, it must be set out with all particulars. A plaintiff cannot complain if general allegations made by him in the plaint are answered by equally general allegations in the written statement. AIR 1962 SC 630 (633): (1961) 2 Lab LJ 427. (AIR 1959 Bom 134, REVERSED.) °° AIR 1965 Andh Pra 425 (431): (1965) 2 Andh WR 383.

(5) Mere putting in of document and its acceptance by trial Court will not make provision of Rr. 2 and 4 redundant. (1965) 67 Punj LR 362 (366).

(6) Where defence based on S. 53 T. P. Act (1882) was taken but plea was not artistically drafted keeping in view the difference between a sham and a nominal sale and a sale which is real but voidable, but where the plea could yet be made out, the Court could give relief based on the plea if the same was approved. AIR 1963 SC 1150 (1153): (1963) Supp 2 SCR 55.

Rule 4-A

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Kerala: Laccadive, Minicoy and Amindivi Islands[a]

Same as that of Madras.

[a] See Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 and Sch.

Madras and Pondicherry

Insert the following after Rule 4:

"4A. (1) In a suit for infringement of a patent, the plaintiff shall state in his plaint or annex thereto the particulars of breaches relied upon.

(2) In any such suit the defendant if he disputes the validity of the patent shall state in his written statement or annex thereto the particulars of the objections on which he relies in support of such invalidity.

(3) At the hearing of any such suit no evidence shall except by leave of the Court (to be given upon such terms as to the Court may seem just), be admitted in proof of any alleged infringement or objections not raised in the particulars of breaches or objections respectively". [R. O. C. 2770/44].

Order 6, Rule 4 (contd.)

2. Fraud. — (1) In suits on the basis of fraud, the allegation of fraud must be clear, definite and specific. AIR 1955 Pat 66 (68) °° AIR 1969 Orissa 63 (65): 34 Cut LT 1258 °° 1966 All WR (HC) 773 (774) °° 1965 All WR (HC) 563 (564): 1965 All LJ 1055 °° AIR 1965 Pat 279 (282) (DB).

(2) General allegations of fraud, however strong the words in which they are stated may be, if unaccompanied by particulars, are insufficient to amount to an averment of fraud of which any Court ought to take notice. **AIR 1951 SC 280 (283): 1951 SCR 548:** 30 Pat 947 °° ILR (1957) 7 Raj 101 (106) °° AIR 1915 PC 7 (13): 39 Bom 441: 42 Ind App 135 °° AIR 1937 PC 146 (148): ILR (1937) All 566: 64 Ind App 143: 31 Sind LR 306 °° (1966) 70 Cal WN 1100 (1107) (DB) °° AIR 1963 Bom 244 (245): 65 Bom LR 408 (DB) °° AIR 1962 All 590 (602): 1962 All LJ 501 (DB). **(REVERSED** on another point in **AIR 1966 SC 1164).** °° (1962) 66 Cal WN 254 (259).

[But see AIR 1917 Nag 139 (140).]

(3) A plaint seeking relief on the ground of fraud but omitting to give particulars does not disclose a cause of action and should be rejected or returned for amendment but the suit should not be dismissed. AIR 1952 Orissa 312 (316) (DB) °° (1895) 19 Bom 593 (601, 602) (DB) °° (1888) 15 Cal 533 (537): 15 Ind App 119 (PC) °° (1885) 9 Bom 358 (361, 364) (DB) °° AIR 1921 Pat 193 (200): 6 Pat L Jour 373 (FB).

(4) Fraud may be inferred from the surrounding circumstances. ILR (1950) Nag 834 (847) (DB) °° AIR 1946 Nag 419 (423) (DB).

(5) Where both parties do not show that that there was any conspiracy to defraud, a third person or to commit any other illegal act, the maxim, in pari delicto potior est conditio defendantis can hardly be made applicable. **AIR 1960 SC 213 (216, 217): (1960) 1 SCR 861.**

(6) A plaintiff seeking to avoid the statute of limitation on the ground of fraud must specifically state the particulars as to how he was kept out of knowledge of his rights by the fraudulent acts of the defendants, and the time when he discovered it. AIR 1950 Mad 801 (803) (DB) °° AIR 1927 All 437 (439).

(7) Allegations of fraud must be substantially proved by the party making the same though it does not mean that every puzzling artifice or contrivance resorted to by the opposite party, should be unravelled. ILR (1950) Nag 834 (847) (DB) °° AIR 1935 Bom 144 (146) °° AIR 1923 PC 73 (76).

(8) A charge of fraud amounting to a criminal offence must be established beyond reasonable doubt. **AIR 1941 PC 93 (95).**

(9) When one kind of fraud is alleged, another kind of fraud cannot, on failure of proof of the fraud alleged, be substituted for it. AIR 1951 Nag 194 (196): ILR (1951) Nag 241 °° (1887) 11 Bom 620 (643): 14 Ind App 111 (PC) °° AIR 1929 Bom 1 (5): 53 Bom 75 (DB).

(10) A party cannot be allowed to prove fraud unless he has pleaded fraud in his pleading. AIR 1955 All 24 (25) (DB) °° AIR 1963 Cal 647 (659).

(11) Petition under S. 397, Companies Act, on ground of fraud — Particulars of fraud must be given — Minority group not excused from this duty. (1965) 69 Cal WN 137 (154): (1955) 35 Com Cas 187.

(12) Where in a suit by a reversioner for recovery of property alienated by the limited owner, the evidence sufficiently disclosed fraud and collusion on the part of the limited owner and alienee and also indicated that transactions were made to defraud the reversioner. It could not be said that sufficient particulars of fraud and collusion were not found either in plaint or in the evidence.

The evidence in the case of fraud for proving the same need not be so specific or definite as in other cases. Case law discussed. AIR 1967 Cal 512 (516): 69 Cal WN 339 (DB).

(13) Granting of a lease of debutter property without any legal necessity is a fraudulent act. So also the lease is in fraud of the deity, when the lease is for no con-

Order 6, Rule 4 — Note 2 (contd.)
sideration. The law of pleading does not require any further averment. The object of pleading is to give the defendants full notice of the case to be made, so that they are not taken by surprise. AIR 1960 Cal 741 (747).

(14) Fraud need not be pleaded in the plaint but in connection with the dispute between the parties, an allegation of fraud should be made against the plaintiff. In order to find out whether such an allegation has been made, it is permissible to look, not only into the plaint but into the evidence and the correspondence. AIR 1963 Cal 405 (407) (DB). (1942 AC 356, Rel. on.)

3. Misrepresentation. — (1) When misrepresentations are alleged, the party pleading them should state as to each misrepresentation, its date, and whether it was made in writing or verbally, and as to each verbal misrepresentation, the occasion thereof. **AIR 1924 PC 186 (187)** °° AIR 1963 Madh Pra 37 (39): 1962 MPLJ 781 (DB).

(2) Release deed passed pending litigation — Application for amendment of plaint consequent to the deed made immediately — Appellant never asked for accounts nor cared to ascertain how respondent were managing said property — No plea based on misrepresentation taken in another suit — Present plea of misrepresentation is an afterthought. **AIR 1967 SC 1395 (1396): (1967) 1 SCR 275.**

(3) Plaint not containing expression "undue influence" or "misrepresentation" but simply "fraud" — Facts alleged in plaint constituting 'misrepresentation' and 'undue influence' and not controverted in defence — Court can give effect to pleas of 'misrepresentation' and 'undue influence'. **AIR 1966** All 438 (439).

4. Undue influence and coercion. — (1) Though undue influence and coercion may overlap in part in some cases they are separate and separable categories in law and must be separately pleaded. **AIR 1951 SC 280 (283): 1951 SCR 548.**

(2) Order 6, Rule 4, Civil P. C., provides, inter alia, that in all cases in which the party pleading relies on undue influence, particulars shall be stated in the pleading. The reason of the rule is: A plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence, and by exercising such influence an unfair advantage was obtained over him by the other. The party pleading must be required to plead the precise nature of the influence exercised, the manner of use of the influence and the unfair advantage obtained by the other. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise. If the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particulars which give adequate notice to the other side of the case intended to be set up. **AIR 1963 SC 1279 (1288): (1964) 1 SCR 270** °° **AIR 1951 SC 280 (283): 1951 SCR 548** °° AIR 1956 Bom 569 (571) °° **AIR 1969 SC 583 (585): (1969) 1 SCJ 694** °° **AIR 1967 SC 878 (881): (1967) 1 SCR 331** °° AIR 1967 All 565 (566) °° AIR 1965 Ker 189 (194, 195): 1964 Ker LT 497 (DB).

(3) General allegations are insufficient even to amount to an averment of undue influence and coercion of which any Court ought to take notice. **AIR 1951 SC 280 (283): 1951 SCR 548:** 30 Pat 947 °° (1906) 33 Cal 773 (783, 784): 33 Ind App 186 (PC) °° AIR 1958 Punj 190 (200): ILR (1958) Punj 481 (DB).

(4) If there are facts on the record to justify the inference of undue influence the omission to make an allegation of undue influence specifically is not fatal to the plaintiff being entitled to relief on that ground and all that the Court has to see is that there is no surprise to the defendant. AIR 1950 Hyd 55 (56): ILR (1951) Hyd 191 (DB) °° AIR 1935 Mad 726 (729): 58 Mad 454 °° AIR 1931 Nag 63 (64): 27 Nag LR 19.

(5) In the case of coercion when a Court is asked to find that a person was threatened with death it is necessary to give particulars as to the nature of the threat, the circumstances, the date, time and place in which it was administered and the name of the person threatening. **AIR 1951 SC 280 (283): 1951 SCR 548:** 30 Pat 947.

(6) Plaint not containing expression "undue influence" or "misrepresentation" but simply "fraud" — Facts alleged constituting "undue influence" and "misrepresentation" and not controverted in defence — Court can give effect to pleas of "misrepresentation" and "undue influence". AIR 1966 All 438 (439).

(7) All that the written statement alleged was that when there was a state of emergency in the country on account of the Qabaili raids, the defendant was forced to affix his thumb impression on some paper where it was written that the land in question belonged to a mosque and that what was written on the paper was contrary to facts.

Held, it was an unsatisfactory form of pleading coercion. AIR 1960 J and K 132 (135).

(8) The party pleading undue influence will have to establish that the opposite party had an influence over him either because of the close relationship existing or due to other circumstances and by exercising that influence he took unfair advantage at his costs. Once these factors are established then it is for the other side to establish the

Order 6, Rule 4 — Note 4 (contd.)
validity of the transaction. AIR 1959 Mys 102 (104): 36 Mys LJ 868 (DB).

5. "Other cases in which particulars may be necessary. — (1) Where a custom is set up, the particulars of the custom with the essential requisites to its validity and binding effect must be stated. AIR 1953 Madh B 32 (34) °° AIR 1958 Manipur 7 (12) °° AIR 1953 Orissa 73 (74) °° AIR 1951 Raj 136 (138) (DB) °° AIR 1921 Cal 569 (571) (DB) °° AIR 1964 Manipur 14 (16).

(2) A party setting up a plea of easement should clearly indicate in his pleading all the facts connected with such plea. AIR 1956 Bhopal 41 (42) °° 1954 Raj LW 673 (675) °° AIR 1953 Nag 205 (206): ILR (1952) Nag 668 (DB) °° AIR 1962 Punj 299 (302): ILR (1962) 2 Punj 255.

(3) Where issues of far-reaching importance affecting the Crown and riparian owners in the territory are involved it is essential to their proper determination that the pleadings should state with sufficient particularity the claims made by one side and the other and the Court should be seised of all the relevant facts. AIR 1950 PC 73 (75).

(4) When plaints are filed by money-lenders it is advisable that the Court should call for the particulars necessary to be given according to law namely Rr. 11 and 12 of the Orissa Money Lenders Act. AIR 1958 Orissa 111 (112): ILR (1958) Cut 45.

(5) Evidently, benami cannot be a matter of mere presumption. It should be averred in the pleadings and proved. AIR 1957 Hyd 37 (38, 39): ILR (1956) Hyd 733 (DB).

(6) Rash and negligent driving — Particulars to be given in plaint — Plaintiff must give particulars of rashness, negligence, injuries, etc. AIR 1963 Bom 223 (224): 65 Bom LR 429.

(7) Charge of abuse of power — Satisfactory proof necessary. AIR 1966 Mys 40 (48): (1965) 2 Mys LJ 571 (DB).

(8) Plea of non-compliance with O. 32, R. 7 should be specifically pleaded — It cannot be raised in arguments — It cannot be spelt out from general allegations. AIR 1962 Pat 182 (185) (DB).

(9) To sustain the plea of estoppel, which is a mixed question of fact and law, there should be distinct pleadings, stating the facts on which estoppel can be founded, the specific issue on the point and a proper trial of the same. In the absence of such pleadings and issue, the contention on the point of estoppel cannot be gone into. (1961) 63 Pun LR 915 (918).

(10) There is no statutory right of privacy and therefore where the plaint does not plead there was any customary easement right of privacy prevailing in the locality where the plaintiff's house is situated, it cannot be said that the plaint disclosed any cause of action by the defendant opening certain windows in his house adjoining the plaintiff's house. 1959 Raj LW 273 (275).

(11) Though word defamation is not mentioned in O. 6, R. 4 yet it comes within the expression "in all other cases". In an action for defamation the plaintiff must give particulars as to when and where the libel or slander was published and the person by whom it was published. (1968) 2 Andh LT 101 (105).

(12) There is distinction between "omission to state material facts" and omission to give full particulars. If material facts are omitted party should not be allowed to raise contention on a particular point but if material facts are pleaded but particulars are not given, the Court may permit the point to be raised. The first relates to question of jurisdiction while the latter to a matter of procedure. AIR 1968 Orissa 99 (106): 34 Cut LT 328.

6. Contract. — (1) A claim under S. 65, Contract Act, must be specifically pleaded. If the essential facts constituting the cause of action have not been pleaded the Court will decline to entertain the claim. AIR 1955 Cal 626 (628) °° (1954) 93 Cal L Jour 373 (375) °° AIR 1961 Punj 5 (7): 63 Pun LR 186.

(2) In a suit for specific performance of contract there should be a specific allegation that the plaintiff has been and is still willing to perform his part of the contract. AIR 1956 Mad 693 (695) °° AIR 1954 Mad 116 (117).

(3) Where the plaintiff has failed to make the necessary averments or allegations he cannot be allowed to make up such defects by evidence. AIR 1954 Mad 116 (117).

(4) Where the suit for specific performance of the contract for sale is against a subsequent purchaser the conditions mentioned in S. 27 (b) of the Specific Relief Act must be averred. AIR 1954 Mad 116 (117).

(5) Suit for declaration that shares of company are not liable to be sold in enforcement of lien for debt owed by holder of shares to company — Averments in plaint — Articles constituting contract must be pleaded. AIR 1959 Cal 715 (722): (1960) 30 Com Cas 582.

(6) Where the parties have completely presented the case, before the Court and the illegality of the contract on the ground of public policy has been brought to the notice of the Court having regard to the words of S. 23 of the Contract Act namely, 'the object' of any agreement is lawful unless. .... The Court regards it ..... opposed to public policy', it is the duty of the Court to give effect to the fact thus brought to its notice although the illegality is not raised in the pleadings. AIR 1959 Madh Pra 151 (168): 1960 MPLJ 334 (FB).

(7) Defendant relying on part performance — Defendant's readiness to perform remaining part of contract must be specifically pleaded and proved. AIR 1965 Madh Pra 275 (283): 1967 MPLJ 711 (DB).

Order 6, Rule 4 — Note 6 (contd.)

(8) Suit for damages based on wrongful repudiation of contract — Acceptance of repudication need not be specifically pleaded. (1960) 64 Cal WN 992 (996).

7. Negligence — Nuisance. — (1) In an action for negligence, the plaintiff must give full particulars of the negligence complained of, and of the damage he has sustained. AIR 1922 Pat 17 (18) °° AIR 1960 Cal 214 (218).

(2) It is not open to the plaintiff to allege and seek to prove one kind of negligence and then ask the Court of Appeal to find negligence of another kind. AIR 1932 PC 95 (97).

(3) Where in an action for public nuisance special damages are necessary to be proved, the plaint should state the full particulars of such damages. AIR 1926 Cal 549 (550) (DB).

(4) Negligence not correlated to state of mind — Particulars of negligence are necessary in plaint. AIR 1966 All 333 (337): ILR (1965) 2 All 127.

8. Recovery of land. — (1) In an action for recovery of land, the plaintiff must give the nature and particulars of his title, and must show that he has got a right to immediate possession. AIR 1929 PC 303 (304) °° (1908) 31 Mad 531 (531, 532) (DB) °° (1898) 21 Mad 288 (289, 290) (DB).

(2) In a suit for possession the defendant who seeks the aid of S. 53A, Transfer of Property Act, need not aver in his written statement that he is ready and willing to perform his part of the contract. AIR 1956 Mad 693 (695).

(3) Where a suit is based on title extended over more than twelve years, plea of adverse possession need not be specifically pleaded as it is included in the plea of title. AIR 1957 Pat 157 (159) (DB) °° ILR 46 Pat 1103 (1115) (DB).

(4) Law does not require an explicit or express specific statement in every case as to the date of commencement of the tenancy in order to entitle the plaintiff to succeed in his suit for ejectment on notice to quit. If the plaintiff's case is sufficiently clear on this point although there is no express specific statement as to the date of commencement of the tenancy and, if that case is proved and the notice to quit be valid and sufficient with reference to the commencement of the tenancy as disclosed in such case, the plaintiffs are entitled to succeed. AIR 1957 Cal 479 (481) (DB).

(5) The period or periods for which the tenant defendant has made default is a matter which is within the special knowledge of the plaintiff and if he fails to plead that in his plaint he cannot get a decree for ejectment by making vague allegations in the plaint and then fishing out for evidence when the suit is brought to trial. AIR 1957 Cal 198 (199).

(6) Prejudice to the rights of the mortgagee — Question of prejudice is one of factual inadequacy of mortgaged property — Plea should be specifically raised and proved. AIR 1963 SC 1607 (1612): (1964) 2 SCR 324.

9. Particulars of defence. — (1) Any party to a suit, will have to give particulars of the circumstances on which he relies as the basis of his plea. The defendant also is subject to this rule. AIR 1926 PC 109 (109) °° AIR 1956 Bhopal 41 (42).

(2) Where the defendant contends that the suit or application is misconceived he must specify or particularise why he contends that the suit or application is misconceived. AIR 1948 Bom 20 (23).

(3) Where the defendant alleges that he is released from or exonerated and discharged from the performance of his contract, he must in his written statement give sufficient information to his opponent as to how and when he was so released or discharged. AIR 1955 Pepsu 51 (57, 58): ILR (1954) Patiala 563 (DB).

(4) It is incumbent on the defendant who seeks to use an admission of the plaintiff against his own interest to plead the fact of such admission in his written statement. AIR 1953 Nag 154 (164): ILR (1952) Nag 700 (DB).

(5) Plea of negligence in defence should be raised in pleading with full particulars — Plea cannot be raised for first time in appeal. AIR 1964 SC 152 (157, 158): (1964) 2 SCR 859.

(6) Plea of fraud by defendant — Written statement should contain full particulars of fraud — General allegations not enough — In absence of particulars defendant cannot be allowed to lead evidence in excess of plea. AIR 1962 Pat 384 (387): 1962 BLJR 77 (DB).

(7) A contracting purchase of cotton from B — On failure of B suit against him was filed by A — Breach of Cls. 4 and 5 of Cotton Control Order (1950) not pleaded by B in his defence — **Held** per Newaskar, J. — Court should not consider grounds not raised in pleadings — (Per S. B. Sen, J.) — Failure to plead breach of Cls. 4 and 5 is not fatal — Even mention of wrong clause is not fatal — It is difficult to pin point any particular clause of the order for contravention — Overall effect of all clauses needs to be considered — Failure to mention Cls. 4 and 5 does not deprive party of plea. 1968 MPLJ 438 (441, 449) (DB).

R. 5. Further and better statement, or particulars.—A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

[R. S. C., O. 19, R. 7.]

HIGH COURT AMENDMENTS

Bombay: Dadra and Nagar Havelia

In Order VI, for the existing Rule 5 and its marginal note, substitute the following as Rule 5 and marginal note :—

Further and better statement or particulars.

5. (1) A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading may in all cases be ordered upon such terms, as to costs and otherwise, as may be just.

(2) No application for further and better particulars from the plaintiff or the defendant except the one given by the defendant on or before the returnable date of the summons or by the plaintiff on or before the first date fixed for hearing after the filing of the written statement, shall be entertained, unless the plaintiff or the defendant assigns good cause for the same.

ORDER 6, RULE 5 — SYNOPSIS

1. Scope and object.
2. Application for particulars.
3. When particulars need not be given.
4. Failure to give particulars after order.
5. Amendment of further particulars.
6. Revision.

1. Scope and object. — (1) It is the duty of the Court to see that parties plead their cases so plainly, fully and clearly that each side knows the nature of the case which has to be met. AIR 1941 Oudh 457 (464): 16 Luck 832 (DB) •• Madh B LJ 1954 HCR 1698 (1699) •• 7 Sau LR 172 (174) •• (1966) 68 Pun LR 16 (21, 22): 1965 Cur LJ 786.

(2) If the pleadings are not definite the proper course would be, not to take the case off the file, but to order particulars to be given or to direct amendment of the plaint. AIR 1931 Cal 659 (661): 58 Cal 539 (DB) •• AIR 1931 Pat 135 (135) (DB).

(3) The rule permits a better statement of the claim being put in when it is ordered by the Court. AIR 1939 Lah 386 (388).

(3a) O. 6, R. 5 (2) (Bom) is applicable to proceedings on the Original Side of Bombay High Court. AIR 1969 Bom 117 (118, 119): 70 Bom LR 546.

(4) Case under O. 6, R. 5 (2) (Bom) and O. 5, R. 2 (Bom) — Summons, served on defendant, not accompanied by copy of plaint as required under O. 5, R. 2 (Bom) — Summons cannot be held to be properly served on defendant — Chamber Summons taken out by defendant, after returnable date of plaintiff's summons, is not barred under O. 6, R. 5 (2). AIR 1969 Bom 117 (119): 70 Bom LR 546.

(5) As to the power of Election Tribunal to allow particulars in the Election petition under Representation of the People Act (1951). See undermentioned cases. AIR 1955 SC 610 (618): (1955) 2 SCR 428 •• AIR 1959 Mad 288 (292): 1960-1 Mad LJ 420. (Under S. 90 (5) of the Representation of the People Act there is a power to allow particulars for a fair trial. The particulars of the opponent's pleadings can also be asked for. If O. 6, R. 5 is taken to regulate the trial of election petition by virtue of S. 90 (1) there would be no need for any special power to direct particulars and the deletion of the clause in S. 83 (3) when it was regulated by S. 90 (5) would have no significance.) •• AIR 1963 Pat 235 (239, 240, 241): ILR 45 Pat 215 (DB). (Election petition challenged the election petition on the ground that the opposite party was disqualified under S. 7 (d). The nature of subsisting contracts was indicated but instances were not given. Opposite party demanding particulars under O. 6, R. 5. By amendment petitioner seeking to brief details of various contracts in the pleadings. Amendment allowed in the circumstances of the case.)

(6) As to the power of the High Court to ask for further and better statement of claim or particulars in pleading, in petition under Art. 226 of the Constitution, see the undermentioned case. (1967) 69 Punj LR 98: 64 ITR 249 (DB). (Affidavit allowed to be filed after original petition to elaborate law points in petition — So far as affidavit introduces new points not covered by original writ petition it must, to that extent, be ruled out.)

2. Application for particulars. — (1) There will be no necessity for amendment by giving particulars when the Court has already come to a definite finding on a point. AIR 1923 Mad 245 (246) (DB).

(2) If a party having a right to apply for particulars does not do so in the trial Court, he cannot complain of want of particulars in the Appellate Court, for his failure to apply operates as an estoppel. AIR 1920 Pat 678 (680) (DB) •• AIR 1930 Cal 621 (621, 622) (DB).

(3) After filing the written statement, the Court shall fix a date for (i) reception of documents other than those in possession or power of parties, and (ii) applications for interrogatories, discovery of documents and the inspection thereof. Such applications should not be entertained thereafter, unless good cause is shown to the satisfaction of the Court [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Mysore

Renumber Rule 5 as R. 5 (1) and add the following as sub-rule (2) :—

"(2) In a suit for infringement of a trade mark or copyright, the Court may either on its own motion or on the application of any party apply the provisions of sub-rule (2) of Rule 4 of this Order so far as the circumstances of the case may allow" [30-3-1967].

R. 6. Condition precedent.—Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

[R. S. C., O. 19, R. 14.]

Order 6, Rule 5 — Note 2 (contd.)

(3) Though there is no period of limitation for applying for particulars, the party seeking particulars may be expected to do so within a reasonable time after the necessity arises. Undue delay may to an extent go against him. (1966) 68 Pun LR 16: 1965 Cur LJ 786.

3. When particulars need not be given. — (1) Where a matter is casually stated in the plaint and the claim does not turn upon it nor is the defendant called upon to meet the case as regards such matter further and better particulars may well be refused. 1947 Mar LR (Civ) 68 (70).

(2) Eviction proceedings under Rent Control legislation — Uncontroverted pleadings held sufficient for withholding protection against eviction. AIR 1967 Cal 336 (337): 70 Cal WN 682 (DB).

4. Failure to give particulars after order.— (1) When an order for delivery of particulars under this rule is not obeyed, if the plaintiff is in default the suit may be stayed, or, the defence may be struck out under R. 16 if the defendant is in default. AIR 1924 All 17 (19): 45 All 624 (DB).

(2) The Court has even got the power to dismiss a suit in the case of default of a plaintiff to obey the order of the Court. AIR 1958 Orissa 111 (112): ILR (1958) Cut 45 °° AIR 1940 Nag 261 (262): ILR (1942) Nag 20 (DB) °° AIR 1932 Mad 316 (318).

(3) The Court has got the power to stay a suit or to strike out a defence even if such a condition is not added to the original order for delivery of particulars, and this power is a discretionary one. AIR 1930 Mad 473 (475, 476): 53 Mad 645 (DB).

(4) Application from defendant asking for particulars — Court passing order containing default-clause, regarding 4 paras of plaint — Defendants' solicitor asking for particulars only about 2 of 4 paras — Plaintiff complying with solicitor's demand — Failure to furnish particulars about other two paras — Dismissal on ground of non-compliance with order and not justified. AIR 1964 Cal 328 (331, 332).

(5) Plaintiff failing to furnish the further and better particulars of the claim or failing to amend the plaint — Duty of Court is to adjudicate case on merits — Dismissal of suit under S. 151 even when it discloses cause of action not proper. AIR 1963 Raj 106 (109): 1962 Raj LW 696.

5. Amendment of further particulars. — (1) Where the plaint in a suit for accounts asked for full and complete accounts but the plaintiff in the particulars supplied under this rule asked for accounts only upto a particular date it was held that the plaintiff was not entitled to claim accounting for a further period till the dealings between the parties continued unless he asked for amendment of his further particulars. AIR 1952 Ajmer 13 (2) (14).

6. Revision. — (1) A wrong decision upon the question whether in the circumstances certain particulars should be ordered or not cannot be revised under S. 115. AIR 1950 Cal 149 (151) (DB) °° Madh B LJ 1954 HCR 836 (837).

(2) Plaintiff failing to comply with order for supply of better particulars — Dismissal of suit — Order amounts to decree and is appealable — No revision lies. (AIR 1941 Nag 223, Rel. on.) — Omission to prepare formal decree at early stage — Not material. ILR (1960) 10 Raj 823.

Order 6, Rule 6

1. Scope. — (1) It is not necessary for a party to plead expressly the performance of a condition precedent. It will, under this rule, be implied in his pleading. It is for the other party, if he contends that there was a condition precedent and that it has not been duly performed, so say what that condition is and to plead its non-performance. Otherwise, its due performance will be presumed. AIR 1953 Bom 61 (64) °° AIR 1924 Pat 205 (206).

[But see AIR 1933 Cal 632 (635): 60 Cal 733 (DB).]

R. 7. Departure.—No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

[R. S. C., O. 19, R. 16. See Ss. 33 and 100; O. 3, Rr. 8 and 9; O. 41, R. 2.]

Order 6, Rule 6 — Note 1 (contd.)

(2) An averment as to the readiness of the plaintiff to perform his part of the contract in the plaint may be absolutely necessary in a suit for specific performance of the contract. AIR 1956 Mad 693 (695).

(3) If in a suit for specific performance of a contract of sale, the plaint read as a whole indicates that the plaintiff was always ready and willing to perform his part of the contract by keeping the money ready, the plaint will not be thrown out on the ground of absence of specific words "readiness and willingness" on the part of the plaintiff in the plaint. AIR 1954 Nag 334 (335): ILR (1954) Nag 866 (DB).

(4) Where in a suit for possession the defendant raises a plea of part performance under S. 53A, T. P. Act, the absence of an averment in the written statement of the defendant that he is ready and willing to perform his part of the contract is not fatal. AIR 1956 Mad 693 (695).

(5) Notice of suit under S. 13 (6) of W. B. Premises Tenancy Act XII of 1956 is condition precedent within this rule and should be implied in pleading. AIR 1967 Cal 390 (397).

(6) The provisions of O. 6, R. 6, show that it is not always for the defendant to take up special plea of condition precedent not having been fulfilled by the plaintiff to oust the jurisdiction of the Court. There are also cases where it is incumbent upon the plaintiff to take up a special plea to maintain his suit. ILR (1959) Cut 459.

(7) It is not necessary for the plaintiff to plead in his plaint that he has satisfied the requirements of S. 69, Partnership Act. AIR 1961 Orissa 94 (96).

(8) Suit by landlord for eviction of tenant. Landlord not specifically taking in plaint, plea about failure by tenant to tender rent — But allegation in plaint regarding non-payment of rent including such plea by implication — There is sufficient compliance with O. 6, R. 6. 1964 BLJR 59. (**OVERRULED** on another point in AIR 1964 Pat 401 (FB).)

(9) Suit on basis of sale of occupancy holding — Residence of transferee within particular area, a condition precedent to validity of sale — Performance of condition must be implied in the plaint — It is for defendant to deny performance of said condition and plead all facts establishing illegality of sale. AIR 1961 Pat 286 (288, 289): 1961 BLJR 121 (DB).

(10) Written notice under Section 111 (g) of T. P. Act is condition precedent — Defendant-tenant not raising plea of want of notice — Plea cannot be allowed to be raised in appeal for first time. AIR 1965 Pat 156 (159) (DB).

(11) If the plaint itself suffers from an infirmity in the sense that it does not contain a statement about the determination of a lease by giving the requisite notice under Section 106, T. P. Act then the plaintiff will not be entitled to a decree. AIR 1967 Pat 35 (39).

(12) Registration of a firm under Section 69, Partnership Act is not a part of cause of action — It is only procedural bar to the plaintiffs taking recourse to suit as a remedy. AIR 1961 Orissa 94.

Order 6, Rule 7

1. Scope and object.— (1) A statement made by a party to the Court is in the nature of a supplementary pleading for the purposes of this rule. AIR 1919 Mad 471 (471) (DB) °° AIR 1929 Oudh 204 (206, 207) (DB).

(2) The provisions of this rule apply also to minors. AIR 1937 Pat 625 (626) °° AIR 1962 Pat 159 (160). (Defendant attaining majority during pendency of suit — He may be allowed to file fresh written statement or amend one filed by his guardian ad litem.)

(3) The words "except by way of amendment" in this rule cannot be construed so as to permit inconsistent pleas to be advanced by means of an amendment. Whether a party would be permitted to amend his pleadings depends on Order 6, Rule 17. AIR 1943 Lah 159 (161, 162).°° AIR 1966 Orissa 6 (8, 9): 32 Cut LT 930 °° AIR 1966 Pat 383 (386, 387): 1966 BLJR 571 (DB). (Alternative plea can be allowed at later stage when all materials and facts to supply basis for such plea are already on record.) °° AIR 1965 Pat 304 (305). (Proposed amendment not changing nature of suit — Amendment to be allowed.) °° 1965 BLJR 105 (109). (Subsequent application by universal legatee based on same facts for letters of administration does not amount to amendment of plaint.) °° AIR 1963 Andh Pra 9 (12): (1962) 2 Andh WR 119 (DB).

(4) The exception contained in this rule allows an amendment of the previous pleadings of a party but does not allow amendment of his subsequent pleadings which would have the effect of converting that subsequent pleading into a pleading which if originally pleaded would have infringed this rule. AIR 1947 Bom 149 (151).

(5) A party does not have a right to amend a previous pleading without the permission of the Court. AIR 1961 Him Pra 46 (47, 48). (If the plaint is allowed to be amended after the filing of the written statement by the defendant the additional written statement that may be filed by the defendant after the amendment

R. 8. Denial of contract.—Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

[R. S. C., O. 19, R. 20.]

Order 6, Rule 7 — Note 1 (contd.)
of the plaint should be confined and limited to the amended portion of the plaint only.)
[But see AIR 1966 Punj 162 (164, 165): 67 Pun LR 335. (AIR 1961 Him Pra 46, DISSENTED FROM.)]

2. New ground of claim or defence.— (1) Where a plaint is defective, it cannot be supplemented by a subsequent statement. AIR 1945 Pat 92 (94) °° 1902 All WN 35 (38) (DB).

(2) Where the issue framed is sufficiently wide to cover the case newly set up by the defendant and all the documents relating to it are before the Court so that no prejudice could be caused to the plaintiff, the Court may dispose of the case on such new plea. AIR 1948 Oudh 307 (319, 320): 22 Luck 522 (DB) °° AIR 1961 Cal 620 (622): ILR (1962) 1 Cal 118.

(3) Issue involving allegation of fraud will not be allowed to be raised, if not found on pleadings. AIR 1965 Pat 279 (283) (DB).

(4) Where the defendant seeks to amend his defence by adding a new ground and the plaintiff consents to such amendment on condition of his being permitted to file a reply he can raise by such a reply a new ground to meet the amended defence. **AIR 1950 PC 39 (41).**

(5) There is no provision in the Code to enable the Court to permit the substitution in toto of one written statement for another already filed. AIR 1950 Mad 46 (47).

3. Inconsistent allegations.— (1) A party cannot in subsequent pleading make any allegation inconsistent with what he has alleged originally. (1851) 5 Moo Ind App 271 (290) (PC) °° (1966) 2 Mad LJ (SC) 92 (96, 97): (1967) 1 Andh LT 40: (1966) 2 SCJ 789. (New plea of fact not set up in plaint cannot be raised in appeal.) °° AIR 1966 Ker 96 (97): (1965) 2 Ker LR 315 (FB) °° AIR 1968 Andh Pra 291 (292) °° AIR 1968 J and K 2 (5): 1967 Kash LJ 392 (DB) °° AIR 1968 Pat 203 (205): 1968 BLJR 619 (DB). (Plaintiff cannot found his claim in Second Appeal on a cause of action at variance with the plaint.) °° AIR 1967 Ker 88 (90): 1966 Ker LT 665 (DB) °° AIR 1967 Madh Pra 280 (283): 1967 MPLJ 499 (DB) °° AIR 1966 Orissa 150 (156): (1966) 8 OJD 249. (Plaintiff cannot raise new ground in appeal.) °° AIR 1966 Pat 97 (101): ILR 45 Pat 1019 (DB). (Departure from pleading in appeal cannot be allowed.)°° AIR 1965 Ker 203 (205): 1964 Ker LJ 539 (DB) °° AIR 1961 Him Pra 46 (48). (Amendment of written statement without leave of Court — Inconsistency with previous written statement — Court can ignore the amendment.)

[See also 1966 Ker LJ 1076 (1079): 1966 Ker LR 603 °° 69 Punj LR 98 (106, 107): (1967) 1 ITJ 628 (DB). (Affidavit allowed to be filed after original petition to elaborate law points in petition — So far as affidavit introduces new points not covered by original writ-petition it must to that extent, be ruled out.)]

[But see ('13) 21 Ind Cas 81 (82) (All).]

(2) While disposing of an application for amendment of a written statement raising a plea inconsistent with an earlier admission in the Original written statement the Court should be liberal in allowing amendments when earlier admission might have been made by mistake. 81 Mad LW 15 (17): (1968) 1 Mad LJ 390.

(3) Suit for recovery of possession of property from lessee and declaration of title — Defendant originally pleading that suit was not maintainable without impleading co-sharers — Subsequently defendant filing petition under Order 8, Rule 9 for permission to file additional statement on ground that he had purchased suit property from one of co-sharers, subsequent to plaint.

Held, additional statement should be filed. AIR 1965 Mad 9 (10): 77 Mad LW 476.

(4) Where both parties understand the real point in issue and give evidence, the fact that a pleading subsequnent to the plaint and the evidence is at variance with the original pleading is immaterial. AIR 1914 All 479 (481).

Order 6, Rule 8 — Note 1

(1) The party denying merely factum of contract and not alleging its unenforceability in law must be held bound by the pleadings and be precluded from raising the illegality or validity of the contract. **AIR 1954 SC 165 (168, 169): 1954 SCR 958.** (AIR 1952 Pat 393, **REVERSED.**) °° 1960 MPLJ 673 (676, 677): 1960 Jab LJ 706.

(2) Where the defendant disputes the legality or sufficiency in point of law of the contract set up by the plaintiff, he must plead specifically the grounds of his objection. AIR 1932 All 199 (202, 203): 53 All 963 (DB).

(3) No court will enforce an illegal contract, if the illegality is duly brought to the notice of the Court and if the person invoking the aid of the Court is himself implicated in the illegality. AIR 1955 Vindh Pra 31 (32) °° 1954 Raj LW 423 (426) °° AIR 1933 Mad 187 (189).

(4) Objection as to illegality of contract not raised in pleading — It is open to the appellate Court even without a pleading to consider the question whether the agree-

R. 9. Effect of document to be stated.—Wherever the contents of any documents are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

[R. S. C., O. 19, R. 21.]

R. 10. Malice, knowledge, etc.—Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

[R. S. C., O. 19, R. 22; See Rr. 2 and 4 above.]

Order 6, Rule 8 — Note 1 (contd.)

ment relied on in the case is immoral. AIR 1959 Andh Pra 370 (376, 377) (DB).

(5) Contracts contended to be void under Section 23, Contract Act — Point not taken in written statement but borne out by facts — Court must consider contention. AIR 1960 Andh Pra 190 (191).

(6) If a written statement contains an admission of certain facts favourable to plaintiff but contains a denial of other facts favourable to him the plaintiff must take not only the first set of facts as truly stated but also the second set of facts. AIR 1967 Cal 294 (309).

(7) Denial of contract — Plea not taken in the written statement — It cannot be raised during reply argument in appeal. AIR 1969 Tripura 26 (28).

(8) If the matter is clear and the illegality of the transaction is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved then unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail. AIR 1960 SC 213 (216, 217): (1960) 1 SCR 861.

Order 6, Rule 9 — Note 1

(1) Averment in written statement that a protest note by godown keeper mentioned circumstances in which loss occurred — Protest note not part of written statement. AIR 1967 Assam 74 (76): ILR (1964) 16 Assam 395 (DB).

(2) Election petition — Plea of corrupt practice of hiring or procuring motor cars to carry voters — Particulars of cars and voters given — Connection of candidate with use of cars sufficiently pleaded — As to who hired or procured cars is matter of evidence. AIR 1969 SC 692 (694).

Order 6, Rule 10 — Note 1

(1) Where a certain condition of mind such as insanity is relied on by a party for his claim or defence he must allege it as a fact in his pleading and where he does not do so, and the fact of the existence of such state of mind is only brought out in the evidence, the Court should not act on such fact. AIR 1938 Nag 204 (208).

(2) Where a mistaken bona fide belief and good faith are the grounds for applying the rule of equitable subrogation, they must be distinctly alleged in the pleadings and proved. AIR 1931 Mad 110 (113).

(3) Where the plaintiff alleges mala fides and attacks a certain order by the Collector on the ground that it is made for a collateral purpose, the plaintiff is relying on the state of mind of the Collector and it is not necessary for him to set out the particulars. AIR 1951 Bom 72 (77) (DB).

(4) Where there is fraud there is no room for the doctrine of acquiescence to operate which is only a form of estoppal. AIR 1930 Cal 678 (684).

(5) Bias must be pleaded and proved. AIR 1957 Mad 623 (626) (DB).

(6) Failure to take plea in written statement — Failure also to take objection to vagueness of notice and allegation of malice — Objection raised in second appeal before High Court — Party will not be allowed to do so. AIR 1962 All 233 (237).

(7) Negligence not correlated to state of mind — Particulars of negligence are necessary in plaint. AIR 1966 All 333 (335) = ILR (1965) 2 All 127.

(8) Damages for malicious prosecution — Suit for — Acquittal in criminal case itself not sufficient — Independent inquiry by Civil Court necessary. (1968) 14 Law Rep. 360: (1968) 1 Mys LJ 488.

(9) The Court hesitates to attribute mala fides to any one and particularly to statutory bodies excepting on convincing grounds. The party who alleges mala fides carries the burden of proving it. In his pleading he must set out the particulars and substantiate the same by satisfactory evidence. (1965) 2 Mys LJ 365: (1965) 4 Law Rep 58 (DB).

(10) Suit for compensation — Negligence on part of Railway Administration alleged — Burden of proof on plaintiff — Loss due to deviation in agreed route — **Held** what was in issue was not state of mind but breach of contract and hence mere allegation of negligence or misconduct was not sufficient in notice under Section 80, Civil P. C. AIR 1966 All 333: ILR (1965) 2 All 127,

R. 11. Notice.—Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.

[R. S. C., O. 19, R. 23; See S. 80.]

R. 12. Implied contract, or relation.—Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

[R. S. C., O. 19, R. 24.]

R. 13. Presumptions of law.—Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (e. g., consideration for a bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim.)

[R. S. C., O. 19, R. 25.]

R. 14. Pleading to be signed.—Every pleading shall be signed by the party and his pleader (if any): Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

[1882, Ss. 51, 115; 1877, Section 51; 1859, S. 27, R. S. C., O. 19, Rule 4; See S. 2, Cl. 20.]

Order 6, Rule 11 — Note 1

(1) Where in suit for eviction, the plaintiff neither alleges notice to terminate tenancy as contemplated by Section 106, T. P. Act nor proves it such a suit has to be dismissed. 1968 BLJR 847 (DB).

(2) As regards suit against Government or public servant, see Notes under Section 80, Civil P. C.

Order 6, Rule 13

1. Presumption of law.— (1) A party need not plead that which the law presumes in his favour. ('43) 1943 Nag L Jour 148 (149).

(2) Where the plaintiff institutes a suit for declaration of his title to the religious office by virtue of a gift by the last holder, he must plead and prove the custom of alienability of such office, in the first instance. If he does not so plead or prove, the presumption of law holds the field. ('56) AIR 1956 Pat 345 (347) (DB).

(3) When law raises a presumption that the result of the election has been materially affected as a result of candidate having been kept out of the arena of election, it is not necessary to allege in the petition that the result of the election of the successful candidate was materially affected by non-compliance of the provisions of the Act or Rules. ILR (1967) Guj 76 (96, 97): (1967) 8 Guj LR 9.

(4) Indian Muslims — Presumption is that Hanafi Law applies — Where deviation therefrom is sought to be relied on, it must be pleaded and proved as a fact. AIR 1967 Kerala 78 (79): 1966 Ker LT 445.

Order 6, Rule 14

1. Pleading to be signed.— (1) The object of requiring every pleading to be signed by the party is to prevent, as far as possible, disputes as to whether a suit was instituted with the plaintiff's knowledge and authority. AIR 1925 Sind 275 (278) °° AIR 1968 Assam 57 (59) °° 1960 Ker LT 731 (734, 735). (Application for amendment of plaint is not a pleading — Omission of plaintiff's signature can be cured later on.)

(2) There is no difference between vakalats. affidavits and pleadings as to the procedure by which they can be signed. AIR 1928 Mad 175 (176): 51 Mad 242 (DB).

2. Signature by persons duly authorised.—(1) There is nothing in law to prevent a corporation from suing by its agent as provided by O. 3, R. 1 Civil P. C. Order 29, R. 1 is only permissive and does not preclude a corporation from taking advatage of O. 3, R. 1 and O. 6 R. 14 and having its pleadings signd by a duly constituted agent. AIR 1957 Ker 164 (165) (DB) °° (1966) 68 Bom LR 868 (870): 1967 Mah LJ 112.

(2) In a suit filed by juristic or corporate bodies in order to prove that the plaint

HIGH COURT AMENDMENT

Mysore

In O. VI, R. 14, renumber existing R. 14 as R. 14 (2) and insert the following as sub-rule (1) to Rule 14.

(1) Every pleading shall contain the party's full address for service, that is to say, full address of his place of residence as well as place of business, if any, in addition to his pleader's address for service as required by Rule 32 of Order V of this Code. Such address for service furnished by the party, unless a change therein has been notified to the Court by filing a memorandum to that effect, shall be presumed to be his correct address for service for purposes of the suit, any appeal or revision or other proceeding directed against the decree or order passed in that suit. When a memorandum of change of address is filed by any party, a note to that effect shall be made in the cause title of the pleading and if the pleading happens to be the written statement also in the cause title of the plaint [30-3-1967].

Order 6, Rule 14 — Note 2 (contd.)

was duly and properly signed, it is necessary that the plaint should state that the person who actually signed it was duly authorised to do so. AIR 1955 Bhopal 18 (19).

(3) The question as to when a person can be said to be duly authorised by the party depends upon the circumstances of each case. AIR 1943 Cal 13 (15) °° AIR 1925 Lah 144 (144) °° (1911) 10 Ind Cas 141 (142) (Lah) °° AIR 1961 Bom 292 (298): 62 Bom LR 251 (DB). (Managing director having authority under Articles of Association to institute suits — Plaint signed by Managing Director or by person orally authorised by him is valid.)

(4) Where a document authorising the mukhtar-i-am of the party to sign the pleading also states that the party generally remains away on business, the Court may permit the mukhtar-i-am to sign the pleading on the ground that the party for good cause was unable to sign the pleading. Rule 14 does not require any proof that the party was absent or unable to sign the pleading at the particular time when the pleading was signed. AIR 1967 All 487 (488) (DB) °° AIR 1963 Madh Pra 151 (152, 153): 1962 Jab LJ 593. (Am Mukhtiyar signing and verifying plaint though signature by plaintiff not impossible — Defect can be remedied at later stage.)

(5) A pleading signed by an unauthorised person is not valid. But in such a case, the Court may permit the party himself to sign it later. (1912) 16 Ind Cas 255 (256) (DB) (Cal) °° AIR 1922 Bom 113 (113): 46 Bom 150 (DB) °° ILR (1966) 1 Punj 324 (327): 1965 Pun LR (Supp) 41 °° AIR 1962 Ker 19 (20, 21): 1961 Ker LT 182. (But suit by unrecognised agent must have been instituted with knowledge and authority of plaintiff.)

(6) The proviso to this Rule does not apply to case of party permanently residing outside the Country but only where absence is temporary. AIR 1962 Ker 19 (20): 1961 Ker LT 182.

3. Omission to sign pleadings — Effect. —(1) An irregularity in the signature or verification of a plaint is a mere defect of procedure and does not affect the jurisdiction of the Court. AIR 1956 Hyd 133 (135): ILR (1956) Hyd 514 (DB) °° AIR 1941 Nag 159 (160) °° 1967 Cur LJ 184: 69 Pun LR 238. (Pleading not signed by party — Subsequent signature cannot date back from earlier date on which unsigned pleading was signed.) °° AIR 1964 All 19 (20) (DB). (Verification of application for grant of permit under Motor Vehicles Act stands on different footing than a plaint.) °° AIR 1961 Bom 292 (296, 299, 300): 62 Bom LR 251 (DB). (Defect can be cured even after limitation.)

(2) An omission or mistake in the signature is not fatal to the suit but is capable of being cured by appropriate amendments. AIR 1956 Hyd 133 (135): ILR (1956) Hyd 514 (DB) °° AIR 1948 Mad 369 (371) (DB) °° AIR 1941 Nag 159 (160) °° ILR (1960) 10 Raj 9 (12). (Pleadings not signed — Amendment should be allowed.) °° 1968 All WR (HC) 564.

[But see AIR 1950 Bom 130 (133).]

(3) In fact the proper course is not to dismiss the suit or reject the plaint but to get plaint amended. AIR 1956 Hyd 133 (135): ILR (1956) Hyd 514 (DB) °° (1896) 18 All 396 (399, 400) (SB) °° AIR 1915 Cal 444 (448) (DB). °° AIR 1968 Goa 53 (55). (Improper verification of election petition.)

[But see 1894 All WN 95 (95, 97).]

(4) An objection, if not taken by the defendant at the earliest possible opportunity, cannot be allowed to be raised for the first time in appeal. (1900) 22 All 55 (61, 64) (DB) °° AIR 1920 Pat 636 (638) (DB) °° AIR 1929 Mad 790 (791) °° (1911) 7 Nag LR 33 (35).

(5) Where several persons institute a suit, it is sufficient that one of them signs the plaint with the other plaintiffs' knowledge and authority. AIR 1951 Pat 323 (324) (DB) °° AIR 1950 Ajmer 30 (30) °° AIR 1924 Pat 104 (106): 3 Pat 67 (DB) °° (1890) 17 Cal 580 (582) (PC) °° 1968 All WR (HC) 693: 1969 All LJ 59.

HIGH COURT AMENDMENTS

Rule 14A

Assam and Nagaland

Same as that of Calcutta.—Assam High Court Order, 1948 and Act 27 of 1962, S. 15 [1-12-1963].

Calcutta : Andaman and Nicobar Islands

Insert the following :

"R. 14A.—Every pleading when filed shall be accompanied by a statement in a prescribed form, signed as provided in Rule 14 of this Order, of the party's address for service. Such address may from time to time be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition. The address so given shall be called the registered address of the party and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purposes of execution, and shall hold good subject as aforesaid for a period of two years, after the final determination of the cause or matter. Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat" [25-7-1928].

Orissa

Same as that of Calcutta except the words "when filed", appearing in the first line of Rule 14A of Calcutta, are to be deleted [7-5-1954].

R. 15. Verification of pleadings.—(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

[1882, Ss. 51, 52, 115; 1877, Ss. 51, 52; 1859, S. 27.]

ORDER 6, RULE 15 — SYNOPSIS

1. Scope and object.
2. Who can verify pleadings.
3. Mode of verification.
4. Effect of defective verification.
5. Omission to verify.

1. Scope and object. — (1) The Court is bound to see in every case that the pleadings are verified in the manner prescribed and that the verifications are not treated as mere formalities. AIR 1914 Low Bur 198 (199) °° AIR 1930 Nag 152 (152).

(2) In the case of pardanashin ladies, their pleadings will not be accepted as satisfactory proof of the contents thereof unless it is strictly proved that the pleadings were read out and explained to them. AIR 1916 PC 27 (34): 43 Ind App 212.

(3) A contentious probate proceeding should take the form of a suit, and should be verified by the parties. AIR 1924 Rang 273 (274) (DB).

(4) This Rule applies to election petitions under Representation of the People Act, 1951. **AIR 1955 SC 610 (615): 1955-2 SCR 428** °° AIR 1954 Mad 336 (338, 339) °° (1959) 63 Cal WN 175 (179).

(5) Petition under Ss. 397 and 398, Companies Act (1956) has to be verified as indicated in O. 6, R. 15. (1964) 68 Cal WN 163 (168).

(6) Under Section 16 of the Territorial Councils Act the District Judge is not debarred from permitting alteration or amendment of the election petition, under Order 6, Rule 17, C. P. Code, and of the verification under O. 6, R. 15. The provisions of the C. P. Code apply to the trial of an election petition, under the Territorial Councils Act, not only in respect of the matters covered by Rules 70, 71, 72, 75 and 79, but all matters raised at the trial. AIR 1958 Him Pra 26 (27, 28, 29).

2. Who can verify pleadings. — (1) It is open to the opposite party to insist on the party himself verifying the pleading in important cases. (1887) 9 All 505 (507, 508) (DB) °° (1882) 8 Cal 885 (887) (DB) °° (1881) 6 Cal 268 (270).

(2) In order to comply with the rules regarding verification contained in O. 6, R. 15, it is not sufficient that the plaint is verified by someone authorised by the plaintiff. It must be verified by the plaintiff,

HIGH COURT AMENDMENTS

Bombay: Dadra and Nagar Haveli[a]

(i) In sub-rule (1) of Rule 15, in so far as it applies to the Bombay City Civil Court, there shall be substituted a comma for the full stop, and the following shall be added at the end of the sub-rule :—

"within the local jurisdiction, before one of the officers of the Court empowered to administer oath, and elsewhere in India, before the officer indicated by Section 139 of the Code" [16-8-1948].

(ii) In sub-rule (1) of R. 15 substitute a colon for the full stop at the end and add the following proviso, thereafter.

"Provided that in respect of pleadings to be filed in the Bombay City Civil Court such verification shall, within the local jurisdiction of the Court, be made before one of the officers of the said Court empowered to administer oath and elsewhere, before any officer mentioned in S. 139 of the Code of Civil Procedure, 1908" [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Orissa

For sub-rule (1) substitute the following :

"Save as otherwise provided by any law for the time being in force, the facts stated in every pleading shall be verified by solemn affirmation or on oath of the party or of one of the parties pleading or of some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, before any officer empowered to administer oath under Section 139 of the Code" [27-9-1961].

Patna

For sub-rule (1) substitute the following :—

"Save as otherwise provided by any law for the time being in force, the facts stated in every pleading shall be verified by solemn affirmation or on oath of the party or of one of the parties pleading or of some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, before any officer empowered to administer oath under Section 139 of the Code" [27-9-1961].

Order 6, Rule 15 — Note 2 (contd.)

or one of the plaintiffs, or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. AIR 1961 Bom 292 (299): 62 Bom LR 251 (DB).

(3) Where the plaint contains serious allegations of fraud, falsification of account, culpable negligence, etc. against the defendants and the verification is sought to be made by an agent under a power of attorney by merely putting on record the power of attorney, it is wholly insufficient for the purpose, as the plaintiff's agent simpliciter holding an authority to sign the verification under the power of attorney would be incompetent to verify the plaint. AIR 1958 Cal 104 (104, 105) (DB).

(4) Where there are several plaintiffs, verification by one of them is enough. AIR 1951 Pat 323 (324) (DB) °° AIR 1950 Ajmer 30 (30).

(5) The competence of the officer to verify the plaint must be supported by an affidavit. ILR (1962) 2 Cal 187 °° (1965) 69 Cal WN 325. (Writ petition verified on behalf of corporation, person verifying must file an affidavit of fitness or of competency along with the pleading or petition.)

(6) The word 'acquainted' contemplates personal acquaintance or at any rate something more than mere instructions received by counsel from a client. 1967 All WR (HC) 475.

(7) Deputy Secretary of Board of Secondary Education is a person acquainted with the facts and proceedings relating to suit by the Board and is competent to verify the plaint and affirm affidavit and other documents to be filed in Court. (1966) 70 Cal WN 1130.

(8) Application for execution of decree can be signed by an authorised agent. (1966) 68 Bom LR 868: 1967 Mah LJ 112.

(9) Suit by firm — Person with power of attorney from manager of firm can verify. **AIR 1961 SC 325 (330): (1961) 1 SCR 982.**

3. Mode of verification. — (1) A verification in the form "the contents of the plaint are true to the best of my knowledge and belief" is not in strict compliance with Code though it substantially complies with it, AIR 1949 Ajmer 37 (38) °° (1896) 18 All 396 (398) (SB) °° (1892) 15 All 59 (60) (SB).

(2) A verification is not faulty in form merely because it does not state the source of the information. AIR 1934 Cal 632 (632) (DB).

(3) Where the allegations in an election petition under the Representation of the People Act, 1951 purport to be based on information and the verification clause refers to the entirety of the petition and the attached schedule, absence of enumeration of the various paragraphs therein as having been based on information cannot be considered to be a defect. **AIR 1955 SC 610 (615):**

Order 6, Rule 15 — Note 3 (contd.)
1955-2 SCR 428 °° AIR 1964 J. ad K. 88 (90): 1964 Kash LJ 335 (DB). (AIR 1955 SC 610, Rel. on.)

(4) The necessity for making reference to the paras in an election petition would arise only when some paras have to be verified on the basis of personal knowledge and others upon information received and believed to be true. But where the petitioner has verified the whole body of the petition with reference to his own knowledge non-reference to paras is not improper. AIR 1968 Goa 53 (55).

[See 1966 Cur LJ 318 (Punj). (Person verifying written statement must specify what he verifies of his own knowledge and what he verifies upon information received and believed to be true.)]

(5) The term "any law" in O. 6, R. 15, will also include the special law or procedure prescribed in O. 27, R. 1. Therefore verification of written statements filed on behalf of the Government, done according to O. 27, R. 1, Civil P. C. is valid and the procedure prescribed in O. 6, R. 15 (Patna amendment) need not be resorted to. AIR 1967 Pat 295 (297).

(6) Allegation in petition under S. 397 or S. 398, Companies Act — Deponent can verify petition on information received by him and believed to be true. 68 Bom LR 431: (1966) 1 Com LJ 42 (DB).

(7) Vagueness or lack of particularisation of averments is not to be judged by reading relevant pleadings in petition with counter pleadings in written statement. AIR 1965 All 552 (558) (DB).

4. Effect of defective verification. — (1) A defect in verification can be cured by amendment at any stage of the suit. AIR 1952 Ajmer 44 (1) (44) °° AIR 1949 All 499 (500, 501) °° AIR 1940 Cal 385 (388) °° AIR 1968 Goa 53 (55). (Improper verification of election petition.) °° AIR 1963 Madh Pra 151 (153): 1962 Jab LJ 593. (Plaint signed and verified by Mukhtiar, though signature by plaintiff not impossible.) °° AIR 1961 Bom 292 (299): 62 Bom LR 251 (DB). (Even after limitation.) °° ILR (1960) 10 Raj 9 °° AIR 1959 Cal 642 (646): ILR (1960) 2 Cal 1.

(2) Defect in verification of winding up petition under R. 21 of Company (Court) Rules, 1959 is not a mere irregularity — Leave cannot be granted to reverify the petition. AIR 1968 Cal 388 (391): 70 Cal WN 852.

[See however AIR 1950 Bom 130 (134) °° (1905) 2 Cal L Jour 11 (14) (DB).]

(3) A defect in verification is not a ground for interference in appeal under the provisions of S. 99 of the Code. (1896) 18 All 396 (399, 400) (SB) °° (1901) 5 Cal WN 91 (98) (DB) °° AIR 1967 All 487 (488). (Where defendant admits claim, defect of verification by Mukhtiar is cured.)

[See however AIR 1949 Ajmer 37 (38).]

(4) In the case of an election petition under the Representation of the People Act it would be a wrong exercise of discretionary power to dismiss an application on the sole ground of absence of the date of verification the applicant should normally be called upon to remove the lacuna by adding a supplementary verification. AIR 1955 SC 610 (615): 1955-2 SCR 428.

[See also 1965 Cur LJ 228. (Election under Punjab Gram Panchayat Act.) °° 1963 BLJR 86. (Election petition not verified as required under R. 75 (1) of Bihar Panchayat Election Rules 1959 — Amendment can be allowed by the Tribunal.)]

(5) Verification of a petition required under Sec. 281, Succession Act, is similar to verification required of pleadings under O. 6, R. 15, C. P. C. Omission to verify, or defective verification of, a pleading is a mere irregularity within Sec. 99, C. P. C. An omission to verify, or a defective verification of, a petition for probate cannot have a more serious effect than that of a plaint. AIR 1958 All 329 (330).

(6) Application under S. 54 of Motor Vehicles Act for grant of permit — Form of declaration prescribed by rules — Form consisting of two parts — First part is similar to verification of plaint — Failure to sign declaration — Such failure in respect of second part of declaration is matter of substance — Tribunal can in such case refuse granting of permit. AIR 1964 All 19 (20) (DB).

5. Omission to verify. — (1) The want of verification does not have the effect of making the plaint void. It does not affect the merits of the case, and can be rectified by permitting the party concerned to make good the deficiency by amending the pleadings under O. 6, R. 17 of the Code. Madh B LJ 1955 HCR 1771 (1772) °° AIR 1950 Mys 70 (73): ILR (1951) Mys 126 (DB) °° AIR 1931 All 507 (512): 54 All 57 (SB) °° AIR 1964 Andh Pra 164 (166): (1964) 1 Andh WR 89 (DB). (Election petition.)

[See also AIR 1968 Punj 292 (292): 69 Pun LR 971. (Written statement filed by objections is not proper in the eye of law if not verified and supported by affidavit.)]

(2) The amendment may be made even though the period of limitation may have expired on the date of verification. AIR 1926 Lah 82 (82) °° AIR 1964 Andh Pra 164 (166): (1964) 1 Andh WR 89 (DB). (Election petition.) °° AIR 1961 Bom 292 (299): 62 Bom LR 251 (DB).

R. 16. Striking out pleadings.—The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.

[R. S. C., O. 19, Rule 27; Cf. 1882, S. 116; See O. 6, Rules 2 and 17.]

ORDER 6, RULE 16 — SYNOPSIS

1. Scope and object.
2. "Unnecessary."
3. "Scandalous."
4. "Or which may tend to prejudice, embarrass or delay the fair trial."
5. Matter may be struck out or amended at any stage of the proceeding.
6. Power of the Appellate Court to expunge matters.

1. Scope and object. — (1) This rule enables a party to apply to strike out, or compel the amendment of, the whole or any part of his opponent's pleadings which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action. **AIR 1955 SC 610 (618): 1955-2 SCR 428 °°** ILR (1953) Mys 591 (596).

[See also AIR 1961 Him Pra 46 (48). (Amendment of written statement without leave of Court — Inconsistency with previous written statement — Court can ignore the amendment even if O. 6, R. 16 is inapplicable to the case.)]

(2) The right of the plaintiff of basing his claim for relief in the suit on two alternate titles is subject to this rule. AIR 1955 Trav-Co 134 (137) (DB).

(3) The Court may suo motu strike out or amend such matters in such manner and on such terms as it thinks just. AIR 1918 Mad 681 (686): 40 Mad 365 (FB) °° (1967) 33 Cut LT 1056: ILR (1966) Cut 926. (Court not having jurisdiction to grant alternative relief may delete the alternative prayer.)

(4) The power under this rule should be exercised with great care and caution. AIR 1951 Nag 412 (413): ILR (1951) Nag 496 °° AIR 1925 Cal 860 (861) (DB).

(5) A written statement ought not to be struck out unless it is clear beyond all reasonable doubt that the allegations in it are such as cannot afford a defence to the action, and which, if not struck out, would unnecessarily delay the suit. AIR 1951 Nag 412 (413): ILR (1951) Nag 496 °° AIR 1925 Cal 860 (861) (DB).

(6) To the trial of an election petition by an Election Tribunal under the Representation of the People Act, 1951 the provisions of O. 6, R. 16, C. P. C. apply. AIR 1958 All 596 (600): ILR (1958) 1 All 353 (DB) °° AIR 1958 All 858 (860): ILR (1957) 2 All 205 (DB) °° AIR 1958 Madh Pra 168 (174) (DB).

(7) It will be for the tribunal to take each allegation of corrupt practice contained in the election petition separately and decide in each case as to whether the pleadings satisfy the requirements of Section 83 of the Representation of the People Act or not. It will, of course, be open to petitioner to move an application for amendment in accordance with the law. If such an application for amendment is moved, it will be for the Election Tribunal to decide how far and which amendment should be permitted, and after that has been decided, the Tribunal must deal with each paragraph separately and record its findings as to which of the grounds are so vague that they are liable to be struck off under Order 6, Rule 16 of the Code of Civil Procedure. AIR 1958 All 587 (593) (DB).

2. "Unnecessary." — (1) Where the pleading in addition to its being unnecessary charges the defendant with dishonest conduct, or makes it embarrassing for the Court, it will be ordered to be struck out. AIR 1953 Trav-Co 524 (525): ILR (1953) Trav-Co 1033 (DB) °° AIR 1951 Pat 364 (366) (DB).

(2) Where a plaint or a written statement is unnecessarily prolix and verbose, or argumentative, or is full of matter which is wholly irrelevant or non-understandable, it can be dealt with under this rule. (1867) 8 Suth WR 295 (297, 298) (DB) °° (1929) 114 Ind Cas 906 (907) (DB) (All) °° (1867) 7 Suth WR 212 (213) (DB) °° (1874) 12 Beng LR (App) 19 (20).

3. "Scandalous". — (1) Where scandalous and irrelevant matter is introduced in the pleadings, the Court may order the same to be expunged. AIR 1946 All 204 (206): ILR (1945) All 685 (DB) °° (1909) 4 Ind Cas 380 (381) (DB) (Cal) °° AIR 1966 Mad 161 (162): (1965) 2 Mad LJ 477.

(2) Allegations made in a pleading for the mere purpose of abusing or prejudicing the opposite party and any indecent or offensive matters are scandalous. (1909) 4 Ind Cas 380 (382) (DB) (Cal).

(3) In a suit to set aside sale-deed on ground that it was not supported by consideration and was obtained by defendant by coercion and fraud, passages in the plaint attributing a de facto position to defendant in the administration of the State and alleging exploitation of that position by her are not only unnecessary for a proper adjudication but also scandalous. AIR 1953 Trav-Co 524 (525): ILR (1953) Trav-Co 1033 (DB).

(4) The question before the Court is whether the words complained of amount to an allegation necessary for the formulation of the plaintiff's case, either in the way of establishing a cause of action or relevant for the purpose of the decision of any of the issues. AIR 1944 Bom 197 (198, 200).

4. "Or which may tend to prejudice, embarrass or delay the fair trial." — (1) A

R. 17. Amendment of pleadings.—The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

[Cf. 1882 and 1877, S. 53; 1859, S. 29; R. S. C., O. 28, R. 1. See Ss. 152, 153; O. 1, R. 10; O. 6, Rr. 2, 7, 16 and 18.]

HIGH COURT AMENDMENTS

Bombay: Dadra and Nagar Haveli

For the existing Rule 17 and its marginal note, substitute the following as Rule 17 and marginal note :—

17. Amendment of pleadings.—The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. Where, however, an application for amendment is made by the plaintiff in a suit in which the defendant has not appeared, though served with a summons, and where in the opinion of the Court the amendment applied for is a material one, the Court shall give notice of the

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Order 6, Rule 16 — Note 4 (contd.)

pleading which is ambiguous or unintelligible, or a pleading which contains vague, unnecessary or irrelevant allegations, is embarrassing and may be struck out. (1910) 7 Ind Cas 169 (169) (DB) (Cal) ** **AIR 1955 SC 610 (618): 1955-2 SCR 428** °° (1873) 10 Bom HCR 425 (428) °° AIR 1965 Pat 150 (158) (DB).

(2) A pleading is not necessarily embarrassing merely because of the fact that it states inconsistent or alternative allegations. (1910) 7 Ind Cas 166 (169) (DB) (Cal) °° (1882) 8 Cal 170 (173).

(3) Where particulars are called for from a defendant under O. 6, R. 5 and he fails to comply with the order, the defence may be struck out under this rule, if without the particulars his pleadings is obscure, incomplete and embarrassing. AIR 1930 Mad 473 (475, 476): 53 Mad 645 (DB).

5. Matter may be struck out or amended at any stage of the proceeding. — (1) The rule being discretionary, the Court may refuse to exercise its power unless the application is made at the earliest opportunity. (1885) 9 Bom 373 (381).

(2) An objection under this rule is no ground for interference when the point is taken for the first time in appeal. AIR 1917 Mad 954 (955) (DB) °° AIR 1930 Mad 814 (815, 816).

6. Power of the Appellate Court to expunge matters. — (1) The appellate Court has power to return the memorandum of appeal where it contains allegations of partiality against the Judge whose decree is in question, and order the objectionable portion to be expunged. (1899) 22 Mad 155 (158, 161) (DB).

(2) The High Court has power to expunge remarks appearing in the judgment of the lower Court, but the power will be exercised only in extraordinary cases. AIR 1917 Mad 223 (224) (DB) °° AIR 1933 Lah 711 (711).

ORDER 6, RULE 17 — SYNOPSIS

1. Scope.
2. The Court may allow either party to alter or amend — Discretion of Court.
3. Amendment of plaint introducing new case.
4. Amendment introducing new case in written statement.
5. Amendment taking away right accrued to a party by lapse of time.
6. Amendment not to be allowed when it places the opposite party in a position which cannot be compensated by costs.
7. Amendment to be refused when the application is not in good faith.
8. Amendment by adding or substituting a new plea of fraud.
9. Amendment by adding new reliefs or claims.
10. Amendment by adding a new ground of relief.
11. "As may be necessary for the purpose of determining the real questions in controversy."
12. Amendment by introducing new cause of action.
13. "At any stage of the proceedings."
14. Opportunity to be given to the opposite party to amend his pleading.
15. "On such terms as may be just."
15A. How amendments should be made.
16. Court not having jurisdiction over suit if can allow amendment of plaint.
17. Amendment taking suit out of jurisdiction if can be allowed.
18. Suit not properly instituted — Amendment.
18A. Extent of amendment.

application to the defendant before allowing the amendment; and where in the absence of the defendant the Court grants any amendment in a form materially different from that of which notice has been given to the defendant, a copy of the amended plaint shall be served on the defendant [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Gujarat

In Rule 17 add the following sentence :

"Where, however, an application for amendment is made by the plaintiff in a suit in which the defendant has not appeared though served with a summons and where in the opinion of the Court the amendment applied for is a material one, the Court shall give notice of the application to the defendant before allowing the amendment; and where in the absence of the defendant the Court grants any amendment in a form materially different from that applied for, a copy of the amended plaint shall be served on the defendant" [17-8-1961].

Punjab, Haryana and Chandigarh

Add the following as sub-rule (2), renumbering the existing rule as sub-rule (1)—

"(2) Every application for amendment shall be in writing and shall state the specific amendments which are sought to be made indicating the words or paragraphs to be added, omitted or substituted in the original pleading" [14-12-1951]; Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

Order 6, Rule 17 — Synopsis (contd.)

19. Effect of amendment and limitation.
20. Appeal.
21. Revision.

1. Scope. — (1) Though the rule only refers to pleadings the Court has also power to allow the amendment of applications. AIR 1938 Pat 209 (210) (DB).

[See also AIR 1964 Cal 42 (43): 67 Cal WN 601 (DB). (Execution proceedings — Defendant company going into liquidation before passing of decree against it — Amendment of description of defendant in execution proceedings is permissible.)]

(2) An appellate Court has power to allow a memorandum of appeal to be amended under this Rule read with Section 107. AIR 1948 Pat 97 (99, 102): 26 Pat 83 (DB).

(3) A petition in insolvency can be amended under this rule. AIR 1938 Mad 53 (55) ** AIR 1935 Mad 202 (203).

(4) The provisions of Order 6, R. 17, Civil P. C., are fully available to the Civil Judge and the Civil Judge can at any stage before reference is made to the arbitrator, allow either party to alter or amend his pleadings in such manner and on such terms as are just and necessary for the purpose of determining the real questions in controversy between the parties. AIR 1958 All 692 (695, 696) (DB).

(5) By reason of Section 25 of the Displaced Persons (Debts Adjustment) Act of 1951, applications made under the Act should be regulated by the provisions contained in the Code. So it is open to the Tribunal to allow an amendment if it is in order. AIR 1958 Andh Pra 76 (78).

(6) The application of Order 6, R. 17, Civil Procedure Code to the proceedings before the Election Tribunal is not excluded by Section 83 (3) of the Representation of the People Act (1951). The tribunal has power in appropriate cases to direct amendment of the petition under Order 6, Rule 17. **AIR 1957 SC 444 (454, 455): 1957 SCR 370 ** AIR 1960 SC 368 (376, 377): (1960) 2 SCR 289.** (Amendment seeking to introduce new ground in election petition after limitation cannot be allowed.) ** **AIR 1969 SC 677 (681).** (Election petition — Candidate against whom charge of corrupt practice is made must be joined as party — Non jonder of— Power of amendment cannot be used at all — Provisions of Civil P. C. cannot be used as curative means to save election petition.) ** AIR 1963 Raj 226 (228): 1963 Raj LW 582 (DB). (Limitation prescribed by Section 81 (1), R. P. Act — No power in Tribunal to extend it — Amendment of election petition —Application to amend filed beyond limitation cannot be allowed.) ** (1962) 28 Cut LT 233 ** AIR 1960 Madh Pra 27 (28, 29): 1959 MPLJ 715 (DB) ** AIR 1960 Punj 614 (616, 617): ILR (1959) Punj 1157. (Amendment must be permissible under Representation of the People Act, 1951.)

(7) Election tribunal can allow election petition to be amended and dismiss the amended petition for non-compliance

Order 6, Rule 17 — Note 1 (contd.)

with Section 82 of Representation of the People Act. **AIR 1965 SC 1243 (1246): (1965) 1 SCR 393.**

(8) Even after deletion of sub-section (3) of Section 83 of Representation of the People Act (1951), election tribunal has power to give an option to petitioner either to amend petition or furnish particulars or to have particular para struck off as being vague. **AIR 1965 SC 1243 (1247): (1965) 1 SCR 393.**

(9) Amendment of verification — Election Tribunal has jurisdiction under Order 6, Rule 17 to allow amendment. (1959) 63 Cal WN 175.

(10) Conduct of Election Rules, 1961, Rule 94-A — Affidavit not in prescribed form cannot be amended under Order 6, Rule 17, Civil P. C. AIR 1964 Pat 53 (58) (DB).

(11) Power of Court to allow amendment of pleadings of Election petition is governed by S. 86 (5) of Representation of the People Act, 1951 — Applicability of Order 6, Rule 17 would not come in operation where there is specific provision regarding amendment of particulars in Section 86 (5) of the Act. AIR 1968 Guj 289 (294).

(12) Amendment of recrimination petition — Addition of new ground — Introduction of only new fact and not a new claim — Amendment allowed. (1967) 69 Punj LR 732: ILR (1968) 1 Punj 401.

(13) Petition under Article 226, Constitution of India—Amendment of petition — Provisions of Rule 17 apply. (1965) 67 Pun LR 576.

(14) Act of insolvency under S. 6 (g) of Provincial Insolvency Act not pleaded in petition — Petition cannot be amended after expiry of 3 months from date of commission of such act of insolvency except on exceptional ground. (1963) 4 Guj LR 439.

(15) Proceedings under — Madras Hindu Religious and Charitable Endowments Act (1951), S. 87 — Civil P. C. does not apply — Principle underlying Order 6, Rule 17 will however apply. AIR 1966 Andh Pra 33 (35): 1966 Cri LJ 123: (1965) 2 Andh WR 503.

(16) Petition for eviction under Rent Control Act — Amendment petition — Provisions of Order 6, Rule 17 apply. (1967) 2 An WR 479: (1967) 2 Andh LT 355.

(17) If there is no injustice to the other side, and the amendment of pleadings or enlargement of reliefs of execution is necessary for the purpose of determining the real question in controversy between the parties the amendments should be permitted and not refused. AIR 1964 Mad 236 (236): (1963) 2 Mad LJ 180.

(18) The liquidators of a company in a members' voluntary liquidation with the sanction of a special resolution of the company do not need the sanction of the Company Court to continue the suit already filed before such liquidation by seeking to amend the plaint. By the conjoint operation of Sections 512 and 457 of the Companies Act, the power of a liquidator in a members' voluntary winding up with the sanction of the special resolution of the company is the power with the sanction of the Court 'to institute a suit' — an expression which does not mean continuance of a suit as well. AIR 1968 Cal 355 (357): 72 Cal WN 424.

(19) Objections to award under Section 41 Arbitration Act — Amendment of — Order 6, Rule 17 can be invoked. (1965) 67 Pun LR 1254: ILR (1966) 1 Punj 329.

(20) The provisions of this rule apply to interpleader suit after it has proceeded to trial. AIR 1961 All 559 (561).

(21) Judicial separation — Amendment of petition for purpose of determining real questions in controversy and for avoiding multiplicity of proceedings can be allowed. 1965 Cur LJ 878 (Punj).

(22) The Code casts a duty on the Court to see that the defendants are made aware of any amendment in the plaint, whether the amendment be in regard to the addition of parties or in regard to contents thereof. AIR 1969 Pat 228 (232) (DB).

2. The Court may allow either party to alter or amend — Discretion of Court. — (1) This rule confers a very wide discretion on the Courts in the matter of amendment of pleadings. AIR 1956 Assam 79 (80): ILR (1955) 7 Assam 430 (DB) ** 1965 All LJ 1147: 1965 All WR (HC) 441 ** 1965 Cur LJ 867 (Punj) ** (1966) 68 Pun LR 16: 1965 Cur LJ 786 ** AIR 1961 Punj 60 (66): 63 Pun LR 516.

(2) The powers under the rule are to be liberally exercised. ('56) 1956 Madh BLJ 132 (133) ** ('55) Madh BLJ 1955 HCR 1769 (1771) ** (1966) 1 Mad LJ 561: 79 Mad LW 267 ** AIR 1963 Andh Pra 298 (300): ILR (1962) Andh Pra 84.

(3) The discretion under this rule must be exercised according to judicial principles and not in an arbitrary, vague or fanciful manner, or so as to cause injustice to the opposite side. AIR 1956 Assam 79 (80): ILR (1955) 7 Assam 430 (DB) ** AIR 1950 PC 68 (70): 77 Ind App 15 ** (1966) 68 Pun LR 16 (16): 1965 Cur LJ 786 ** 1965 All WR (HC) 441: (1965) All LJ 1147. (Trial Court refusing permission to amend plaint on grounds based on no evidence — Confirmation of order by appellate Court — Decision is vitiated by error of law.) ** 1965 Cur LJ 867 (Punj) ** ILR (1964) 1 Punj 798 (DB) ** 1961 Jab LJ 905.

Order 6, Rule 17 — Note 2 (contd.)

(4) Appellate Court allowing proposed amendment without considering whether it was essential for determination of points involved — Judgment is defective. 1964 BLJR 884.

(5) Rules of procedure have no other aim than to facilitate the task of administering justice. AIR 1953 Hyd 212 (214) ** AIR 1928 Oudh 305 (306) (DB) ** AIR 1936 Pat 140 (142) (DB).

[See also 1965 Pun LR (Sup) 703. (Application for amendment of writ petition — Application not showing in which part of writ petition the new paragraphs have to be incorporated — Proposed amended petition filed with application — Application allowed.)]

(6) Multiplicity of suits should be avoided. AIR 1955 Hyd 1 (2) (FB) ** **AIR 1966 SC 997 (999, 1000): (1967) 1 SCJ 106** ** AIR 1967 Delhi 61 (63): 69 Pun LR (D) 29 (DB) ** (1967) 2 MLJ 468: (1967) 80 Mad LW 414 ** AIR 1966 Bom 174 (179): 67 Bom LR 864 (DB) ** AIR 1963 Manipur 43 (44, 45).

(7) Interests of substantial justice should be advanced. ('53) AIR 1953 Hyd 212 (214): ILR (1953) Hyd 366 ** ('51) AIR 1951 Cal 262 (264): ILR (1950) 1 Cal 606 ** AIR 1961 Punj 60 (66): 63 Pun LR 516.

(8) A Court should allow the amendment of a pleading where there has been a clerical error or a bona fide wrong description of property or where there has been a mistake of law or fact. **('58) AIR 1958 SC 245 (252): 1958 SCR 1021** ** ('58) AIR 1958 Mad 461 (461, 462) ** ('57) 1957 Jab LJ 202 (206) ** AIR 1968 Manipur 22 (23) ** (1968) 81 Mad LW 15: (1968) 1 Mad LJ 390 ** 1968 Cur LJ 323: 70 Punj LR 416 ** AIR 1966 Cal 84 (86, 87, 90, 91) (DB) ** 1966 All LJ 235 ** ILR (1966) Guj 877: (1966) 7 Guj LR 918 (DB) ** (1965) Raj LW 229 ** AIR 1964 Andh Pra 101 (104, 105): (1963) 2 Andh WR 392 (DB) ** ILR (1960) 10 Raj 9.

[See also ILR (1963) 13 Raj 826. (Suit against two defendants — One of them dying before institution of suit — Proper procedure is to amend plaint.)]

(9) Amendment to correct technical defect — Suit by adopted son to set aside sale effected by father — Fact of adoption not expressly mentioned in body of plaint — Defect held was technical and plaint should be allowed to be amended. AIR 1959 Punj 181 (182): 61 Pun LR 268.

(10) An amendment merely clarifying the position put forward in the plaint or a written statement must be allowed. ('56) 1956 Madh BLJ 132 (133) ** **AIR 1967 SC 96 (98): (1966) 1 SCR 796** ** AIR 1969 Pat 181 (182) ** (1966) 1 Mad LJ 561: 79 Mad LW 267 ** AIR 1966 Punj 339 (340) ** AIR 1965 Manipur 53 (56) ** AIR 1961 J and K 6 (6).

[See also 1962 Jab LJ 132. (Particulars of corrupt practice — Non-observance of directions for counting of votes and for evaluating preferences, given as ground for challenging election — Amendment seeking to give further instances of mistakes in evaluation can be allowed.)]

[But see ('54) AIR 1954 Punj 206 (206).]

(11) A Court cannot compel a plaintiff to change the character of his suit. ('54) AIR 1954 Madh B 42 (43): ILR (1953) Madh B 134 ** ('53) ILR (1953) Mys 591 (602) ** ('30) AIR 1930 Cal 42 (46): 57 Cal 349 (DB).

(12) There is no provision in the C. P. Code authorising the Court to direct suo motu a party to amend his pleadings. Hence, where no application under O. 6, Rule 17 is made for leave to amend but the Court suo motu directs amendment of written statement to include a new defence not already raised in the pleadings, the direction is erroneous. AIR 1969 Pat 107 (109).

(13) Court has no power to insist on a party to amend his pleadings. AIR 1964 Tripura 19 (21).

(14) In no circumstance amendment of plaint should be suggested and allowed by a Judge, merely because evidence and pleadings do not tally. AIR 1967 Orissa 58 (59): 33 Cut LT 65.

(15) Merely because an amendment is sought by the plaintiffs at the suggestions of the Court it is not proper to disallow it unless there are grounds for holding that it is forced upon an unwilling party For, the Court wanting to do justice may invite the attention of the parties to defects in pleadings so that they could be remedied and the real issue between the parties tried. **AIR 1965 SC 1008 (1011): (1965) 1 SCR 542.**

(16) While considering whether an amendment should be allowed, the Court need not and ought not to go into the alleged falsity of the case in the amendment. AIR 1955 Andhra 138 (140) ** 1956 Andh WR 932 (933) ** AIR 1953 Hyd 212 (214): ILR (1953) Hyd 366.

(17) The Court ought not to give its finding on the merits of the amendment sought for without first allowing the amendment and framing an issue thereon and allowing both sides to adduce evidence. AIR 1953 Hyd 212 (214): ILR (1953) Hyd 363 ** ('49) AIR 1949 Mad 433 (433).

(18) Suit for possession of property by registered society through its president — President's election declared void — Election of P as new President — Plaint of suit amended within limitation and allowed to be signed and verified by P — Defect in plaint held cured and that suit was maintainable. AIR 1966 All 570 (575): ILR (1965) 1 All 483.

(19) Plaintiff. an heir of deceased mortgagee obtaining succession certificate to recover mortgage debt — Suit without

Order 6, Rule 17 — Note 2 (contd.)
joining other heirs is not bad — Application for amendment to incorporate plea of acknowledgment — Reasons for omitting plea not satisfactory — Amendment cannot be allowed. AIR 1963 Bom 170 (171): 65 Bom LR 1 (DB).

(20) Where the plaintiff had an opportunity to amend the plaint but did not do so, he must be deemed to have waived his claim. 1965 BLJR 119.

(21) Absence of a formal amendment for an alternative relief in the plaint will not stand in the way of dispensation of justice if it does not cause any prejudice or surprise to other party. 1965 BLJR 214: ILR 44 Pat 694.

(22) If the pleadings and the issues framed thereon do not justify admission of the documentary evidence in question, then the Court would be transgressing the bounds of its legitimate function in suggesting to the plaintiff to amend the plaint in order to bring the documents within the realm of relevancy and in adjourning the case for that purpose. 1965 Cur LJ 786: 66 Pun LR 16.

(23) Amendment of plaint — Petition for — Petition neither allowed nor rejected — **Held,** not passing any order on petition was serious lacuna. AIR 1967 Tripura 33 (37).

3. Amendment of plaint introducing new case. — (1) As a general rule the Court will not, in the exercise of such discretion, allow an amendment converting a suit of one character into a suit of another character. **AIR 1957 SC 444 (456): 1957 SCR 370** ** ('55) AIR 1955 Hyd 1 (2): ILR (1954) Hyd 575 (FB) ** AIR 1954 Sau 66 (70) (FB) ** ('58) ILR (1958) Mad 662 (664) ** AIR 1957 Madh B 171 (172) ** 1957 Ker LJ 948 (950) ** **AIR 1967 SC 96 (98): (1966) 1 SCR 796** ** AIR 1969 Ker 19 (21): 1968 Ker LR 566. (Suit for redemption and possession of mortgaged property — Amendment seeking to convert it into one for possession on basis of title — Cannot be allowed in second appeal.) ** AIR 1969 Manipur 33 (35) ** AIR 1968 Mad 87 (88, 89): 80 Mad LW 381 (DB) ** AIR 1968 Tripura 29 (32). (AIR 1958 Tri 36, Foll.) ** (1966) 1 Mad LJ 561: 79 Mad LW 267 ** AIR 1965 Raj 172 (174): 1965 Raj LW 254 (DB) ** AIR 1964 Bom 7 (19, 20): 65 Bom LR 191 (DB) ** AIR 1964 Cal 57 (59) : 67 Cal WN 903. (Suit against an unincorporated and unregistered club in the name of the club — Not a case of misdescription — Amendment not allowed since it would change the character of the suit.) ** AIR 1964 Manipur 61 (62) ** AIR 1964 Mys 56 (58): (1963) 2 Mys LJ 263 ** AIR 1964 Raj 232 (234): 1964 Raj LW 362 ** 1963 Ker LT 70: ILR (1963) 1 Ker 489 ** AIR 1961 Bom 136 (140): 62 Bom LR 336 (DB) ** AIR 1961 Pat 302 (304): 1961 BLJR 28 (DB) ** AIR 1961 Pat 298 (298) ** AIR 1960 Pat 54 (55, 56): 1959 BLJR 602 (DB) ** AIR 1960 Punj 255 (257) (DB) ** AIR 1960 Punj 62 (64) ** AIR 1959 All 546 (553) (DB). (AIR 1923 Nag 241, **Diss. from.**) ** (1959) 61 Pun LR 443 ** 1959 Raj LW 273 ** 62 Cal WN 176: ILR (1959) 1 Cal 78 ** AIR 1957 Madh Bha 171 (172): 1956 Madh BLJ 929.

[See also AIR 1967 Orissa 58 (59): 33 Cut LT 65. (But in no circumstance amendment of plaint should be suggested and allowed by a judge, merely because evidence and pleadings do not tally.)]

(2) Suit on promissory note — Plea in defence that note is void because of material alterations made in it — Plaintiff should not be allowed to amend plaint so as to base his suit on original consideration. (1964) 1 Mys LJ 22.

(3) What an amendment must not alter is the fundamental character of the suit, that is, the foundation on which the suit is based and not the prayer in the plaint. AIR 1952 Assam 10 (12): ILR (1951) Assam 305 (DB).

(4) The Court cannot, by way of amendment, substitute one distinct cause of action for another, or change the subject-matter of the suit. AIR 1950 PC 68 (70): 77 Ind App 15 ** AIR 1954 Sau 66 (70) (FB) ** AIR 1958 Mad 307 (308) ** AIR 1957 Cal 688 (690) ** AIR 1956 Cal 138 (144) ** AIR 1922 PC 249 (250, 251): 48 Ind App 214: 48 Cal 832 ** **AIR 1967 SC 96 (98):** (1966) 1 SCR 796 ** AIR 1961 Bom 284 (285 to 287): 63 Bom LR 169. (Suit on basis of commission agency — Amendment seeking to change cause of action as one on basis of pucca adatiya basis.)

(4) An amendment will generally be allowed where the nature of the suit is not altered, provided it does not cause prejudice or surprise to the opposite party. AIR 1955 Hyd 1 (2): ILR (1954) Hyd 575 (FB) ** AIR 1959 Andh Pra 126 (128): ILR (1957) Andh Pra 443 (DB) ** AIR 1958 Manipur 26 (27) ** AIR 1956 Him Pra 1 (2) ** AIR 1955 Nag 222 (223): ILR (1956) Nag 314 (DB) ** **AIR 1964 SC 818 (822, 823): 1963 Supp 2 SCR 995.** (Receiver entitled to institute suit in his own name — Misdescription of plaintiff in cause title — Amendment of plaint can be allowed at any time.) ** AIR 1969 Orissa 34 (35, 36) ** AIR 1968 Cal 213 (215): 70 Cal WN 1095 (DB) ** AIR 1968 Orissa 163 (164): 34 Cut LT 549 ** (1967) 1 Mys LJ 383: 10 Law Rep 19 ** AIR 1967 Pat 326 (327) ** (1966) 1 Mad LJ 408: 79 Mad LW 206 ** AIR 1966 Orissa 18 (19, 20, 21): 31 Cut LT 917 ** AIR 1966 Punj 339 (340) ** (1966) 68 Pun LR 351 (Delhi). ** AIR 1965 Bom 32 (33): 66 Bom LR 450 ** AIR 1965 Pat 345 (349) ** AIR 1964 Andh Pra 118 (121) (DB) ** AIR 1964 Madh Pra 15 (17): 1963 MPLJ 284 (DB) ** AIR 1963 Andh Pra 78 (81, 82): (1962) 1 Andh WR 232 (DB) ** AIR 1963 Guj 153 (158): (1963) 4 Guj LR 172 ** AIR 1963 J and K 4 (8): 1962 Kash LJ 103 (DB) ** (1963) 1 Ker LR 132: 1963 Ker LT 279 ** ILR

Order 6, Rule 17 — Note 3 (contd.)
(1963) Cut 146 ** (1962) 64 Pun LR 807 ** (1962) 64 Pun LR 633 ** AIR 1961 Assam 48 (50): ILR (1961) 13 Assam 23 (DB) ** AIR 1961 Mad 262 (265): 74 Mad LW 261 ** AIR 1959 Cal 642 (644, 645): ILR (1960) 2 Cal 1 ** AIR 1959 Madh Pra 191 (193): 1959 MPLJ 285.

[See also AIR 1969 Mys 111 (114): (1968) 1 Mys LJ 466. (Suit by firm — Plaintiff through mistake, suing as owner of firm — Defect not fatal — It can be set right.)]

(5) Suit by unregistered Sangam through its President for recovery of money — Members of Sangam though distributed over many villages having community of interest — Court has jurisdiction to cure defect by giving them permission to amend plaint and to sue in representative capacity. (1965) 78 Mad LW 626.

(6) An amendment may be allowed even if it introduces a new ground of claim or an allegation of fact inconsistent with the original pleading, where the Court thinks it just and necessary. AIR 1955 Hyd 1 (2): ILR (1954) Hyd 575 (FB) ** AIR 1957 Ker 140 (140) ** AIR 1964 Raj 50 (54, 55): 1963 Raj LW 491 ** AIR 1963 Madh Pra 22 (23): 1962 Jab LJ 597.

(7) Suit for pre-emption based on contiguity — Right based on contiguity declared to be void by Supreme Court during pendency of suit — Amendment of plaint, claiming right on basis of easement allowed. AIR 1964 J and K 82 (83): 1964 Kash LJ 7 (DB).

(8) In a suit filed by a joint Hindu family firm in the name of the firm an amendment seeking addition of individual coparceners will be allowed. ('57) 1957 Jab LJ 238 (241).

(9) An amendment of a plaint cannot be refused on the mere ground that the court-fee paid on the original plaint will be found to be insufficient if the amendment is allowed. ('55) ILR (1955) Trav-Co 635 (644) (DB).

(10) Suit against dead person — Suit is a nullity — No amendment for substitution of another person will be allowed. AIR 1964 Mys 293 (295): (1963) 2 Mys LJ 341 (DB).

(11) Practice in Courts in State of Hyderabad was to ask for permission to file rejoinder which, if Court permitted, became part of pleadings and rejoinder had effect of suitably amending plaint — Rule of practice has to be respected. AIR 1965 Andh Pra 98 (101): ILR (1963) Andh Pra 931 (DB).

(12) Suit for injunction — Amendment of plaint seeking alternative relief of possession — Can be allowed even if it deprives defendant of his plea as to maintainability of suit. AIR 1966 Him Pra 1 (2, 3).

(13) Plaintiff seeking to argue a pure question of law at the trial on the basis of a custom alleged by him to exist.

Held, that as the question was a pure question of law the plaintiff could be given an opportunity to raise it by way of amendment. AIR 1965 Manipur 24 (26).

(14) An amendment is called for when a change in the contents of the pleading is called for; not when a change of the ageney in the conduct either of the suit or of the defence takes place, the suit itself undergoing no change. AIR 1968 Cal 355 (359): 72 Cal WN 424.

(15) Suit by joint family business in name of assumed business title — Suit is nullity — Application for amendment by adding member of family as plaintiff — There could be no amendment of description of such plaintiff. AIR 1965 All 586 (589).

4. Amendment introducing new case in written statement.—(1) The principles applicable to the amendments of plaints will equally be applicable to amendments of written statements. AIR 1954 Nag 200 (202).

[See however AIR 1953 Cal 15 (17).]

(2) An amendment of a written statement setting up a case which is totally inconsistent with the original case set up will not be allowed if it is unjust to the opposite side to allow it. AIR 1956 Assam 70 (80): ILR (1955) 7 Assam 430 (DB) ** AIR 1955 Mys 141 (142): ILR (1955) Mys 422 ** **AIR 1967 SC 96 (98):** (1966) 1 SCR 796 ** AIR 1969 Pat 107 (109) ** AIR 1967 Manipur 28 (29) ** AIR 1967 Pat 386 (388) (DB) ** ILR (1966) 2 Cal 91 (96) ** (1964) 68 Cal WN 965 ** (1962) All WR (HC) 849: 1963 All LJ 190 ** AIR 1961 Bom 136 (140): 62 Bom LR 336 (DB) ** AIR 1961 Ker 110 (111): 1960 Ker LT 990 ** AIR 1959 All 546 (553) (DB) ** AIR 1959 Andh Pra 448 (458): (1959) 1 Andh WR 239 (DB).

(3) Where the proposed amendment of the written statement will have the effect of displacing plaintiff's suit a Court will refuse the application to amend. AIR 1942 Cal 153 (163): ILR (1942) 1 Cal 326 (DB) ** AIR 1934 All 11 (12) (DB).

(4) The Courts are inclined to be more liberal in allowing amendment of defence than of plaint. AIR 1953 Cal 15 (17) ** ('55) Madh BLJ 1955 HCR 1769 (1771) ** (1961) 3 Orissa JD 1. (Amendment of written statement — Amendment not working injustice to plaintiff—Amendment would be allowed even at late stage.) ** AIR 1960 Punj 575 (581, 582) (DB).

(5) Defendant seeking amendment of written statement — Amendment not prejudicing plaintift's case, but necessary for settlement of controversy — Amendment should be allowed and plaintiff given chance to rebut defendant's case. 1968 Pat LJR 617.

(6) Suit for ejectment based on title — Defendant seeking to add further ground in support of his defence — Facts constituting the ground alleged coming to the knowledge of the defendant subsequent to the filing of written statement — Facts sought to be introduced material in determining the legal effects on plaintiff's title

Order 6, Rule 17 — Note 4 (contd.)
— Proposed amendment held necessary for the purpose of determining the real question between the parties — Question of prejudice to the plaintiff not material in such contingencies. AIR 1964 Cal 439 (442) (DB).

(7) Amendment of written statement — Amendment changing nature of defence from admission to denial of plaintiff's right to redeem.

Held, amendment should be allowed as it went to root of case affecting question of liability of suit as also jurisdiction of Court. 1967 Jab LJ 117: 1967 MPLJ 165.

(8) Pre-emption — Allegations about consideration — General denial in written statement — Amendment to incorporate specific denial — Order refusing amendment held wrong. AIR 1965 Manipur 38 (39).

(9) Where in a suit for possession the defendant seeks by way of amendment an additional ground of defence not inconsistent with the original case set up in the written statement, the Court should allow the amendment even if the defendant has failed to set up such ground in the first instance. AIR 1949 Mad 467 (467).

(10) The improbability or the unconvincing nature of the new defence sought to be raised is not in itself a ground for refusing to allow an amendment of a written statement by the inclusion of such defence. AIR 1954 Nag 200 (202) ** AIR 1935 Pat 463 (465).

(11) The Court cannot permit the substitution in toto of one written statement for another already filed. ('50) AIR 1950 Mad 46 (47).

(12) A defendant can be allowed to amend his written statement by substituting a plea of denial of liability to be redeemed in place of an admission of liability, provided that the application was not belated, that the circumstances sought to be relied upon were not available at time when original written statement was filed and that there was valid explanation for omission to raise plea of denial in the original written statement. 1959 Ker LJ 117: 1959 Ker LT 159.

(13) Application in appeal for amending written statement raising an alternative case — Important question of law arising in amendment petition.

Held, petition should be allowed. AIR 1965 Manipur 23 (24).

(14) Amendment of written statement to election petition — Order 6 Rule 17 applies — However tribunal in considering the question of amendment should gain due weight to the consideration of expeditious disposal of election petitions. ILR (1964) 1 Punj 798.

5. Amendment taking away right accrued to a party by lapse of time. — (1) No amendment will be allowed which will work injustice to one of the parties. AIR 1955 Hyd 1 (2): ILR (1954) Hyd 575 (FB) ** AIR 1954 Pat 439 (441): 33 Pat 52 (DB) ** AIR 1959 Andh Pra 448 (458) : (1959) 1 Andh WR 239 (DB). (Unless there are good and proper reasons an amendment of plaint or written statement should not be allowed after the case is closed.)

(2) An amendment will work injustice to the opposite party where it takes away from a party a right accrued to him by lapse of time. AIR 1956 Cal 630 (634) (DB) ** AIR 1954 Punj 206 (206) ** AIR 1952 Cal 222 (225): ILR (1950) 1 Cal 108 ** AIR 1952 Punj 281 (282) ** **AIR 1967 SC 96 (98): (1966) 1 SCR 796.**

(3) As a rule, a plaintiff will not be allowed to amend his plaint by introducing a new cause of action which since the date of the plaint, has become barred by the statute of limitation. **AIR 1957 SC 444 (445): 1957 SCR 370** ** AIR 1958 All 663 (666) (DB) ** AIR 1958 Andh Pra 234 (235) ** AIR 1958 J and K 21 (23) (DB) ** AIR 1958 Mad 187 (193, 194): ILR (1958) Mad 257 (DB) ** AIR 1957 Pat 30 (32) (DB) ** AIR 1948 PC 100 (101, 102): 75 Ind App 147 ** (1969) 1 Andh WR 242 ** 1962 Ker LT 518: 1962 Ker LJ 644 ** AIR 1959 Madh Pra 425 (426): 1959 MPLJ 987 ** (1959) 1 Mad LJ 307.

(4) Amendment of plaint to include parties not joined within period of limitation — Cannot be allowed after expiry of period of limitation. AIR 1968 All 201 (202, 203).

(5) No such amendment should be allowed as will take away a valid defence under the law of limitation. AIR 1942 Sind 104 (105, 106) (DB) ** AIR 1933 Bom 450 (451) : 53 Bom 200 (DB) ** (1966) 1 Mad LJ 408: 79 Mad LW 206.

(6) Under peculiar or special circumstances, an amendment may be allowed even where it has the effect of depriving the defendant of his right to plead limitation. AIR 1956 Cal 630 (634) (DB) ** ('55) ILR (1955) Trav-Co 635 (643) (DB) ** AIR 1921 PC 50 (51, 52): 47 Ind App 255 ** (1969) 1 An WR 242 ** AIR 1968 Cal 213 (215) : 70 Cal WN 1095 (DB) ** 1967 Ker LJ 80: 1967 Ker LT 74 ** AIR 1967 Pat 326 (328) ** AIR 1965 Madh Pra 85 (88): 1965 Jab LJ 532 ** (1965) 67 Pun LR 1254 : ILR (1966) 1 Punj 329 ** AIR 1964 Andh Pra 118 (121) (DB) ** (1964) 68 Cal WN 786: 1963 Cal LJ 75 ** AIR 1964 Guj 174 (180): (1964) 5 Guj LR 678 ** AIR 1963 Andh Pra 78 (81, 82): (1962) 1 Andh WR 282 (DB) ** 1963 Raj LW 611: ILR (1963) 13 Raj 1155 ** 1962 Ker LT 771: 1962 Ker LJ 1288 ** (1962) 64 Pun LR 807 ** (1962) 64 Pun LR 633 ** 1961 Jab LJ 1509 ** AIR 1960 Andh Pra 222 (229): (1960) 1 Andh WR 340.

(7) Where there is no attempt by the proposed amendment to introduce a new cause of action or to claim a new relief, the rule does not apply. ('53) AIR 1953 Hyd 212 (214) ** (1968) 81 Mad LW 338 **AIR 1961 Bom 292 (296, 297, 299, 300): 62 Bom LR 251. (Defects in presenting,

Order 6, Rule 17 — Note 5 (contd.)
signing and verification of plaint — Not fatal — Can be cured by amendment even after limitation.)

(8) Where there is no question of depriving the opposite party of any legal right but the proposed amendment would only result in reduction of the court-fee payable by the party seeking the amendment, there is no objection to the amendment, being allowed. AIR 1954 Cal 26 (26) (DB) ** ('46) AIR 1946 Pat 408 (412) (DB).

(9) Election petition — Amendment of — Tribunal can allow any amendment provided it is sought within limitation prescribed by Section 81, R. P. Act. AIR 1963 Pat 235 (238): ILR 45 Pat 215 (DB).

6. Amendment not to be allowed when it places the opposite party in a position which cannot be compensated by costs.— (1) "There is no injustice if the other side can be compensated with costs." ('55) AIR 1955 Hyd 1 (2): ILR (1954) Hyd 575 (FB) ** AIR 1964 Mys 56 (58): (1963) 2 Mys LJ 263.

(2) If the amendment puts the other party to a disadvantage or causes injury and if the disadvantage or injury can be compensated by costs, then the amendment may be allowed. If it cannot, the amendment should be refused. **AIR 1957 SC 363 (363): 1957 SCR 595** ** ('54) AIR 1954 Pat 439 (441): 33 Pat 52 (DB) ** ('56) AIR 1956 Assam 79 (80): ILR (1955) 7 Assam 430 (DB).

(3) When the other side can be compensated by way of costs or other proper terms, the amendment ought not to be refused on the sole ground of delay or negligence. ('55) AIR 1955 Andhra 138 (139) ** (1963) 65 Punj LR 1016.

7. Amendment to be refused when the application is not in good faith. — (1) It is necessary for the exercise of the Court's discretion in allowing an amendment, that the applicant has acted in good faith. ('53) AIR 1953 Hyd 212 (215): ILR (1953) Hyd 366 ** ('49) AIR 1949 Ajmer 19 (22) ** ('22) AIR 1922 Cal 255 (256) (DB).

[See however ('52) AIR 1952 Mad 782 (782).]

(2) As a general rule, leave to amend ought not to be refused if the applicant has acted bona fide. ('54) AIR 1954 Ajmer 74 (75) ** ('53) AIR 1953 Hyd 212 (215): ILR (1953) Hyd 366 ** ('11) 11 Ind Cas 481 (491, 495) (DB) (Cal).

[But see ('52) AIR 1952 Mad 782 (782).]

(3) Leave to amend will be refused where the applicant has been acting mala fide. ('58) AIR 1958 Tripura 10 (11) ** ('56) AIR 1956 Ajmer 49 (49) ** (1968) 2 Andh LT 119 ** AIR 1960 Ker 150 (157): 1959 Ker LT 516 (DB).

(4) Courts will infer want of bona fides from great delay in applying for leave to amend. ('56) AIR 1956 All 439 (443): ILR (1956) 1 All 24 (DB) ** ('49) AIR 1949 Ajmer 19 (22).

(5) Where the application for amendment is made at a late stage of the suit and after the hearing had virtually concluded, the delay cannot be regarded as equivalent to mala fides. It can only give rise to the plea of laches against a party. 1965 All WR (HC) 441: 1965 All LJ 1147.

8. Amendment by adding or substituting a new plea of fraud. — (1) Where fraud of one kind has been pleaded, an amendment introducing a new and distinct kind of fraud in substitution of the fraud pleaded, will not be allowed especially after all the evidence has been given. ('87) 14 Ind App 111 (121): 11 Bom 620 (PC).

(2) Where no fraud has at all been alleged in the original plaint a new plea of fraud, except where strong grounds exist will not be allowed to be raised by way of amendment. ('46) AIR 1946 Lah 410 (422) (DB) ** ('28) AIR 1928 Mad 759 (760) ** **AIR 1965 SC 1008 (1011): (1965) 1 SCR 542.** (L. P. A. No. 85 of 1961 (Bom)- **REVERSED.)**

(3) The Court will, in every case, require to be satisfied about the truth and substantiality of the proposed amendment, and why the allegations were not originally made, before it grants the amendment. AIR 1924 Mad 883 (885).

(4) Where in a "passing off" action, the omission to refer to fraud in the plaint was due to an oversight and there were circumstances to show that the plaintiff intended from the very outset to allege fraud, it was held that, in the interests of justice the amendment should be allowed. AIR 1928 Mad 759 (760).

9. Amendment by adding new reliefs or claims. — (1) An alteration merely in the relief claimed in the suit does not as a general rule change the character of the suit, and an amendment seeking such alteration will be allowed if it does not cause injustice to the other side. AIR 1957 Mad 436 (437) (DB) ** ('55) ILR (1955) Trav-Co 635 (643) (DB) ** ('54) AIR 1954 Madh B 1 (2).

(2) Where a claim to which the plaintiff is entitled has been left out by a bona fide mistake, or by inadvertence, or on a misapprehension of facts, an amendment will be allowed by adding the claim so left out. ('56) 1956 Madh BLJ 1135 (1137) ** AIR 1953 Pat 131 (131): 31 Pat 775 (DB) ** AIR 1919 Cal 904 (906): 45 Cal 305 (DB).

(3) Where, by virtue of circumstances arising subsequent to the institution of the suit, the plaintiff becomes entitled to a larger or other relief than the one claimed, amendment may be allowed so as to add such other relief. ('55) AIR

Order 6, Rule 17 — Note 9 (contd.)
1955 Tripura 27 (28) ** ('53) AIR 1953 Mad 402 (403) (DB) ** AIR 1960 Cal 278 (282) ** AIR 1959 Andh Pra 9 (13): (1958) 2 Andh WR 447 (DB).

(4) All reliefs ancillary to the main relief asked for in the plaint may be allowed to be added by way of amendment. ('03) 5 Bom LR 329 (333) (DB) ** ('32) AIR 1932 Cal 87 (88) (DB) ** AIR 1963 Manipur 43 (44, 45).

(5) Where a mere declaration is asked for, an amendment by adding the appropriate consequential relief may be allowed. ('50) AIR 1950 Pepsu 21 (22) ** (1962) 64 Pun LR 1102 ** (1959) 61 Bom LR 1607: ILR (1960) Bom 154.

(6) Suit for possession — No prayer for declaration of title to suit land — **Held,** plaintiff would be entitled to declaration of title on basis of plaint or to amend plaint praying for declaration of his title after paying necessary Court-fee. AIR 1967 Tripura 33 (37).

(7) Suit for partition by residuary legatee before ascertainment of residue — Amendment so as to include prayer for administration allowed. AIR 1949 FC 64 (67): 1948 FCR 239.

(8) Where the consequential relief to set aside a decree is essential the plaintiff will not be allowed to omit the prayer for such relief in order to avoid payment of court-fee. AIR 1957 Madh Pra 134 (135).

(9) Where the proposed amendment is likely to cause injustice to the other side, it will not be allowed. AIR 1942 Cal 153 (163): ILR (1942) 1 Cal 326 (DB).

(10) Where the application for amendment introducing a new claim is made when the claim is barred by time, it cannot be allowed. AIR 1948 PC 100 (101, 102): 75 Ind App 147 ** ('52) AIR 1952 Punj 246 (247).

(11) Where a suit for specific performance or, in the alternative, for damages, was sought to be amended so as to convert it into a suit for damages only, it was observed that the Court should have the power of granting such an amendment in a proper case. But it is one to be most carefully and jealously exercised in all the circumstances of each individual case and with due regard to its effects upon the position both of the plaintiff and the defendant. AIR 1928 PC 208 (219): 55 Ind App 360.

(12) Suit for gratuity and other reliefs — Finding on preliminary issue that suit for gratuity was incompetent — Finding is no bar to any amendment being allowed by Court regarding plaintiff's claim to death-cum-retirement gratuity. AIR 1961 Punj 3 (5): 63 Pun LR 23.

(13) Suit for declaration of title with partition as consequential relief— Amendment seeking deletion of prayers for declaration and substituting therefor prayer for partition — Amendment allowed at plaintiff's risk as to the fate of suit. AIR 1959 Orissa 16 (17): 25 Cut LT 252.

(14) Where in suit for ejectment the defendant denies the title of the plaintiff as the landlord, it is not necessary for the plaintiff to amend his plaint by adding a prayer for declaration of title and ownership. AIR 1962 All 122 (122).

(15) In petition for divorce under Hindu Marriage Act (1955) alleging cruelty and adultery on part of husband the petitioner may be allowed to add alternative prayer for judicial separation if she files application for amendment. AIR 1961 Andh Pra 122 (123): (1960) 2 Andh WR 55.

10. Amendment by adding a new ground of relief. — (1) A new ground in support of the relief claimed cannot be said to alter the character of the suit and will as a general rule be allowed. AIR 1950 Cal 472 (473) ** ('57) 99 Cal L Jour 19 (38) ** AIR 1969 Bom 194 (197): 70 Bom LR 390 ** ILR (1966) Guj 660: (1966) 7 Guj LR 589 ** (1966) 1 Mad LJ 408: 79 Mad LW 206 ** (1966) 68 Pun LR 406.

(2) Necessary facts and circumstances set out in plaint — Amendment of plaint by addition of new relief allowed — No question of limitation arose. AIR 1959 Andh Pra 126 (128): (1957) 2 Andh WR 134 (DB).

11. "As may be necessary for the purpose of determining the real questions in controversy." — (1) The main object of allowing amendments is to get at the rights of the parties and to avoid multiplicity of suits, where the dispute can be settled in the suit already instituted without unfairness or injustice to the other side. ('59) AIR 1959 Andh Pra 9 (11, 12): ILR (1958) Andh Pra 569 (DB) ** ('57) AIR 1957 Trav-Co 59 (60, 61) (DB) ** ('55) AIR 1955 Hyd 1 (2): ILR (1954) Hyd 575 (FB) ** AIR 1969 Pat 181 (181, 182) ** AIR 1967 Delhi 61 (63): 69 Pun LR (D) 29 (DB) ** AIR 1965 Manipur 53 (56) ** AIR 1963 Manipur 43 (44, 45) ** 1960 Ker LJ 744: 1960 Ker LT 731. (Amendment involving bringing in new plaintiff with new cause of action, new subject-matter and new prayer — Joint suit by two plaintiffs maintainable — Application made at very early stage — No prejudice to defendant — Amendment allowed.)

(2) Where the properties in the plaint are wrongly described or some properties are omitted from the plaint by inadvertence, an amendment will be allowed for rectification. AIR 1952 Pepsu 31 (32): 2 Pepsu LR 571 ** AIR 1952 Raj 15 (16) ** AIR 1914 Lah 263 (264, 265): 1914 Pun Re No. 62 (DB) ** AIR 1934 Cal 640 (642) (DB).

(3) Where there is a mistake in the statement of the cause of action or a bona fide mistake or omission in making

Order 6, Rule 17 — Note 11 (contd.)
the necessary averments in the plaint, or in drawing up the pleadings, an amendment will be allowed. AIR 1952 Raj 7 (9) ** ILR (1951) 1 Raj 297 (FB) ** 1956 Madh BLJ 1272 (1275) ** AIR 1954 Assam 223 (224) (DB). (Petty clerical mistake.) ** AIR 1969 Pat 181 (181, 182) ** ILR (1966) Guj 877: (1966) 7 Guj LR 918 (DB).

(4) The "questions in controversy between the parties" when the parties join issue, do not include new questions which the defendant neither wished nor intended then to dispute. AIR 1952 Him Pra and Bilaspur 38 (40) ** AIR 1950 Raj 20 (24) ** AIR 1949 Ajmer 19 (21).

(5) The plaintiff should be allowed to amend his pleading so as to raise new grounds of claim where, owing to a change in the prevailing view of the law, during the pendency of the proceedings it was found that his original stand was not tenable. AIR 1941 PC 85 (88): 69 Ind App 64 ** AIR 1958 All 36 (37) ** 1961 Ker LT 114.

(6) Application for amendment on ground of subsequent events — **Held,** application was not allowable since relevant subsequent events were brought on record by opposite party in and with its written statement. 1967 Cur LJ 151.

(7) The governing consideration in an application for amendment should be how far, if at all the proposed amendment is necessary to determine the "real controversy" between the parties. AIR 1953 Cal 15 (17) ** ('54) 7 Sau LR 161 (162) ** (1964) 2 Andh LT 421.

[See also AIR 1968 MP 175 (177): 1968 MPLJ 171. (Question not in controversy between parties — Application for amendment rejected.)]

(8) An amendment which is not necessary to enable a party to raise the contention which he desires to raise thereby may be refused. ('56) AIR 1956 Bhopal 66 (66) ** ('53) AIR 1953 Mad 958 (963) (DB).

(9) A minor plaintiff, when he attains majority must be given an opportunity of making even drastic amendments to a plaint according to what he considers ought to have been correct and relevant allegations. ('57) AIR 1957 Mad 629 (629).

(10) Plea about unreliability of other party's evidence — Can be raised without incorporation of contention in pleadings — No necessity to amend the pleadings. **AIR 1967 SC 1124 (1129): (1967) 1 SCR 93.**

(11) Application under Section 45-H, Banking Companies Act without application under Section 543, Companies Act which was condition precedent — Since petition included all material required to be alleged for petition under Section 543, and since omission of Section 543 had created no prejudice in minds of opposite parties, Court allowed petition to be amended indicating in heading that it was also under Section 543. AIR 1962 Punj 433 (435): (1963) 33 Comp Cas 1043.

(12) Additional written statement by way of amendment of previous statement — One defendant raising new ground inconsistent with that raised in joint written statement — No injustice to plaintiff — Amendment allowed to determine real controversy between parties without payment of costs. AIR 1966 Orissa 6 (8, 9): 32 Cut LT 930.

12. Amendment by introducing new cause of action. — (1) The Court cannot, by way of amendment, substitute one distinct cause of action for another. ('55) 1955-2 Mad L Jour 13 (13) ** ('53) ILR (1953) 1 Cal 15 (19) (DB) ** **AIR 1967 SC 96 (98): (1966) 1 SCR 796** ** AIR 1969 Punj 187 (188): 1969 Lab IC 699 ** AIR 1965 Manipur 14 (15) ** AIR 1959 All 546 (553) (DB). (AIR 1923 Nag 241, **DISS. FROM.)**

[But see ('14) AIR 1914 Mad 322 (323).]

(2) Where the plaintiff sued for specific performance of a contract alleged to have been entered into by the defendant with him in 1912, and on his failure to establish the alleged contract sought to amend the plaint by setting up another and independent contract of 1903 it was held that such amendment could not be allowed. AIR 1922 PC 249 (251): 48 Ind App 214: 4 Upp Bur Rul 30.

[But see ('16) AIR 1916 Mad 1072 (1073) (DB).]

(3) A plaint can be amended by putting in the necessary ground of exemption from limitation for the suit, such as an acknowledgment of liability. AIR 1954 Cal 463 (467) (DB) ** AIR 1948 Nag 334 (340, 341): ILR (1947) Nag 477 (DB) ** (1967) 1 Mys LJ 411: 10 Law Rep 133.

(4) A new cause of action can well be allowed to be taken by way of an amendment provided it is an alternative plea. (1966) 1 Mad LJ 408: 79 Mad LW 206.

(5) Where, in respect of an original liability to pay a certain sum of money, a document is taken and the plaintiff in a suit on such document finds that the document is inadmissible in evidence owing to some technical defect, an amendment of the plaint by claiming relief as on the basis of the original liability does not, as a general rule, amount to a substitution of a distinct cause of action, and should, therefore, be allowed. AIR 1956 Mys 37 (38): ILR (1956) Mys 60 ** ('36) AIR 1936 Mad 785 (787) (FB) ** AIR 1969 Orissa 34 (35, 36) ** AIR 1961 Ker 169 (171): (1960) 2 Ker LR 75 ** AIR 1960 Raj 10 (12, 13): 1959 Raj LW 667 (DB) ** AIR 1959 Orissa 176 (176): ILR (1958) Cut 176.

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[But see 1963 Ker LT 354: 1963 Ker LJ 223.]

(5) Where the cause of action was the same both for the prayer for ejectment as well as for that for redemption and the subject-matter also was the same:

Held, that the conversion of the suit in ejectment into one for redemption by amendment of plaint could be allowed. AIR 1961 Mad 413 (415): 73 Mad LW 666.

(6) Where subsequent to the institution of the suit by the plaintiff, events happen which give the plaintiff a new cause of action for the relief claimed or the right to a new or additional relief, he will as a general rule, be allowed to amend the plaint by moulding it in an appropriate manner. AIR 1954 J and K 63 (64) ** AIR 1952 Assam 10 (14): ILR (1951) 3 Assam 305 (DB) ** AIR 1969 Pat 181 (182) ** (1967) 2 Mad LJ 468: 80 Mad LW 414 ** AIR 1965 Andh Pra 98 (101): ILR (1963) Andh Pra 931 (DB) ** AIR 1964 Manipur 1 (2) ** 1961 Jab LJ 780: 1961 MPLJ 501 ** AIR 1960 Ker 93 (94): 1959 Ker LT 807.

(7) Amendment on basis of subsequent events — Finding in another pending litigation cannot afford ground for amendment of plaint. AIR 1961 Pat 302 (304): 1961 BLJR 28.

[See however ('42) AIR 1942 Sind 4 (5).]

[But see ('27) AIR 1927 Cal 56 (57) (DB).]

(8) Where the cause of action is foreign to the original cause of action on which the suit was brought, the amendment cannot be allowed. ('52) AIR 1952 Punj 221 (221) ** ('50) AIR 1950 Cal 107 (107) ** ('31) AIR 1931 Mad 533 (533).

(9) Defendant attaining majority during pendency of suit—He may be allowed to file fresh written statement or amend one filed by his guardian ad litem. AIR 1962 Pat 159 (160).

(10) Fresh suit on another mortgage not barred — Amendment of pleading not allowed. AIR 1959 Ker 172 (174): 1958 Ker LT 1009 (DB).

13. "At any stage of the proceedings." —(1) The amendment can be made at any stage of the proceedings. AIR 1956 Mys 44 (45): ILR (1956) Mys 1 ** AIR 1955 Tripura 29 (30) ** ('55) Madh BLJ 1955 SCR 1769 (1771) ** AIR 1965 Ker 29 (30, 31): 1964 Ker LT 532. (Amendment of execution petition — Amendment can be allowed even after appellate decree has become time-barred.) ** ILR (1964) 1 Punj 798 (DB) ** (1963) 65 Punj LR 1016 ** AIR 1963 Raj 106 (109): 1962 Raj LW 696 ** AIR 1961 Punj 60 (65): 63 Pun LR 516 ** 1960 Ker LT 731 ** AIR 1959 All 579 (579): 1958 All LJ 437. (One of two trustees filing suit — Court has jurisdiction to allow amendment of plaint by joining other trustees at any stage.)

(2) An amendment may be allowed.

(a) Before or at, or after the trial or before the final decree in the case. AIR 1951 Nag 412 (414): ILR (1951) Nag 496 ** AIR 1949 Mad 467 (467) ** AIR 1969 Orissa 34 (35, 36) ** AIR 1963 Manipur 43 (45). (An amendment of the plaint can be allowed before admitting the plaint under O. 7, R. 9, before returning the plaint under O. 7, R. 10 or before rejecting the plaint under O. 7, R. 11 C. P. C.) ** AIR 1959 Cal 642 (644): ILR (1960) 2 Cal 1.

[See also (1963) 67 Cal WN 417. (Original side — Calcutta High Court — Practice — Preliminary decree passed — Amendment of plaint ordered thereafter — **Held** that if such a practice existed it was erroneous — Amendment as ordered should be carried out.)]

(b) In appeal. AIR 1954 Nag 65 (69): ILR (1953) Nag 579 ** AIR 1953 Trav-Co 237 (238): ILR (1952) Trav-Co 1011 ** **AIR 1960 SC 622 (624):** (1960) 2 SCR 768. (Amendment adding new prayer.) ** AIR 1968 Mys 266 (268): (1968) 1 Mys LJ 288 ** AIR 1967 Andh Pra 155 (165): 1967 Cri LJ 691: (1966) 2 Andh WR 401 (DB). (Election petition — Amendment formal and not resulting in prejudice or taking other party by surprise — Amendment allowed at the argument stage of appeal on ground that party which cross-examined witnesses on the point and had opportunity to tender rebuttal evidence cannot complain of prejudice.) ** AIR 1966 Bom 174 (179): 67 Bom LR 864 (DB) ** AIR 1965 Manipur 23 (24) ** AIR 1964 Andh Pra 118 (121) (DB) ** AIR 1963 Madh Pra 202 (205): 1962 Jab LJ 1039 ** AIR 1960 Andh Pra 222 (229): (1960) 1 Andh WR 340 (DB).

[See also AIR 1959 Cal 477 (478): ILR (1959) 2 Cal 623 (DB). (Plaint amended after preferring appeal — Appellate Court can hear appeal on basis of amended plaint.)]

(c) In second appeal. AIR 1958 Punj 460 (462, 463) ** ILR (1955) Cut 163 (175) (DB) ** I L R (1955) Trav-Co 635 (644) (DB) ** AIR 1963 Guj 153 (158): (1963) 4 Guj LR 172 ** ILR (1963) Cut 146 ** 1961 Jab LJ 1205 ** AIR 1959 Madh Pra 191 (193): 1959 MPLJ 285.

(d) In revision. ('13) 20 Ind Cas 831 (832) (Lah).

(e) Even in an appeal before the Federal Court or the Privy Council. AIR 1945 FC 47 (59): 1945 FCR 103 ** AIR 1925 PC 169 (170): 47 All 459 ** ('67) 11 Moo Ind App 468 (486) (PC).

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(3) A Court of appeal may remand the case directing the lower Court to amend the plaint and proceed with the trial. 1955-1 Mad LJ 5 (7) ** AIR 1950 All 396 (398): ILR (1951) 2 All 176 ** ('01) 23 All 167 (173) (DB).

(4) Mere delay, in applying for an amendment will not be a ground for refusing an application for leave to amend. AIR 1957 Pat 633 (636) (DB) ** AIR 1956 Mys 44 (45): ILR (1956) Mys 1 ** AIR 1955 Trav-Co 201 (206): ILR (1955) Trav-Co 411 **AIR 1969 Guj 159 (161, 164, 166) ** AIR 1969 Orissa 34 (35, 36) ** 1967 Ker LT 74: 1967 Ker LJ 80 ** (1964) 2 Andh LT 421 ** ILR (1963) Cut 345 ** AIR 1960 J and K 110 (111) ** AIR 1960 Punj 653 (654): 62 Punj LR 694 ** AIR 1959 Madh Pra 191 (193): 1959 MPLJ 285.

(5) Where the application is made at such a late stage that under the circumstances, it will cause injustice or injury to the opposite party if the leave to amend is granted the application will be refused. ('58) AIR 1958 Ker 368 (374) (DB) ** AIR 1958 Manipur 38 (40) ** AIR 1958 Tripura 10 (11) ** ('87) 11 Bom 620 (638): 14 Ind App 111 (PC) ** AIR 1969 Punj 187 (188): 1969 Lab IC 699 ** (1964) 2 Andh LT 421 ** AIR 1961 Punj 102 (104): 62 Pun LR 490 (DB) ** 1961 Raj LW 634 ** AIR 1960 Pat 54 (55, 56): 1959 BLJR 602 (DB) ** AIR 1959 Madh Pra 30 (33): 1959 MPLJ 823 (DB) ** AIR 1959 Mys 188 (189): 37 Mys LJ 496.

[See (1966) 1 Mad LJ 158: 78 Mad LW 749. (Suit for dissolution of partnership — Agreement found to be illegal — Plaintiff seeking to amend plaint by asking for restitution of contribution — Relief of restitution could be granted only if agreement itself was legal — Plaintiff should have asked for alternative relief in plaint in first instance and not in stage of second appeal.)]

[See also AIR 1969 Ker 19 (21): 1968 Ker LR 566. (Suit for redemption and possession of mortgaged property — Amendment seeking to convert it into one for possession on basis of title — Cannot be allowed in second appeal.) ** ILR (1966) Cut 503: 8 Orissa JD 290 (DB). (Plea of mala fide not taken in petition under Article 226 of Constitution — It cannot be allowed to be taken for the first time at the hearing stage.)]

[See however AIR 1954 Nag 200 (202).]

(6) Property belonging to mother disposed of by will by father — Daughter filing suit to recover property from beneficiaries under the will without impleading necessary parties viz., her brothers who were entitled to inherit property along with her — Though plea as to non-joinder was raised in trial Court itself and an issue was framed plaintiff making no attempt to amend her plaint even in the appeal before High Court — No application for amendment made even to the Supreme Court until the appeal was allowed to stand over after it was heard — **Held** that in the circumstances it would not be possible to entertain the application for amendment. **AIR 1965 SC 271 (276):** (1964) 6 SCR 1.

(7) Even though a question of the initial jurisdiction of the Court is raised at a late stage the Court should ordinarily decide it and should not avoid to decide it on the ground of undue delay. 1961 Jab LJ 329: 1961 MPLJ 394.

(8) Amendment of material facts in election petition to introduce corrupt practice after period of limitation — Tribunal has no jurisdiction to allow such amendment. AIR 1965 Mys 102 (107): (1964) 1 Mys LJ 488 (DB).

(9) Defendant deliberately desisting from setting forth his case in trial Court — Decree in favour of plaintiffs — Fresh allegations sought to be raised by defendant in appeal — Such allegations inconsistent with those in trial Court and improving original case — Amendment held could not be allowed. AIR 1964 Manipur 5 (6-7).

(10) In the absence of an enabling provision, if on the date the application for amendment was made the suit would have been barred by limitation, there is no escape but that the application has got to be dismissed on the ground of limitation. (1969) 1 Mad LJ 393.

14. Opportunity to be given to the opposite party to amend his pleading.—(1) Where a pleading is allowed to be amended. an opportunity should be afforded to the opposite side to meet the new case by filing any additional statement or letting in such further evidence as may be necessary. AIR 1956 Bhopal 16 (16) ** AIR 1955 Ajmer 8 (1) (8) ** AIR 1929 PC 306 (308) ** 1965 All LJ 1011 ** (1959) 61 Bom LR 1607: ILR (1960) Bom 154.

(2) Where an amendment of a plaint allowed at the appellate stage is purely of a formal character, if the appellate Court thinks that any reply to the amendment by the defendant is necessary it should call one from the defendant and should itself determine whether, and, if so, how far, further proceedings are called for. A remand of the case to the lower Court is unnecessary. **AIR 1954 SC 5 (8, 9).**

(3) Amendment of plaint after filing of written statement — Additional written statement should be limited to amended portion of plaint only. AIR 1961 Him Pra 46 (47, 48).

(4) There is no rule of law, statutory or otherwise, which restricts or limits the defendant when he is called upon to file a written statement to an amended plaint, to contest the plaintiff's claim to any particular pleas. AIR 1960 Punj 575 (581, 582) (DB).

(5) Amendment of plaint after filing of written statement — Court permitting defendant by unqualified order to file

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fresh written statement — Scope of fresh written statement — Not confined to amended part of plaint — Statement is not also controlled by O. 6, R. 7. AIR 1966 Punj 162 (164, 165): 67 Pun LR 335 (AIR 1961 Him Pra 46, **Dissent. from.**)

(6) Amendment of memo of appeal by adding question of law such as non-registration of firm and lack of jurisdiction allowed — Amendment in written statement by adding same questions is necessary. AIR 1964 Manipur 5 (6).

(7) Plea raised in defence for first time — Any material relevant to meet that defence can be validly relied upon by plaintiff in the course of evidence without amending plaint. AIR 1959 Pat 540 (544, 545): 1959 BLJR 425.

(8) Defendant allowed to amend written statement — Plaintiff should be given chance to rebut defendant's case. 1968 Pat LJR 617.

15. "On such terms as may be just."— (1) As a general rule an amendment will only be allowed on the terms that the cost of the application for leave to amend, and the costs occasioned by, and in consequence of, the amendment shall be paid by the party amending, in any event. AIR 1951 Nag 412 (414, 415): ILR (1951) Nag 496 ** AIR 1915 PC 172 (173) ** AIR 1964 Andh Pra 118 (121) (DB).

[See also 1961 Jab LJ 1509. (Amendment allowed without awarding costs though Court should have allowed the same — Awarding of costs is in discretion of Court — High Court refused to interfere in revision.)]

(2) Where a party accepts under an order costs which, but for the order, would not at that time be payable, he cannot afterwards object that the order ought not to have been made. AIR 1927 Mad 1009 (1009) ** AIR 1934 Cal 554 (555, 556): 61 Cal 433 (DB) ** AIR 1961 Bom 136 (139): 62 Bom LR 336 (DB).

[But see AIR 1956 Mad 105 (108): ILR (1956) Mad 719 (DB) ** AIR 1956 Mad 679 (679).]

(3) Where an amendment of a pleading is allowed on condition of the party paying to the opposite party a certain sum as costs and such sum is paid and accepted by the opposite party, the latter cannot afterwards object to the order allowing amendment. AIR 1955 Nag 222 (223): ILR (1956) Nag 314 (DB) ** AIR 1957 Him Pra 23 (25) ** AIR 1965 Punj 463 (465) (DB) ** AIR 1964 Pat 275 (277): 1964 BLJR 291 (DB) ** 1961 Jab LJ 905.

(4) If the costs are accepted under protest and the right to challenge the order is reserved it would be open to challenge the order notwithstanding that the costs are accepted. AIR 1961 Bom 136 (139): 62 Bom LR 336 (DB).

(5) Amendment of plaint allowed on payment of costs before a fixed date — Costs not paid within time fixed — Court can extend time in the interest of justice. 1959 Ker LT 457.

(6) Amendment costs have to be allowed as amendment costs and the determination of such costs cannot be based on any irrelevant considerations such as an anticipatory possible remand that the Court might envisage. Remand for fresh trial would constitute a ground for imposing heavy amendment costs only when the Court is allowing the amendment and at the same time remanding the case for a fresh trial. AIR 1961 Madh Pra 169 (170, 171): 1961 MPLJ 1124.

(7) Additional written statement by way of amendment of previous statement — One defendant raising new ground inconsistent with that raised in joint written statement — No injustice to plaintiff — Amendment allowed to determine real controversy between parties without payment of costs. AIR 1966 Orissa 6 (8, 9): 32 Cut LT 930.

15A. How amendments should be made.— (1) Pleadings can never be deemed to have been amended; if any amendment is sought by a party, it must be expressly made with the leave of the Court. AIR 1960 Punj 62 (64) (DB).

(2) Amendment of plaint — Mere offer to amend is not sufficient; application for amendment is necessary. AIR 1967 Andh Pra 331 (338): (1967) 1 Andh LT 345 (DB).

(3) The suit for accounts was instituted in August, 1948 and the second appeal was heard and disposed of in 1959. At the time of argument in second appeal the plaintiff's counsel orally prayed that the High Court should permit him to amend the plaint. It was held that there was no proper application for amendment in accordance with the rules and it was not possible to accede to this exceedingly belated request. AIR 1960 Punj 62 (64) (DB).

(4) When amendments of pleadings cannot be conveniently embodied in the plaint or written statement then an amended plaint or written statement embodying the additional pleadings allowed should be filed and insisted upon by the Courts. AIR 1959 Manipur 9 (9).

(5) Revisional Court allowing amendment of plaint on 12-2-1959 — Delay in communication of order — Amendment carried out on 29-10-1959 with permission of trial Court — Defendant's objection that amendment not carried out within time — Plaintiff applying to High Court for extension of time from 26-2-1959 to 29-10-1959 — Mistake condoned under Section 151 C. P. C. for ends of justice. AIR 1962 Andh Pra 527 (528): (1962) 1 Andh LT 491.

(6) Parties pleading jointly — One alone cannot apply for amendment — He must file separate plaint. AIR 1961 Ker 153 (153): 1960 Ker LT 1102.

Order 6, Rule 17 — Note 15A (contd.)

(7) Relief clause sought to be amended but not clause stating valuation.

Held, that the amendment was consequential on the grant of the amendment of the relief. and could have been ordered by the Sub-Judge. AIR 1959 Manipur 9 (10).

16. Court not having jurisdiction over suit if can allow amendment of plaint.— (1) A Court which has no jurisdiction to entertain a suit is not competent to allow an amendment of the plaint which, if granted, would bring the suit within its jurisdiction. AIR 1953 Assam 102 (103): ILR (1952) 4 Assam 167 ** AIR 1949 Mad 719 (720).

(2) The Court can return the plaint for presentation to the proper Court and the plaintiff can amend the plaint and represent it to the same Court. AIR 1954 All 749 (750) ** AIR 1953 Nag 273 (273): ILR (1953) Nag 792 (DB).

(3) Plaint filed in High Court — Amendment showing Court had jurisdiction may be allowed. AIR 1960 Cal 540 (541).

(4) Where an amendment in the plaint in a suit instituted in a competent Civil Court was allowed after an Act taking away the jurisdiction of the Civil Court had come into force, as the objection to jurisdiction of the Civil Court was not raised at the time of amendment the amendment could not be challenged subsequently. AIR 1964 Punj 462 (464): 66 Pun LR 518.

(5) Second appeal dismissed in limine — Decree of High Court does not supersede that of the Court of first appeal — Application for amendment lies to Court of first appeal. 1966 Cur LJ 195 (Punj).

17. Amendment taking suit out of jurisdiction, if can be allowed. — (1) Even where an amendment of the plaint takes the suit out of the jurisdiction of the Court, the Court should allow the amendment and return the plaint as amended to the proper Court. AIR 1958 All 96 (96) ** AIR 1949 Mad 208 (210) ** AIR 1969 Ker 75 (77): 1968 Ker LT 479 ** AIR 1959 Raj 146 (147): 1959 Raj LW 175.

[See also AIR 1960 Cal 123 (127, 128): ILR (1960) 2 Cal 754. (Change of relief affecting nature of suit and jurisdiction of Court cannot be allowed without formal amendment.)]

[But see (1959) 1 Mad LJ 307 ** AIR 1957 Andh Pra 10 (11) ** AIR 1953 Nag 273 (273): ILR (1953) Nag 792 (DB).]

18. Suit not properly instituted — Amendment.—(1) Where the suit is not properly instituted, the defect cannot be cured by amendment. The only course open to the plaintiff is to file a fresh suit. AIR 1958 Him Pra 1 (4) ** AIR 1944 Bom 201 (202, 203): ILR (1944) Bom 66.

[But see AIR 1953 Bom 28 (29): ILR (1953) Bom 188.]

(2) Suit in name of firm by partners doing business outside India — It is only misdescription of plaintiff — Plaint can be amended by substituting partners' names, under S. 153 and possibly under this rule — Order 1, R. 10 has no application. **AIR 1961 SC 325 (327, 330):** (1961) 1 SCR 982. (AIR 1928 Bom 191, AIR 1931 Cal 770, **OVERRULED.** AIR 1960 Cal 15, Affirmed.) ** AIR 1960 Cal 15 (17, 18, 20) (DB). (AIR 1957 Cal 668, **Reversed.**)

18A. Extent of amendment.—Application for grant of permit in respect of certain route — No power in R. T. A. or Appellate Authority to grant permit in respect of curtailed route after amendment of application. AIR 1965 Madh Pra 286 (287) : 1965 MPLJ 41 (DB).

19. Effect of amendment and limitation. —(1) After amendment the Court must look to the amended pleadings and leave out of consideration those before amendment. AIR 1948 Oudh 307 (337) : 22 Luck 522 (DB).

(2) Where an amendment is allowed under this rule, such amendment relates back to the date of the suit as originally filed where no party is added. AIR 1956 Trav-Co 97 (98): ILR (1955) Trav-Co 98 (DB) ** AIR 1950 Pepsu 21 (22) ** AIR 1964 Punj 462 (464): 66 Pun LR 518 ** AIR 1960 Cal 61 (62): 63 Cal WN 832.

(3) Filing of suit in October 1957 in X Court having pecuniary jurisdiction to try it—For some administrative reasons, transfer of suit in 1962 to Y Court having pecuniary jurisdiction to try it—Petition for amendment of plaint before Y Court allowed — Valuation of suit for purposes of jurisdiction.

Held date of institution of suit had to be taken as October 1957 — Amendment related back to date of institution of suit and amended relief, therefore, had to be valued as on date of institution of suit in 1957 and not as on date of amendment or as on date of transfer. (1967) 1 Andh LT 373: (1967) 1 Andh WR 241.

(4) The amendment of a plaint by the addition of a necessary party cannot relate back to the date of the filing of the suit. ILR (1956) Madh B 26 (37) (DB) ** AIR 1937 Rang 124 (125) (DB).

(5) A plaint can be allowed to be amended under this rule although at the time of the amendment the suit (if instituted then) would have been barred by limitation. **AIR 1957 SC 357 (362):** 1957 SCR 438 ** AIR 1958 J and K 62 (63, 64) ** AIR 1958 Tripura 36 (37) ** AIR 1957 Kerala 21 (22) (DB) ** ('57) 99 Cal LJ 19 (38).

(6) Plaintiffs instituting suit as shebaits of deities — Omission to include deities as plaintiffs — Court can allow to correct omission even if plaintiffs' claim is barred by limitation. 1963 BLJR 861.

(7) When the application for amendment had been made within time, all that followed afterwards would not make the plaint barred by limitation. The order of

R. 18. Failure to amend after order.—If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

[R S. C., O. 28, R. 7; Cf. 1882 and 1877, S. 53.]

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amendment must relate back to the date of the application for amendment. ILR (1959) 9 Raj 90: 1959 Raj LW 110.

20. Appeal.—(1) No appeal lies from an order granting or refusing an amendment under this rule. AIR 1956 Raj 43 (45): ILR (1955) 5 Raj 143 ** AIR 1952 Assam 50 (50): ILR (1951) 3 Assam 136 (DB).

[See however AIR 1918 Cal 188 (189) (DB).]

(2) An Appellate Court, in an appeal from the decree in the suit will not interfere with the discretion of the lower Court in granting or refusing amendments. AIR 1954 Nag 65 (69): ILR (1953) Nag 579 ** ('55) 1955-1 Mad LJ 5 (7) ** 1961 Jab LJ 905. (Trial Court allowing amendment on sound judicial principles— Discretion exercised cannot be interfered with in appeal.) ** AIR 1961 Punj 60 (66): 63 Pun LR 516.

(3) An appellate Court will not interfere with order made by subordinate Court on application under O. 6 R. 17 in exercise of its discretion without exceeding the limits of its power unless it acted perversely or unless the view taken by it is clearly wrong. **AIR 1960 SC 368 (376, 377):** (1960) 2 SCR 289. (Election Tribunal neither exceeding its power nor acting perversely in disallowing amendment — High Court is not justified in setting aside order of Tribunal.)

(4) An order refusing leave to amend a plaint is not appealable under the Letters Patent as a judgment. AIR 1917 Mad 350 (350) (DB).

(5) Where the effect of an amendment of the plaint is to take away from the new party, substituted by the amendment, his defence of limitation, the order of amendment is a judgment within the meaning of Cl. 15 of the Letters Patent. AIR 1956 Cal 630 (633) (DB).

(6) An order allowing amendment under O. 6, R. 17, Civil P. C. of the petition filed under the Jammu and Kashmir Restitution of Mortgaged Properties Act of 2006 is appealable under S. 12 of the Act and is not revisable under S. 115, Civil P. C. AIR 1957 J and K 12 (13) (DB).

(7) Amendment in written statement allowed by trial Court when counsel for both parties were present — Objection not raised — Prayer for time for making consequential amendment in plaint not made — Nor any grievance made on next hearing which took place after two months — Plaintiff held had no justification to question the amendment by raising a ground on appeal. AIR 1967 Bom 382 (384): 69 Bom LR 559.

21. Revision. — (1) An order passed under O. 6, R. 17 either allowing an amendment or refusing to allow an amendment is a "case decided" within the meaning of S. 115, Civil P. C. 1968 All LJ 109: 1968 All WR (HC) 103 (FB). (AIR 1936 All 686 (FB), **Overruled.**)

(2) For other Cases See S. 115 Note 4.

Order 6, Rule 18

1. Failure to amend after order. — (1) The only consequence of the failure to amend within time would be, that the party cannot amend his pleading afterwards, unless the time is extended by the Court. ('42) ILR (1942) Kar (PC) 143 (152) (PC) ** AIR 1940 Mad 641 (645).

(2) Where the appellate Court directs the trial Court to allow an amendment of the plaint, the plaintiff must file the amended plaint within the time fixed by that Court and where there is a further appeal, within fourteen days of the order of the second appellate Court if no time has been fixed by it. ILR (1953) 3 Raj 988 (990, 991) (DB) ** AIR 1952 Pepsu 42 (43).

(3) It is the appellate Court where it allows an amendment which has jurisdiction to extend the time fixed by it and not the trial Court. AIR 1952 Pepsu 42 (43) ** AIR 1954 Nag 65 (69): ILR (1953) Nag 579.

[But see AIR 1962 Andh Pra 527 (528): (1962) 1 Andh LT 491. (Where the trial Court thought it had powers to extend time given by the revisional Court to amend the plaint, mistake committed in the circumstances, could certainly be held to be bona fide and could be condoned, if necessary, by the exercise of the inherent powers vested in the High Court under Section 151.)]

(4) If an appellate Court while remanding a case to the trial Court limits the time within which the plaintiff is to amend his plaint, and if the suit is dismissed because the plaintiff could, for no fault of his, not comply with the direction, the appellate Court can when the case again comes before it in appeal extend the time as provided by S. 148 of the Code. AIR 1952 Pepsu 42 (43).

(5) In a proper case, the final Court of appeal has also power to grant extension of time. ILR (1953) 3 Raj 988 (993) (DB) ** AIR 1952 Pepsu 42 (43).

(6) Amendment of pleadings of Election petition are not governed by provi-

ORDER VII

PLAINT

R. 1. Particulars to be contained in plaint.—The plaint shall contain the following particulars:—

(a) the name of the Court in which the suit is brought;

(b) the name, description and place of residence of the plaintiff;

(c) the name, description and place of residence of the defendant, so far as they can be ascertained;

(d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;

(e) the facts constituting the cause of action and when it arose;

(f) the facts showing that the Court has jurisdiction;

(g) the relief which the plaintiff claims;

(h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and

(i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

[1882 and 1877, S. 50; 1859, S. 26; See 26 and O. 6, R. 2.]

Order 6, Rule 18 — Note 1 (contd.)
sions of Rules 17 and 18 of this order. AIR 1968 Guj 289 (294, 295).

(7) When the amendments are incorporated in the copy of the plaint produced by the plaintiff, what the Court has to do is to get the amendments incorporated in the original plaint, call upon the defendants to file additional written statements if any and then proceed with the suit in the usual way. 1959 Ker LT 469 (469): 1959 Ker LJ 362 (DB).

(8) Non-joinder of parties within period of limitation — Amendment to include them as parties cannot be allowed after expiry of period of limitation. AIR 1968 All 201 (203).

ORDER 7, RULE 1 — SYNOPSIS

1. Scope.
2. "Name, description and place of residence".
3. Party, a minor or person of unsound mind — See Order 32.
4. "Facts constituting the cause of action".
5. When cause of action arose.
6. "Facts showing that the Court has jurisdiction".
7. "Relief which the plaintiff claims" — See Order 7, Rule 7.
8. Set-off or relinquishment of portion of claim.
9. Valuation of suit.

1. Scope. — (1) The provisions of this rule are imperative. AIR 1925 Nag 183 (184) ** AIR 1915 Cal 681 (682): 42 Cal 85 (DB).

(2) Court is competent to grant relief not prayed for in plaint, by way of compromise decree. A joint application containing the terms of compromise supersedes original case of parties contained in pleadings. AIR 1962 All 20 (22).

(3) Petition for winding up on ground of indebtedness of company — Petition itself must be self-sufficient to prove case. (1965) 69 Cal WN 1: (1965) 35 Com Cas 180.

2. "Name, description and place of residence". — (1) The full description of the party and the character in which he sues or is sued should be given in the plaint. AIR 1935 Bom 333 (335) ** AIR 1939 Pat 430 (431) ** ILR (1961) 11 Raj 390. (Suit by Karta of Joint Family on behalf of all members including minors is maintainable.)

(2) The word "description" includes the age, father's name. (1897) 7 Mad L Jour 81 (82) (DB).

(3) The titles by which the defendant is generally known should also be given. (1872) 18 Suth WR 301 (302, 303) (PC). (**REVERSING** on appeal ('66-68) 3 Mad HCR 31 and **OVERRULING** (1899) 12 Suth WR 450.)

(4) Where a person is sued in two capacities it is not necessary that his name should be repeated twice in the cause title. It is sufficient if the two capacities are indicated in the body of the plaint. AIR 1943 Cal 319 (327): ILR (1943) 1 Cal 274 (DB). ((1928) 1 KB 663: 96 LJ KB 1040, Relied on.)

(5) The place of residence of the plaintiff should be accurately given. (1879) 4 Cal L Rep 366 (370). (To describe plaintiff as residing in Chitpore Road is not sufficient.)

(6) The place of residence of the defendant should be given as accurately as can be ascertained; it is not sufficient to make vague statements as to the defendant's place of residence such as "carrying on business in Calcutta" or "formerly in Calcutta now residing in Kashmir". AIR 1931 Cal 458 (462): 58 Cal 418 ** (1879) 4 Cal L Rep 366 (371).

(7) If the plaintiff after inquiry is unable to ascertain the particulars regarding the defendant's place of residence fully, he should include a paragraph in the plaint

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Bombay: Dadra and Nagar Haveli[a]

For item (i) substitute the following:—

"(i) Statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits, showing the provisions of law under which the valuation of the court-fees and jurisdiction is separately made." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Kerala: Laccadive, Minicoy and Amindivi Islands[a]

Same as that of Madras but without the Proviso. (9-6-1959.)

[a] See Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3.

Madras and Pondicherry

Substitute the following for sub-clause (d) of Rule 1:—

"(d) Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect, and in the case of a minor, a statement regarding his age to the best of the knowledge and belief of the person verifying the plaint:

Provided that, where, owing to the large number of defendants or any other sufficient reason, it is not practicable to ascertain with reasonable accuracy the age of the minor defendant, it may be stated that the age of the minor defendant is not known." [R.O.C. No. 1433/43—B. I]: Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-68]

Order 7, Rule 1 — Note 2 (contd.)

to that effect. (1900) 5 Cal WN Ixiii (Ixiii).

(8) It is not sufficient to give these particulars in the cause title of the plaint, as the cause title is not covered by the verification of the particulars in the plaint. AIR 1931 Cal 458 (461): 58 Cal 418.

(9) In a suit by or against a corporation, the plaintiff or defendant, as the case may be, is the corporation itself and the name, description and place of business of such corporation only need be given. It is not necessary to give the particulars of the person who purports to sign the pleading. (1949) 15 Cut L Tim 39 (42, 46).

[See also ILR (1966) Guj 877: (1966) 7 Guj LR 918 (DB). (Misnomer or misdescription of defendant can be corrected by amendment.) ** AIR 1962 Cal 283 (284, 285): 65 Cal WN 1128 (DB). (If a person intends to sue persons who for the time being occupy posts of Chief Executive Officer and City Architect of Municipal Corporation he must implead them by their individual names.)]

(10) It is a fundamental principle that a suit can be instituted only by the person having the cause of action or by some one on his behalf. AIR 1936 Pat 198 (200): 14 Pat 633.

(11) Where a plaintiff has reason to believe that any adverse party is an Indian soldier who is serving under special conditions, he shall state the fact in his plaint. So also Section 3 of the Merchant Seaman (Litigation) Act (1946), requires a similar mention in the case of a serving seaman.

3. Party, a minor or person of unsound mind. — See Order 32.

4. "Facts constituting the cause of action."— (1) As to the meaning of the words cause of action, see Section 20 and the following case. AIR 1947 Bom 293 (295): ILR (1948) Bom 91 (DB) ** 1967 All LJ 17. (Cause of action means the bundle of facts which have to be established to entitle a plaintiff to a decree.) ** 1967 All LJ 17 (20) ** AIR 1966 All 333 (336): ILR (1965) 2 All 129 ** AIR 1961 Andh Pra 143 (153): (1960) 2 Andh WR 115 (DB). (It is not necessary that the legal effect thereof should be mentioned in the plaint.) ** AIR 1959 Cal 162 (164): ILR (1959) 2 Cal 402 (DB). (Case under Defence of India Rules (1939), Rule 75-A.)

[See also AIR 1959 Cal 715 (722): (1960) 30 Com Cas 582. (In a suit for injunction, restraining a breach of a contractual obligation, a pleader must, at least, plead the contract and the threatened breach thereof.)]

(2) In a suit by an endorsee of a promissory note, the plaint must clearly allege that the endorser was given notice of dishonour and also give particulars of the notice. If he claims exemption he must state facts on which the claim is based. AIR 1956 Raj 129 (136): ILR (1956) 6 Raj 612 (DB).

(3) In a suit by a remote reversioner challenging a gift from the Hindu widow in favour of the nearer reversioner who has by accepting the gift precluded himself from challenging the same, it is sufficient if he avers in the plaint the factum of the gift and need not set out any further circumstance to show how he being a remote reversioner, is entitled to sue. AIR 1953 Him Pra 73 (74).

Mysore

Delete R. 1 and substitute the following :—

1. The plaint shall contain the following particulars:—

(a) the name of the Court in which the suit is brought;

(b) the name, age, description, place of residence and place of business, if any, of the plaintiff;

(c) the name, age, description, place of residence and the place of business, if any, of the defendant, so far as can be ascertained by the plaintiff;

(d) Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect and in the case of a minor, his age to the best of the knowledge and belief of the person verifying the plaint:

Provided that, where, owing to the large number of defendants or any other sufficient cause, it is not practicable to ascertain with reasonable accuracy the age of the minor defendants, it may be stated that the age of the minor defendants is not known;

(e) the facts constituting the cause of action and when it arose;

(f) the facts showing that the Court has jurisdiction;

(g) the relief which the plaintiff claims;

(h) where the plaintiff has allowed a set-off or relinquished a portion of the claim, the amount so allowed or relinquished; and

(i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits. (30-3-1967.)

Order 7, Rule 1 — Note 4 (contd.)

(4) The Court must look more to the substance than the form of the action. Whatever may be the name given to the action and although it does not fall within any of the recognized forms of action it must not be rejected. AIR 1953 Mys 147 (150): ILR (1953) Mys 213 (DB).

(5) Where the plea of adverse possession is specifically taken in the course of pleadings before the Court it is immaterial that it was not taken in the plaint itself. AIR 1949 Oudh 32 (33): 23 Luck 283.

(6) In applying the maxim ex turpi causa non oritur actio one has to see whether the illegality goes to the root of the matter. If the illegality be trivial and the plaintiff is not required to rest his case upon that illegality then public policy demands that defendant should not be allowed to take advantage of the position. **AIR 1960 SC 213 (216, 217): (1960) 1 SCR 861.**

5. When cause of action arose.— (1) It is necessary for the plaintiff to state specifically when the cause of action for the suit arose. AIR 1932 Cal 259 (261, 262): 59 Cal 448 ** Madh BLJ 1954 HCR 108 (109) ** AIR 1930 Mad 742 (744) ** (1901) 26 Bom 360 (362) (DB).

[See also AIR 1915 Cal 675 (678).]

(2) The specific mention as to when the cause of action arose is necessary for the purpose of enabling the Court or the defendant to ascertain from the plaint whether there is a cause of action, and whether it is not barred by the law of limitation. AIR 1932 Cal 259 (261, 262): 59 Cal 448 ** AIR 1959 Ker 377 (379): 1959 Ker LT 475 (DB).

[See also AIR 1950 Pat 206 (209).]

(3) The statement as to when the cause of action arose need not be made in a separate paragraph, if it is clear from the other facts alleged in the plaint. AIR 1928 Lah 516 (526): 9 Lah 428 (DB) ** ILR (1965) 2 All 343.

(4) A plaintiff is not absolutely bound by the statement regarding the date of the accrual of the cause of action; it may be determined or inferred from the facts stated. (1879) 4 Cal 529 (531) (DB).

[See also AIR 1935 All 759 (760).]

(5) Where a plaintiff has placed before the Court all the facts on which he bases his claim without deducing his legal position properly from those facts and thus bases his suit on a wrong cause of action he can take the correct stand even after the period of limitation. AIR 1944 Mad 530 (531).

6. "Facts showing that the Court has jurisdiction."— (1) All the facts showing that the Court has jurisdiction should be set out in the plaint, and if any special jurisdiction vested in the Court by law is invoked, all the facts which call for the exercise of that jurisdiction should be set out. AIR 1952 Kutch 77 (78) ** AIR 1938 Mad 497 (498) ** AIR 1961 J and K 61 (62).

[See AIR 1934 Pat 593 (594).]

(2) When jurisdiction of a Court to try the suit is disputed, the Court must decide the same preliminary to the adjudication of the suit itself. AIR 1918 Mad 998 (1000, 1006): 40 Mad 1 (FB) ** AIR 1932 All 413 (414) (DB).

[See also AIR 1960 Bom 141 (143, 144): 61 Bom LR 1097 (DB). (Jurisdiction of tribunal appointed under Section 135 (2) Railways Act, if disputed, should be proved.)]

(3) The Court has to decide the question by considering the cause of action disclosed in the plaint and the substantive relief to which the plaintiff, if successful, would

Order 7, Rule 1 — Note 6 (contd.)

be entitled and not with reference to the prayers which the plaintiff had thought fit to put in the plaint. AIR 1956 Bom 649 (649).

(4) The plaint allegations alone and not the defences or evidence let in by parties should decide the question of jurisdiction. AIR 1956 Pepsu 80 (81): ILR (1956) Patiala 141 ** AIR 1963 All 574 (577, 578).

(5) Where in a claim under Section 13 of the Displaced Persons (Debts Adjustment) Act, 1951, the claimant had stated that he was a displaced person while the defendant resided at Gurdaspur, it was held that it could not be said that the claimant had not alleged as required by Section 4 (ii) of the Displaced Persons (Institution of Suits) Act, 1948, that the cause of action had arisen in a place now situated in Pakistan. The maxim secundum allegata et probata did not apply to the case. AIR 1958 Punj 361 (364): ILR (1958) Punj 682.

(6) Suit for possession — Additional prayer for injunction — Such prayer cannot confer on Civil Court jurisdiction to entertain suit where its jurisdiction has been expressly barred. AIR 1966 All 367 (369): 1965 All LJ 549.

(7) Where certificate under Section 46 (2), Income-tax Act (1922) is issued for recovery of arrears due from father and the sons file suit for declaration that their interests in joint family properties are not bound on ground debt being avyavaharika debt, such a suit is not premature as they are not bound to wait till date of sale. AIR 1959 Mad 71 (72): (1958) 2 Mad LJ 563 (DB).

7. "Relief which the plaintiff claims."— See Order 7, Rule 7.

8. "Set-off or relinquishment of portion of claim."— (1) The amount set off or relinquished should be specified with precision, or at least should be stated in such a manner that the amount may be inferred from the other allegations in the plaint. (1900) 1900 All WN 214 (214) (DB).

[See (1910) 8 Ind Cas 943 (943) (Mad).]

9. Valuation of suit.— (1) The plaintiff should distinctly state in the plaint, the valuation of the suit for the purposes of court-fees and of jurisdiction. As the two valuations may not be the same in several cases, they have to be stated specifically. AIR 1955 Bhopal 6 (6).

[See AIR 1937 Bom 326 (333) : ILR (1937) Bom 402 (DB).]

(2) Where the plaintiff claims reliefs arising out of the same cause of action, he can state the aggregate value of his reliefs, but if he claims reliefs in respect of two, or more distinct causes of action, he should state the valuation of each cause of action separately, as the court-fee is separately payable in respect of each. See Court-fees Act (VII of 1870), S. 17.

(3) Where the plaintiff claims reliefs in the alternative, he should also state his valuations in respect of the two reliefs, and the court-fee is payable on the value of the larger relief. (1882) 6 Bom 302 (303) ** (1891) 15 Bom. 82 (83) (DB) ** AIR 1932 Mad 158 (159) : 55 Mad 336.

[See also AIR 1930 Nag 55 (56).]

(4) The valuation of a suit for the purposes of jurisdiction is necessary in order to ascertain whether the suit is within the pecuniary jurisdiction of the Court. AIR 1918 Mad 998 (1002): 40 Mad 1 (FB) ** 1968 All WR (HC) 501.

(5) A plaintiff should state the true value at which the subject-matter of the suit ought to be valued; it should not be arbitrary or fanciful. AIR 1951 Nag 218 (223) : ILR (1950) Nag 928 (DB) ** AIR 1932 All 413 (414) (DB) ** AIR 1935 Mad 874 (874).

[See also ILR (1953) 3 Raj 1009 (1011).]

(6) The question of court-fees should be determined with reference to the plaint as it is and not as it ought to have been. AIR 1932 All 316 (317)**AIR 1933 All 350 (351): 55 All 274 (DB). (Note.— This case is impliedly overruled on another point in AIR 1934 All 620: 57 All 17 (FB).) ** AIR 1935 Cal 273 (274, 275) (DB) ** AIR 1968 Punj 302: 70 Pun LR 87.

(7) Whether a case falls within any particular provision of the Court-fees Act must be determined from the substance and not merely from the language or form of the plaint. AIR 1943 Nag 70 (71): ILR (1943) Nag 440 ** AIR 1932 Lah 132 (133): 13 Lah 391 (DB) ** AIR 1933 Mad 430 (431) (DB).

(8) The plaint must be read as a whole. AIR 1949 Pat 166 (167).

(9) The mere fact that a suit has been under-valued or over-valued cannot affect the decree unless the wrong valuation has prejudicially affected the merits of the case. AIR 1933 All 249 (252): 55 All 315 (FB).

(10) If no objection is made to the valuation given in the plaint, that matter must be deemed to be final between the parties. AIR 1958 Pat 430 (432): 36 Pat 1123 (FB).

(11) Subject matter once valued is determination of forum of appeal. AIR 1965 All 46 (47, 48): 1964 All LJ 186 (DB) ** 1962 All LJ 432 (433, 434).

[But see AIR 1967 Goa 118 (119) (DB). (On appeal valuation by consent of parties held to be reasonable and not contrary to Portuguese Civil P. C.)]

(12) Application for leave to appeal to Supreme Court — Valuation adopted in plaint and accepted for appeal by defendant — Party applying for certificate can show higher and real value of subject-matter — He is not precluded from doing so by provisions of Section 11, Order 7, Rule 1, Order 8, Rule 2 or Order 41, R. 1 (2), C. P. Code or Section 115 of Evidence Act. AIR 1961 Mad 511 (513): (1962) 1 Mad LJ 65 (FB).

R. 2. In money suits.—Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed:

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

[1882 and 1877, S. 50; 1859, S. 26; See O. 20.]

HIGH COURT AMENDMENTS

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17 (31-10-1966 and 1-5-1967).

Mysore

For Rule 2 substitute the following:—

"2. Where the plaintiff seeks for recovery of money, the plaint shall state the precise amount claimed, and wherever a statement of account or a memorandum of calculation is necessary for the purpose, such statement or memorandum shall be set out in the schedule to the plaint or separately annexed thereto.

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for." (30-3-1967.)

Punjab, Haryana and Chandigarh

In the second paragraph after the word "defendant" insert "or for moveables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate" and after the word "amount" where it last occurs insert "or value". (12-5-1909.): Act 31 of 1966, Ss. 29 and 32 (1-11-1966).

Order 7, Rule 1 — Note 9 (contd.)

(13) There is no law directing how the value of the subject-matter of a petition under Section 10 of Hindu Marriage Act (1955) is to be fixed. The subject-matter of the petition being not capable of pecuniary valuation, it cannot be said that it exceeded any sum of money. AIR 1961 All 395 (396): 1961 All LJ 232 (FB).

ORDER 7, RULE 2 — SYNOPSIS

1. Scope.
2. Mesne profits.
3. Accounts.
4. Suit for damages.

1. Scope.— (1) In a suit for the recovery of money, (except in a suit for mesne profits, or for an amount which will be found due to the plaintiff on taking unsettled accounts between the plaintiff and the defendant) the plaint should, as a rule, state the amount claimed precisely. (1870) 14 Suth WR 373 (374) (DB).

(2) In money suits there is no provision to claim future mesne profits. 1962 Mys LJ (Supp) 420 (DB).

(3) Claim for money by past member of co-operative society — Specific amount not stated in plaint — Suit cannot be entertained. AIR 1961 Ker 258 (259): 1960 Ker LT 1288.

2. Mesne profits.— (1) A plaintiff may claim in a suit past mesne profits, i.e., mesne profits accruing up to the date of institution of the suit, and future mesne profits from the date of institution up to the delivery of possession. The valuation in the plaint should, under this rule, be only with reference to the amount of the past mesne profits claimed. AIR 1954 Tripura 8 (10) ** AIR 1953 Pat 289 (290) ** AIR 1937 Mad 46 (48): ILR (1937) Mad 284 (DB).

[See AIR 1915 Cal 352 (353, 354): 43 Cal 650 (655) (DB).]

(2) The future mesne profits need not be valued, since it is impossible to give even an approximate statement of the amount. AIR 1953 Pat 289 (290) ** AIR 1926 Pat 218 (229): 5 Pat 361 (FB). (Per Jwala Prasad J.) ** AIR 1925 Cal 1076 (1080, 1081): 53 Cal 14 (FB).

(3) The valuation of the past mesne profits given will be the valuation of the "amount sued for" under this rule, and is the valuation for the purposes of jurisdiction. AIR 1926 Pat 218 (225, 229): 5 Pat 361 (FB).

See Ss. 6 and 96.

(4) A suit for recovery of past mesne profits must be for a fixed sum. AIR 1963 Madh Pra 194 (197): 1963 MPLJ 87 (DB).

(5) Regarding past mesne profits plaintiff has an existing cause of action on the date of institution of the suit. He must specifically claim a decree for the past mesne profits, value the claim approximately and pay Court-fees thereon. The Court has discretionary powers to pass the decree for future mesne profits. **AIR 1967 SC 155 (157, 158): (1966) Supp SCR 128** ** AIR 1960 Andh Pra 566 (569): (1960) 2 Andh WR 143 (DB).

R. 3. Where the subject-matter of the suit is immoveable property.—Where the subject-matter of the suit is immoveable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

HIGH COURT AMENDMENTS

Assam and Nagaland

Same as that of Calcutta.—Assam High Court Order 1948, Cl. 6 and Act 27 of 1962, S. 15.

Bombay: Dadra and Nagar Haveli[a]

For Rule 3, substitute the following:—

"3. Where the subject-matter of the suit is immoveable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. In cases of encroachment an accurate plan shall also be filed along with the plaint." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Calcutta: Andaman and Nicobar Islands

Add at the end the words "and where the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same area in terms of the local measures'.

Order 7, Rule 2 — Note 2 (contd.)

(6) In a suit for mesne profits, the amount sued for may be stated approximately. A claim for waste in respect of property in possession of another stands on the same footing. The date for valuation must be provided by the person in possession of the property. AIR 1966 Ker 286 (292, 293): 1966 Ker LT 333 (DB).

(7) Claims for future mesne profits specifying precise amount — Plaintiff not entitled to more than amount so specified in pleadings. AIR 1969 Ker 181 (183): 1968 Ker LT 264.

(8) Future mesne profits can be claimed only in suits regarding immovable properties. 1962 Mys LJ (Supp) 420 (DB).

3. Accounts.— (1) A suit for money which will be found due on taking accounts, is instituted when the defendant is under a legal obligation to render accounts which the plaintiff is not in a position to ascertain. AIR 1947 Bom 255 (259): ILR (1947) Bom 162 (DB) ** (1912) 8 Nag LR 36 (38).

[See also AIR 1950 East Punj 92 (103): ILR (1949) East Punj 547 (FB).]

(2) In a suit for money which will be found due on taking accounts, this rule requires that the plaintiff should state approximately the amount which will be found due to him on taking unsettled accounts between him and the defendant. AIR 1947 Bom 255 (258) : ILR (1947) Bom 162 (DB).

(3) The approximation required under sub-rule (2) may be a rough and ready approximation such as the plaintiff is able to give. 22 Ind Cas 71 (73) (DB) (Bom) ** AIR 1935 Lah 689 (689).

(4) The valuation given by the plaintiff is purely tentative, and is the valuation for the purposes of jurisdiction. See Section 6.

(5) Where a plaintiff sets up a case on account stated it is incumbent on him to say so in clear terms or at least to allege and prove that there were reciprocal items of account which were settled and adjusted between the parties and that the balance found due to the plaintiff was the result of an agreement to set off items on one side of the account against those on the other. AIR 1949 Oudh 48 (49) : 23 Luck 47 (DB).

(6) A suit by agent for accounts against his principal is maintainable in special circumstances if the agent is not in possession of the accounts and the value of the suit may be tentative. AIR 1960 Andh Pra 13 (14, 15): (1959) 1 Andh WR 384.

4. Suit for damages.— (1) It has been held that in a suit for damages based on fraud the plaintiff may give an approximate valuation in the plaint and offer to pay additional Court-fees in case a larger amount is found due before the decree is passed, as Section 11 of the Court-fees Act will not apply to such a case. (1907) 17 Mad L Jour 625 (626) (DB).

(2) In a suit for damages the plaintiff must pay ad valorem Court-fee upon the value of the subject-matter of the plaint and this value cannot but include, among other things, the amount of the general damages claimed. AIR 1957 Raj 39 (41): ILR (1955) 6 Raj 877 (DB).

ORDER 7, RULE 3 — SYNOPSIS

1. "Immovable property."
2. "Description sufficient to identify it."
3. Conflict between description by boundaries and by area.

1. "Immovable property".— (1) This rule does not apply unless immovable pro-

R. 4. When plaintiff sues as representative.—Where the plaintiff sues in a representative character, the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

[1882, S. 50, para 4; See S. 92, O. 1, R. 8; O. 30, O. 31.]

HIGH COURT AMENDMENT

Mysore

For Rule 4, substitute the following:—

"4. (1) Where the plaintiff sues in a representative character, the plaint shall show not only that he has an actual existing interest in the subject-matter, but also that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

(2) When the permission of the Court under Rule 8 of Order I of this Code is sought, before or at the time of the institution of the suit, the plaint shall be accompanied by an application supported by an affidavit stating the number or

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Order 7, Rule 3 — Note 1 (contd.)

perty is the subject-matter of the suit. AIR 1932 Lah 328 (330).

See also S. 16.

2. "Description sufficient to identify it".— (1) A plaint should contain a description of the immovable property sufficient to identify it. AIR 1950 Pat 306 (308, 309) ** (1900) 5 Cal WN 121 (123) (DB) ** AIR 1964 Tripura 36 (37) ** 1961 Raj LW 128.

(2) A suit cannot be dismissed or a plaint rejected on the ground that the description is insufficient. (1897) 1 Cal WN 574 (576) ** (1906) 3 Cal L Jour 560 (566) (PC) ** AIR 1920 Pat 82 (83).

[See (1899) 26 Cal 845 (849) (DB).]

[See also 18 Ind Cas 745 (746) (DB) (Cal).]

[See however (1874) 22 Suth WR 426 (426) (DB).]

[But see (1905) 1 Cal L Jour 27n (28n) (DB).]

(3) In the case of insufficient description the Court may call upon the plaintiff to furnish the necessary particulars or allow the plaintiff to amend his plaint by giving such particulars. AIR 1915 Cal 597 (598, 599) (DB) ** (1874) 21 Suth WR 187 (187). (Court may allow amendment.)

(4) In the case of chur lands which are constantly going under water and re-forming, it is very difficult to premise with any degree of certainly, whether the claim would be for a reformation in situ or for contiguous accretion, until full investigation, based upon a survey and comparison of maps, is made. Hence, in such a case the plaint should not be construed too strictly. AIR 1933 Cal 199 (202) (DB).

(5) In a suit for recovery of land where the description of land is not sufficient to identify it, decree granted to plaintiff is unworkable. AIR 1964 Tripura 36 (37, 38).

(6) Misdescription or insufficient description of property in decree — Executing Court can hold enquiry to ascertain subject-matter of decree. 1961 Raj LW 128.

(7) What exactly is the land or area of the land over which the dispute exists is a question which goes to the root of the matter. Omission of proper description either in the plaint or non-supply of a map annexed to the plaint or in course of evidence is not a formal defect. (1966) 32 Cut LT 864 (868, 869): ILR (1966) Cut 13.

3. Conflict between description by boundaries and by area.— (1) If in the plaint, or in any deed, there is an inconsistency between the description by the boundaries and by the area, that which is more certain and stable and least likely to have been mistaken, and which sufficiently identifies the land should prevail. AIR 1944 Pat 254 (256): 23 Pat 145 (DB) ** (1909) 37 Cal 293 (308) (DB).

[See (1897) 1 Cal WN clxxxix (clxxxix).]

(2) The true construction is that which will, as far as possible, bring the several factors into harmony with one another and express most nearly the intention of the parties. (1909) 2 Ind Cas 123 (125) (DB) (Cal).

(3) If a land is conveyed with definite boundaries, and the measurements indicate a smaller area than that covered by the boundaries, the rule of interpretation is that the area covered by the boundaries should prevail. AIR 1950 Trav-Co 19 (19) ** AIR 1924 Mad 493 (493) (DB) ** AIR 1931 Cal 596 (598): 58 Cal 686 (DB).

ORDER 7, RULE 4 — SYNOPSIS

1. Scope.
2. Suit in representative character.
3. Steps necessary to institute suit.
4. Probate and letters of administration.
5. Hindus.
6. Mahomedans.
7. Indian Christians.
8. Europeans, Parsees, Jews and Armenians.
9. Succession certificate.
10. Suit for rent.

approximate number of parties interested, the places where they respectively reside, that they have all the same interest in the subject-matter of the suit and the nature of the said interest, and the best means of giving notice of the institution of the suit to the said parties. If the permission sought is granted, the plaint shall state or be amended so as to state that the plaintiff sues on behalf of himself and all other persons interested in the subject-matter of the suit and that he has been permitted by the Court to do so by an order of Court made on a particular date, in the application mentioned above. (30-3-1967.)

Order 7, Rule 4 — Synopsis (contd.)

11. Suit for debt.

12. Suit by or against a company — See Order 29, Rules 1 and 2.

13. Suit by or against a club — See O. 1, Rule 8.

14. Cause title of the suit.

1. Scope.— (1) The provisions of this rule should be strictly complied with. ('25) AIR 1925 Nag 183 (184).

(2) If the provisions are not complied with the plaint may have to be rejected on presentation. AIR 1914 Bom 286 (287): 38 Bom 618 (DB).

2. Suit in representative character.— (1) A suit by a shebait on behalf of the idol is an instance of a representative suit. AIR 1930 Pat 97 (97) (DB).

[See also AIR 1930 Pat 455 (459): 9 Pat 885 (DB).]

(2) A plaintiff suing in a representative capacity should set it out clearly in the plaint and show that he is qualified to do so. (1883) 7 Bom 467 (470, 471) (DB) ** AIR 1925 Nag 183 (184).

[See also AIR 1956 Nag 125 (126): ILR (1956) Nag 13 ** AIR 1956 Pat 478 (482) ** AIR 1954 Assam 111 (112): ILR (1953) 5 Assam 322 (DB).]

(3) The plaint should show that the plaintiff has an actual existing interest in the subject-matter, and the representation must be based on some authority legally expressed: the plaintiff must further be capable in law of representing the person whom he professes to bind. AIR 1956 Nag 204 (206): ILR (1956) Nag 556 ** AIR 1927 All 128 (130) (DB).

(4) The Court has no jurisdiction to adjudicate upon a right when there has been no proper representation of the interests in litigation. AIR 1918 Cal 487 (488) (DB).

(5) As to who are proper representatives in particular cases, see the following cases. AIR 1952 Orissa 312 (315) (DB). (The idol is a juridical person capable of holding property in an ideal sense but the possession and management vest in the shebait. That gives him the right to bring suits necessary for the protection of the property.) ** (1865) 2 Suth WR 49 (50, 51) (DB). (Hindu widow cannot represent husband when sons are alive.) ** (1889) 16 Cal 40 (56): 15 Ind App 195 (PC). (After adoption of a son to her husband widow represents the adopted son during his minority.) ** (1893) 20 Cal 498 (504): 20 Ind App 25 (PC). (Do.) ** (1881) 6 Cal 479 (481) (DB). (Hindu widow representing estate of her deceased husband.)

3. Steps necessary to institute suit.— (1) A person cannot institute an action as administrator in respect of an estate of a person who has died intestate before he gets the grant of the letters of administration. **AIR 1916 PC 202 (204): 43 Ind App 113.**

See Section 212, Succession Act, 1925.

(2) In a suit by a person, as an administrator, the plaint should state that the plaintiff has obtained the letters of administration. (1908) 12 Cal WN 738 (739).

[See however AIR 1914 Bom 286 (287): 38 Bom 618 (DB).]

(3) Where a person dies leaving a will, the executor derives his title and authority from the will of the testator and not from any grant of probate; he may, therefore, institute a suit as executor before obtaining a probate, though he may not be entitled to a decree unless he produces a probate, inasmuch as the production of the probate is the only way in which he is allowed by law to prove his title. **AIR 1916 PC 202 (204): 43 Ind App 113 ** (1911) 39 Cal 327 (334): 38 Ind App 7 (PC) ** (1913) 37 Bom 158 (172) (DB).**

(4) It is not necessary for a person claiming on succession to the effects of a deceased person, to obtain a succession certificate before instituting a suit for the recovery of a debt due to the deceased, though no decree will be passed before the production thereof. (1893) 16 Mad 454 (455) (DB) ** AIR 1924 Pat 525 (526) (DB) ** (1891) 15 Bom 105 (106) (DB).

The same rule will apply to applications for execution of decree. (1893) 20 Cal 755 (757) (DB) ** (1896) 20 Bom 76 (77, 78) (DB) ** ('94) 16 All 26 (28).

[See (1891) 15 Bom 265 (267) (DB).]

(5) The obtaining of a probate or of a succession certificate in such cases is not a step necessary to enable the plaintiff to institute the suit. (1893) 6 CPLR 157 (158).

(6) This rule applies only to the institution of suits and does not prohibit the continuing of the suit already filed by the legal representatives of a plaintiff dying during the pendency of the suit, provided the representative capacity is established before decree. (1892) 16 Bom 519 (521).

4. Probate and letters of administration. — (1) Except in certain particular cases probate and letters of administration are necessary to establish any right to the pro-

Order 7, Rule 4 — Note 4 (contd.)

perty. See Succession Act, 1925, Sections 212, 213.

(2) A probate issued from a Native Court is not sufficient for instituting a suit in British India. (1894) 17 Mad 14 (16) (DB).

(3) Where a probate is not produced, the Court should grant time to the plaintiff to produce the probate, and not dismiss the suit. (1883) 5 All 555 (556).

5. Hindus. — (1) As regards a will made by a Hindu, probate is necessary only if the will is made on or after the 1st September 1870, within the territories which on that date, were subject to the Leiutenant-Governor of Bengal or were within the local limits of ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay and if, the will is made outside those territories or limits, but relates to immovable property situate within those territories or limits. See Succession Act, 1925, Section 213.

(2) It is not obligatory on executors or legatees under wills made before 1st September 1870, or those made in mofusil to take out probate or letters of administration (with copy of will annexed) to establish their rights in Court of law. (1890) 17 Cal 272 (275) (DB) ** (1882) 6 Bom 73 (75) (DB) ** (1896) 18 All 260 (262) (DB).

(3) Where a Hindu dies intestate, it is not necessary to obtain letters of administration to the estate of the deceased. See Succession Act, 1925, S. 212 (2).

(4) If the suit is to recover a debt due to the deceased, it is necessary that a probate or letters of administration or a succession certificate should be produced, as otherwise no decree can be passed. See Succession Act, 1925, S. 214.

6. Mahomedans. — (1) In the case of Mahomedans, it is not necessary to obtain a probate or letters of administration. (1910) 37 Cal 839 (843).

See Succession Act, 1925, Sections 212, 213.

(2) If the suit is for the recovery of a debt due to the deceased, it is necessary to produce a probate or letters of administration or succession certificate. (1884) 8 Bom 241 (255) (DB).

See Succession Act, 1925, Section 214.

7. Indian Christians. — (1) "Indian Christian" has been defined to mean a native of India, who is or in good faith claims to be of unmixed Asiatic descent and who professes any form of the Christian religion. See Section 2 (d) of the Succession Act, 1925.

(2) Till the passing of the Native Christians Administration of Estates Act, 7 of 1901, the Indian Christians were governed by the Succession Act (1865) and, therefore, if the deceased died intestate, letters of administration were necessary and in case the deceased left a will, a probate of the will was necessary to establish any right to his property. But the Native Christian Administration of Estates Act provided that Section 190 of the Succession Act, 1865 shall not apply to the property of an Indian Christian who died intestate, and though a probate was still necessary in the case of a will, no letters of administration were necessary in the case of intestacy. See Sections 190 and 187 of the Succession Act, 1865.

(3) The law is the same since the passing of the Succession Act, 1925. See Succession Act, 1925, Section 212.

(4) A probate, however, is necessary in the case of a will. A succession certificate is necessary in a suit to recover a debt due to deceased as above. See Succession Act, 1925, Section 214.

8. Europeans, Parsees, Jews and Armenians. — (1) These persons are governed by the provisions of Section 212 (1) and Section 213 (1) of the Succession Act and, therefore, it is necessary to obtain a probate or letters of administration, as the case may be, to establish any right in a Court of law. (1894) 18 Bom 337 (342) (DB) ** AIR 1927 Bom 474 (476, 477): 51 Bom 771 (DB).

9. Succession certificate. — (1) In a suit for recovery of a debt due to a deceased person, the person claiming on succession to the effects of the deceased should produce a probate, or letters of administration, or a succession certificate having the debt specified therein, as otherwise no decree can be passed. See Succession Act, 1925, Section 214.

(2) If the suit is for recovery of a joint family debt and the plaintiff claims by survivorship, no succession certificate is necessary. (1895) 19 Bom 338 (339) (DB) ** (1899) 22 Mad 380 (381) (DB) ** (1910) 38 Cal 182 (187) (DB).

[See also (1891) 1 Mad L Jour 679 (680) (DB).]

[But see (1907) 30 Mad 454 (458) (DB).]

(3) As to the other cases where succession certificate is not necessary, see the following cases. (1892) 16 Bom 240 (241) (DB). (To file an award.) ** (1896) 20 Bom 437 (438) (DB). (Curator suing under Act XIX of 1841.) ** (1897) 20 Mad 162 (166, 167): 24 Ind App 73 (PC). (Widow suing as trustee of endowment for a debt due thereto.)

10. Suit for rent. — (1) The word "debt" in Section 214 (1) of the Succession Act, 1925, does not include rent, revenue or profits in respect of land used for agricultural purposes (see Section 214 (2)) and, therefore, no succession certificate is necessary to recover rent for agricultural land. (1899) 26 Cal 536 (538) (DB) ** (1907) 17 Mad L Jour 257 (257) (DB).

[See however (1891) 1 Mad L Jour 680 (682).]

(2) The amount of the decree for rent deposited by defendant in Court is still rent and can be withdrawn without a suc-

R. 5. Defendant's interest and liability to be shown.—The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

[1882, S. 50, para 5. Cf. 1877, S. 50, Cl. 5.]

Order 7, Rule 4 — Note 10 (contd.)

cession certificate by the legal representatives of deceased decree-holder. (1913) 18 Ind Cas 495 (495) (DB) (Cal).

11. Suit for debt. — (1) The Court cannot pass a decree against a debtor of the deceased in favour of a person claiming on succession to be entitled to the effects of the deceased, except on production of a succession certificate, etc. See Succession Act, 1925, Section 214.

(2) As to what is a suit for debt, see the following cases. (1908) 30 All 315 (317) (DB). (Dower whether prompt or deferred is a debt.) ** 1891 Pun Re No. 88 p. 429 (430) (DB). (Do.) ** (1894) 22 Cal 143 (150). (Suit on mortgage — Not a suit for debt.) ** (1894) 16 All 259 (268) (FB). (**DISSENTING FROM** 19 Cal 336 — Suit for sale on mortgage — Succession certificate necessary.) ** (1888) 15 Cal 54 (57, 58). (Purchaser of mortgaged property is not a "debtor".) ** (1906) 29 Mad 77 (79) (DB). (Suit on mortgage — But if personal remely sought, succession certificate necessary.) ** (1908) 12 Cal WN 145 (150) (DB). (Do.) ** (1895) 18 Mad 457 (458). (Suit for damages for wrongful detention not a suit for debt.) ** (1901) 28 Cal 246 (249) (DB). (Right for personal decree being conditional not a debt.) ** (1899) 22 Mad 139 (141, 144) (DB). (Suit for accounts — Not a suit for debt.) ** (1909) 36 Cal 936 (938, 939) (FB). (Debt existing in life of the creditor but which became payable only after his death is still a debt.) ** (1898) 2 Cal WN 591 (593) (DB). (Debt fallen due sinee death of creditor — No succession certificate is necessary.)

12. Suit by or against a company. — See order 29, Rules 1 and 2.

13. Suit by or against a club. — See Order 1, Rule 8.

14. Cause title of the suit. — (1) It is not necessary under this rule that the capacity in which the plaintiff sues should be stated in the cause title of the plaint, although it is a convenient place to make such a statement. It is sufficient if the capacity in which the plaintiff sues appears in the body of the plaint. AIR 1954 Assam 111 (112): ILR (1953) 5 Assam 322 (DB) ** AIR 1928 Nag 319 (321) ** AIR 1919 Cal 245 (247): 46 Cal 877 (DB).

[See Appendix A "Description of parties" in particular cases.]

(2) The strict rules of English pleadings are not applicable to India. AIR 1928 Mad 445 (447) (DB).

Order 7, Rule 5

1. Defendant's interest and liability. — (1) This rule makes it necessary that the plaintiff should show the interest of the defendant in the subject-matter of the suit and his liability to meet the plaintiff's demand. AIR 1924 Nag 191 (193, 194).

(2) If the defendant is sued in a representative capacity, it is incumbent on the plaintiff to state the capacity in which the plaintiff seeks to make him liable, as otherwise any decree passed will bind no more than the defendant's individual interest. AIR 1927 PC 41 (41) ** (1867) 11 Moo Ind App 241 (265, 266) (PC) ** (1876) 1 Cal 133 (140): 2 Ind App 275 (PC).

[See AIR 1935 Mad 425 (426) (DB) ** (1878) 3 Cal 198 (204, 205): 4 Ind App 247 (PC).]

(3) In a suit for the recovery of money against the defendant who was described as a mahant of a temple, it must be stated whether he was sued in his personal capacity or in the capacity of a mahant. Where it was stated during the course of the proceedings that he was being sued in his personal capacity, but it was found that the loan was taken for the purposes of the temple, the plaintiff would not be given a personal decree against the defendant and for the failure of the plaintiff to aver that the defendant was being sued in his capacity as a mahant even no decree against the defendant as a mahant would be given. AIR 1957 Raj 264 (266, 267): ILR (1957) 7 Raj 629.

(4) In a suit against the manager of a Hindu joint family it is not necessary, in order to bind the minor members that the capacity in which the manager is being sued, should be specifically mentioned in the plaint and it is sufficient if the person sued has a representative capacity and this fact is established by independent evidence. AIR 1948 Nag 324 (327): ILR (1948) Nag 393 (DB) ** AIR 1963 Orissa 11 (16) (DB). (Cause title not showing defendant as Karta but body of plaint showing him as Karta.)

(5) As to the liability of the defendant in particular cases, see the cases cited below. AIR 1953 Mad 822 (823) (DB). (Proceedings even in execution against manager bind joint family including minor members — Both acts and omissions of manager are binding.) ** ILR (1954) Madh B 329 (333). (Debt incurred by widow to save sale of estate in execution — Bond however giving right to creditor to file suit and recover debt out of movables belonging to widow — Suit brought not to make estate liable but for a personal decree against widow — Decree cannot be executed against estate which has come into the hands of reversioner on the death of widow.) ** (1890) 14 Bom 597 (603, 604) (DB). (Other members of family are

R. 6. Grounds of exemption from limitation law.—Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed.

[1882, S. 50, para 6; 1859, S. 26.]

Order 7, Rule 5 — Note 1 (contd.)

bound by a decree properly passed against manager.) ** (1904) 28 Bom 383 (389) (DB). (Son liable to pay father's debts whether father is dead or alive.) ** (1904) 27 Mad 71 (75) (DB). (Son not liable to pay sums misappropriated by father where misappropriation involves criminal offence.) ** (1902) 24 All 459 (460) (DB). (Sons and grandsons liable under mortgage bond executed by sons' father.) ** (1899) 23 Bom 454 (457) (DB). (Surety debts of father bind the son.) ** (1904) 28 Bom 408 (411) (DB). (Surety debts of grandfather not binding on grandson.) ** (1885) 7 All 716 (719) (DB). (Suit against some only of heirs of deceased Mahomedan does not bind heirs not parties to suit.) ** (1885) 7 All 822 (826) (FB). (Do.) ** (1875) 1 All 57 (59, 60) (FB). (Do.) ** (1883) 9 Cal 406 (410) (DB). (Mortgagee of several properties from heir-at-law can proceed against purchaser of one of them only to the extent to which that property is liable.) ** (1881) 8 Cal L Rep 447 (488) (DB). (Creditor of deceased Mahomedan cannot follow assets in hands of bona fide purchaser from heir-at-law.) ** (1879) 4 Cal 402 (408): 5 Ind App 211 (PC). (Do.) ** (1908) 30 All 352 (358, 359) (DB). (Estate of husband not liable for debts voluntarily incurred by wife to pay off husband's debts during husband's lifetime.)

(6) If there are more defendants than one the plaint should disclose a cause of action against each defendant and should state the interest of each defendant in the subject-matter and how each defendant is liable to meet the plaintiff's demand. AIR 1924 Nag 191 (193, 194).

(7) Where a suit is filed against a person who is not a necessary party the Court ought to dismiss the suit without going into the merits, in the absence of a necessary party. AIR 1945 Mad 11 (12) (DB).

Order 7, Rule 6

1. Scope.— (1) Where, but for some ground of exemption from the law of limitation, a suit would prima facie be barred by limitation, it is necessary for the plaintiff to show in the plaint such ground of exemption. If no such ground is shown in the plaint, it is liable to be rejected under Order 7, Rule 11 (d). AIR 1955 Ajmer 1 (1) ** AIR 1955 Kutch 2 (4) ** Madh BLJ 1954 HCR 108 (109) ** 34 Bom 540 (545) (DB).

[See also AIR 1951 Cal 198 (199) (DB).]

(2) The plaintiff will not be allowed to show the ground of exemption at the trial by putting in evidence any documents, such as acknowledgments of liability. AIR 1955 Ajmer 1 (1) ** AIR 1944 Nag 247 (249): ILR (1944) Nag 244 ** AIR 1934 PC 208 (210).

(3) The Court may save in exceptional circumstances, allow the plaint to be amended by making the necessary allegations. AIR 1944 Nag 247 (249): ILR (1914) Nag 244 ** Madh BLJ 1954 HCR 108 (109) ** (1909) 34 Bom 250 (251) (DB).

(4) In a mortgage suit, if the mortgaged properties, when sold, are sufficient to discharge the debt, it would not be necessary for the plaintiff to apply, for a personal decree or to show a ground for exemption from the law of limitation with regard to the personal decree. Hence, in a mortgage suit, it is sufficient compliance with the provisions of this rule if the plaintiff claims such exemption in his application for personal decree though the ground was not stated in the plaint. AIR 1944 Mad 65 (67): ILR (1944) Mad 572 (DB). (34 Bom 540, Not foll.)

(5) Where in a suit on a simple mortgage the plaintiff prays for a personal decree, the plaintiff must indicate the ground of exemption in the plaint. AIR 1947 Oudh 91 (93).

(6) It has been held that the principle of this rule should be applied to an application to set aside a sale in execution. AIR 1947 Mad 268 (271): ILR (1947) Mad 721 (DB).

(7) Exemption on ground different from that pleaded cannot be allowed to be proved. AIR 1962 Mad 210 (212): (1961) 2 Mad LJ 502.

(8) Plea of exemption from limitation on a ground not mentioned in plaint cannot be allowed without amendment of plaint. ILR (1966) 1 Mad 18 (26) (DB).

(9) In a suit for redemption the onus is primarily on the plaintiff to prove that at the commencement of the suit he had a subsisting title to redeem. AIR 1959 Ker 377 (379): 1959 Ker LT 475 (DB).

(10) Averments as to saving of limitation — Rule is not imperative in arbitration proceedings. AIR 1963 Cal 307 (308).

(11) The principle underlying this rule applies to an application under Order 21, Rule 90. AIR 1969 Orissa 63 (66).

2. "Plaint shall show".— (1) It is sufficient that the ground of exemption is apparent on the face of the plaint. It is not necessary that the plaint should specifically, and in so many words, claim the ground of exemption. AIR 1955 Raj 188 (192): ILR (1955) 5 Raj 671 (DB) ** ILR (1956) Hyd 52 (54) ** AIR 1954 Ajmer 42 (43).

[See AIR 1937 Mad 826 (828).]

(2) Where the fact of minority is apparent on the face of the record, it is not necessary that the ground of exemption under Section 8 of the Limitation Act

R. 7. Relief to be specifically stated.—Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

[R.S.C., O. 20, R. 6.]

Order 7, Rule 6 — Note 2 (contd.)

should be specifically pleaded. (1909) 2 Ind Cas 77 (78) (DB) (Cal) ** AIR 1967 Pat 301 (304).

(3) If the facts referring to the acknowledgment are sufficiently set out in the plaint, it would suffice and the plaint would be considered as embodying sufficient averments which would take the claim from the bar of limitation. 1958 Andh LT 827 (829) ** AIR 1958 Ker 243 (244) (DB).

(4) Where a plaint is presented on the reopening date after court-holidays, and the period of limitation has expired during the holidays, the fact that the ground of exemption under Section 4 of the Limitation Act was not specifically mentioned in the plaint will not entail the dismissal of the suit, inasmuch as the Court is bound to take judicial notice of the holidays. AIR 1920 Nag 200 (202): 16 Nag LR 198 ** AIR 1937 Pesh 41 (41).

(5) Where a plaint, presented to a wrong Court, is returned for presentation to the proper Court, the endorsements on the plaint will show the applicability of Section 14 of the Limitation Act, and therefore, it is not necessary to specifically allege that ground of exemption. AIR 1956 Madh B 97 (97) (DB) ** (1908) 7 Cal L Jour 560 (562) (DB).

[See however AIR 1914 Cal 858 (860) (DB).]

(6) Where the parties had all the knowledge of the points at issue, failure to give in the plaint proper details for exclusion of time cannot cause any prejudice to the defendants. AIR 1957 Madh Pra 95 (97) (DB) ** AIR 1967 Pat 301 (304).

(7) All that the rule requires is that the plaint should show a ground of exemption from limitation where the suit is instituted after the expiration of the period of limitation. But once that is shown, the rule does not preclude the plaintiff from relying upon a new ground of exemption at the trial. The new ground may even be inconsistent with the original one. AIR 1935 All 946 (949): 58 All 261 (FB) ** AIR 1949 East Punj 219 (220) ** AIR 1937 Oudh 391 (392): 13 Luck 334 (DB).

[See also AIR 1941 Oudh 111 (112).]

[But see (1908) 10 Bom LR 346 (348).]

(8) The High Court of Madras has held that a new ground of exemption can be urged only after amendment of the plaint so as to include the new ground. AIR 1933 Mad 874 (876) ** AIR 1936 Mad 545 (546).

(9) Where the plaintiff once amends his plaint by relying upon a new ground of exemption, he will not, thereafter be allowed to rely upon the original allegation in the unamended plaint. AIR 1926 PC 85 (88): 48 All 457: 53 Ind App 187.

(10) A plaintiff will not be allowed to rely upon a ground of exemption from limitation for the first time in appeal or in revision. AIR 1947 Oudh 235 (237): 22 Luck 299. (Appeal.) ** AIR 1947 Mad 268 (271): ILR (1947) Mad 721 (DB). (Letters Patent Appeal.) ** (1937) 20 Nag L Jour 42 (46). (Second appeal.) ** AIR 1955 Kutch 2 (4). (Revision.)

(11) The appellate Court has the same powers of rejection of plaint as the trial Court under Order 7, Rule 11 (d). See Order 7, Rule 11.

(12) A defendant will not be allowed to raise objections on the ground of failure to set out the grounds of exemption, for the first time in appeal or revision. AIR 1917 Mad 845 (845).

(13) This rule applies only to cases where the suit is barred prima facie. AIR 1914 Lah 408 (410): 1914 Pun Re No. 70 (DB) ** AIR 1919 Lah 20 (21): 1 Lah 89.

(14) Where facts are pleaded by the plaintiff which show that the cause of action is within limitation and that the suit as framed is not barred, the plaintiff discharges burden which is on him to show that under Section 3, Limitation Act, the suit is maintainable. In such a case this rule is not applicable. AIR 1957 All 575 (608).

(15) A plaintiff is not precluded from relying upon a ground of exemption from limitation, if on the facts found (and not prima facie) the plaintiff's claim appears to be barred. AIR 1919 All 227 (228) (DB) ** AIR 1922 Oudh 135 (136, 137): 25 Oudh Cas 89.

(16) The plaintiff has to show that his cause of action accrued within the period of limitation. AIR 1928 Lah 763 (764).

(17) Plaintiff cannot claim advantage of Section 14 of Limitation Act 1908 unless he mentions the circumstances under which he filed the suit in the wrong Court and proves his bona fides. (1966) 2 Andh WR 206: 1966 Mad LJ (Cri) 638.

(18) Suit on instalment bond with default clause — Limitation — Plea of waiver — Plaint must mention facts constituting waiver. 1963 Raj LW 297: ILR (1963) 13 Raj 293 (DB).

ORDER 7, RULE 7 — SYNOPSIS

1. Relief.
2. "General or other relief".
3. Alternative relief.
4. Suit under Section 77 of the Registration Act.
5. Events happening after suit.

Order 7, Rule 7 (contd.)

1. Relief.— (1) Where a question arises as to whether a plaintiff has asked for a particular relief in his plaint, the whole of the plaint must be considered, and the substance and not merely the form of the plaint should be looked to. AIR 1953 Pepsu 151 (153): ILR (1953) Patiala 415 (DB) ** ('55) AIR 1955 Sau 74 (77) (DB) ** ('05) 27 All 97 (122) (FB) ** **AIR 1966 SC 735 (738): (1966) 2 SCR 286 ** AIR 1962 SC 633 (638): 1962 Supp (1) SCR 206** AIR 1967 Cal 461 (468): (1969) 1 Lab LJ 290 (DB) ** 1967 Cur LJ 758 (759) ** AIR 1965 Punj 107 (109, 110). (Cause of action noticeable from assertions made in plaint — Different cause of action pleaded — Court can touch upon real cause of action to allow suit.) ** ('65) 67 Punj LR 69: 1965 Cur LJ 121. (Relief cannot be refused only on ground of wrong mentioning of sub-clause.) ** AIR 1959 Assam 75 (93, 94) (DB).

[See ('56) AIR 1956 Bom 649 (649).]

[See also ILR (1964) 14 Raj 833: 1964 Raj LW 242. (The question whether plaint is defective and plaintiffs' suit should be dismissed on that ground should be decided in the ultimate analysis of the facts and the circumstances of individual cases.) ** AIR 1937 Lah 1 (2) (DB).]

(2) The liberality of construction is subject to a limitation that the facts and documents which entitle the plaintiff to the relief claimed must be stated or referred to in his pleading. ('68) 11 Moo Ind App 468 (474) (PC).

(3) The general rule that a plaintiff cannot be entitled to relief upon facts and documents not stated or referred to by him in his pleadings, does not apply where the substantial matters which constitute the title of all the paries are touched in the issues and have been fully put in evidence in the case. Relief can be granted in such cases on the basis of such matters. ('98) 21 All 53 (69): 25 Ind App 195 (PC) ** AIR 1957 Andh Pra 784 (790, 791, 792) (DB) ** AIR 1941 PC 51 (55) ** AIR 1956 Andhra 235 (237) ** AIR 1955 Sau 74 (77) (DB) ** 1963 All WR (HC) 238.

[See ('51) AIR 1951 Orissa 22 (24): ILR (1950) Cut 464 (DB) ** ('37) AIR 1937 Mad 223 (226) (DB).]

(4) No relief can be granted upon facts and documents not disclosed in the pleadings nor dealt with by the issues or the evidence in the case. ('55) AIR 1955 Ajmer 3 (4) ** ('40) AIR 1940 PC 3 (7): ILR (1940) Kar PC 15 ** ('38) AIR 1938 Lah 296 (299) (SB) ** **AIR 1965 SC 516 (521): (1964) 8 SCR 347.** (Suit by trustees for eviction of archakas from temple lands on basis of title and not for framing scheme — Decree for possession on proof of title — High Court in appeal cannot compel trustee to put archakas in possession of portion of temple lands towards their remuneration.) ** AIR 1968 Ker 57 (58) ** (1966) 68 Bom LR 891: 1966 Mah LJ 446 ** AIR 1965 Orissa 113 (114): 31 Cut LT 889 ** AIR 1964 Orissa 160 (165) (DB) ** 1962 BLJR 277 ** 1961 Jab LJ 72 ** 1961 Pat LR 89: 1961 BLJR 446 ** (1960) 2 Orissa JD 449 ** AIR 1960 Pat 498 (499): ILR 40 Pat 20. (Suit for declaration that plaintiff has acquired right of way by user — No allegation in pleading that right of passage was acquired as easement of necessity — No issue also framed on point — Plaintiff cannot be granted decree on basis of easement of necessity.) ** 1957 Ker LT 286: 1957 Ker LJ 248.

[See AIR 1941 PC 85 (88): 69 Ind App 64 ** ('99) 21 All 53 (69): 25 Ind App 195 (PC).]

[See also 1967 All WR (HC) 199. (A relief for possession of land and one for demolition of structures standing on it are two distinct reliefs and the first does not of itself include the second. An owner can however recover possession of the land without asking for demolition and removal of the structures raised by the trespasser.) ** AIR 1965 Pat 224 (227). (Suit for recovery of amount on basis of handnote — No opportunity should be given for any evidence on question of acknowledgment.) ** AIR 1943 Pat 305 (307): 2 Pat 187 (DB) ** ('32) AIR 1932 All 353 (355) (DB).]

(5) Where the plaintiff asks for a particular relief on a specific ground, he cannot be granted the same relief on a different ground which is not at all disclosed in the plaint. ('55) AIR 1955 Pat 505 (507) (DB) ** ('54) 7 Sau LR 194 (195) ** ('42) AIR 1942 All 221 (222): ILR (1942) All 667 (FB) ** **AIR 1966 SC 735 (738): (1966) 2 SCR 286** ** (1964) 2 Andh WR 383 ** 1959 All WR (HC) 18.

(6) A plaintiff suing for a declaration of titlt to a certain property under a sale deed executed in his favour cannot succeed on the ground of adverse possession if the facts in support of that ground are not disclosed in he plaint. ('08) 31 Mad 531 (531, 532) (DB) ** ('33) AIR 1933 Lah 25 (27): 13 Lah 677 (DB).

(7) Where a case based upon an express agreement fails, a relief based upon an implied agreement which is not pleaded by either side, cannot be granted. When a suit by a legal practitioner against his client for recovery of his fees is based on an express agreement, he is not entitled to any relief on the basis of "quantum meruit" if he fails to make out an express agreement. ('51) AIR 1951 Nag 431 (432).

(8) Suit by a building contractor for additional constructions to a building — Work done not covered by contract — Claim for compensation on oral agreement — Such agreement not proved — Still contractor held entitled to receive compensation under S. 70 of Contract Act. **AIR 1966 SC 1034 (1036): (1961) 3 SCR 663** ** AIR 1962 Mad 345 (346): (1961) 2 Mad LJ 574.

Order 7, Rule 7 — Note 1 (contd.)

(9) Suit on contract — Contract found to be void — No relief claimed on basis of Section 70, Contract Act — Pleadings of parties containing sufficient facts to give relief under Section 70 — No bar to grant of relief under Section 70. AIR 1963 Pat 153 (156) (DB).

(10) Where a ground of relief is disclosed in the plaint, the fact that the plaintiff asked for the relief on a different ground will disentitle him to relief on the ground disclosed in the pleadings. AIR 1956 Andhra 235 (236, 237) ** AIR 1956 Hyd 107 (110): ILR (1956) Hyd 339 ** AIR 1955 Sau 74 (77) (DB) ** AIR 1954 Pat 128 (129) (DB) ** ('54) ILR (1954) Cut 461 (466).

[See also AIR 1960 Punj 209 (211): 62 Pun LR 110 (DB). (Court cannot consider ground which was given up.) ** AIR 1942 Pat 379 (380, 381).]

(11) The Court, in the administration of justice, will not refuse any relief, which on the merits the Court can grant, simply because the applicant asked the Court to exercise its admitted powers under a wrong section. ('53) ILR (1953) 2 Cal 385 (386, 387) ** ('55) 1955 Lab AC 520 (532) (Bom).

[See also AIR 1968 All 204 (207). (Courts not tied down to the actual relief claimed.)]

(12) Where a plaintiff claims a larger relief than he is entitled to, the suit should not be dismissed on the ground, but the plaintiff should be given the relief he is entitled to unless the ground on which the lesser relief can be granted is inconsistent with the case of the plaintiff as set out in his pleadings or would lead to a determination of the issues which would embarrass the defendant. AIR 1957 Andh Pra 784 (790, 792) (DB) ** AIR 1955 Madh B 138 (142): ILR (1955) Madh B 282 (DB) ** ('06) 28 All 482 (487): 33 Ind App 81 (PC). (25 All 337, **REVERSED.**) ** AIR 1969 Mad 235 (240, 241): (1969) 1 Mad LJ 366 ** AIR 1968 Cal 90 (91) (DB). (If a party makes a case which he fails to prove in its entirety but still if he is entitled to relief on what he has been able to prove, he would get such relief as may be allowed to him in the circumstances.) ** 63 Punj LR 17: ILR (1961) 1 Punj 484.

[See however AIR 1921 Lah 336 (336, 337). (Plaintiff's case partly false — Whole case should be dismissed.)]

(13) It is not a ground for dismissing a suit that groundless charges of fraud are made by the plaintiff in his plaint, provided he has a good cause of action. AIR 1917 PC 116 (117): 45 Ind App 61.

[But see ('78) 2 Cal L Rep 18 (21, 22) (DB).]

(14) The Court has jurisdiction to adjust the rights of the parties as ascertained by it and to grant a declaration accordingly, if it is necessary in the ends of justice to do so and the Court's jurisdiction cannot be restricted because the plaintiff has asked for a more extensive declaration or a declaration in a different form. AIR 1956 Bom 243 (245).

(15) Suit for possession — Additional prayer for injunction — Such prayer cannot confer on civil Court jurisdiction to entertain suit where its jurisdiction has been expressly barred. AIR 1966 All 367 (369): 1965 All LJ 549.

(16) Court cannot grant a larger relief than that claimed, even if the plaintiff is really entitled to it, unless the plaintiff gets the plaint amended with the leave of the Court. AIR 1953 Trav-Co 563 (567) (DB) ** AIR 1952 Ajmer 13 (2) (13, 14) ** AIR 1918 Mad 998 (1002): 40 Mad 1 (7, 8) (FB) ** (1962-63) 23 FJR 412 (417) (Punj).

[See however ('54) AIR 1954 All 385 (390) (DB).]

(18) A plaintiff, who has established facts which would entitle him to the particular form of relief claimed, should not be debarred from obtaining that relief merely because the allegations made by him have not been established in their entirety. AIR 1942 Nag 4 (5): ILR (1942) Nag 561 ** AIR 1928 Lah 98 (100): 8 Lah 655 (DB) ** AIR 1936 Pat 147 (149).

(19) The relief claimed should be clearly stated in the plaint. In a suit for a declaration, the terms of the declaration sought should be clear and precise. AIR 1958 Cal 551 (553).

(20) Plaintiff will not be granted a relief not prayed for in the relief para of the plaint. Where the plaintiff has omitted to ask for the appropriate reliefs, he may apply for amendment of the plaint by inserting a prayer for the grant of such reliefs. AIR 1957 Pat 30 (32) (DB) ** ('55) Madh BLJ 1955 HCR 238 (239).

[See also AIR 1969 Andh Pra 250 (254): (1959) 1 Andh WR 455 (FB). (Execution case.)]

(21) It is not open to a Court to grant relief to a plaintiff on a different cause of action and on a plea for which there is no foundation in the pleadings when the plaintiff has been refused permission to add the plea by amending his plaint and when the plaintiff's claim on the plea has become barred by time and the necessary parties have not been impleaded in the suit. AIR 1956 Madh B 25 (30): ILR (1956) Madh B 13 (DB).

(22) The plaintiff should not be nonsuited or his suit dismissed merely because he claims some relief in the suit which he should not have included in it. It is always open to the Court to refuse reliefs to the plaintiff he is not found entitled to, in the suit as laid. ('54) ILR (1954) 6 Assam 361 (364) (DB).

(23) A Court will not grant any relief which it cannot enforce or which is useless and unprofitable to the parties. AIR 1926

Order 7, Rule 7 — Note 1 (contd.)
Pat 305 (312): 5 Pat 595 (SB) ** AIR 1949 PC 53 (54). (Useless relief.) ** AIR 1927 Pat 286 287 (DB). (Suit useless relief.)

(24) Where the plaintiff is entitled to possession, whether he can get actual possession or not by virtue of some statutory provision is not a ground for not giving him a decree for possession. That question can be determined when that question comes before the Court in execution proceedings. AIR 1953 All 559 (564): ILR (1954) 2 All 495 (DB).

(25) The Court has no power to compel any party to pray for any particular relief. AIR 1942 Mad 445 (446).

(26) It is not for the Court to enter into the reasons why a plaintiff or a petitioner presses for some reliefs and abandons others. The Court has only got to decide the case as presented before it. AIR 1952 Cal 294 (305): ILR (1951) 2 Cal 115 ** AIR 1960 Manipur 54 (55, 56).

(27) Arbitrators are not bound by the technical rule of pleading contained in this rule. AIR 1955 Cal 65 (68).

(28) The power of the Courts in India to make merely declaratory decrees which merely serve to define rights present or future without giving present relief is governed entirely by Section 42. Specific Relief Act. But where a decree has the effect of giving present relief as well, the power to make it will be governed by the general provisions of Section 9 and O. 7, Rule 7 and not by Section 42 of the Specific Relief Act, which is not exhaustive. AIR 1957 Tripura 37 (41).

(29) Dismissal of plaintiff from service — Suit for declaration that plaintiff continues in his job — Consequential relief for arrears of salary prior to suit — Claim for arrears pendente lite — First claim is governed by Section 42, Specific Relief Act — For claim for arrears pendente lite separate suit though proper plaintiff not asked to do so as evidence was adduced and litigation was longstanding. AIR 1968 Tripura 29 (31).

(30) Specific Relief Act (1877), Section 42 — Section is not exhaustive — Courts can grant declaratory decree independently of the section — Suit by plaintiff-worshipper for declaration that compromise decree under which certain temple properties were declared to be private properties of defendants-trustees, was not binding on deity — Held, suit fell outside purview of section and would be governed by general provisions like Section 9 or Order 7, Rule 7, Civil P. C. **AIR 1967 SC 436 (440): (1966) Supp SCR 270.**

(31) Court granting reliefs other than the ones prayed for by the party — Parties availing of such other reliefs — They cannot later retrace their steps and seek the reliefs they prayed for originally in the proceeding. AIR 1968 Mad 374 (377): 81 Mad LW 160.

(32) In a suit for damages for false imprisonment, the plaintiff need not specially plead and prove general damage though it is necessary for him to and prove special damage. AIR 1959 Pat 490 (499).

2. "General or other relief."— (1) A general or other relief need not be specifically asked for in the plaint, but can always be granted by the Court as if it had been asked for. Where, from mistake or inadvertence, the plaintiff omits to pray for the proper relief, or if the relief claimed in the plaint is not wholly sufficient or appropriate, the Court has always the power to grant the proper relief according to the circumstances of the case. AIR 1956 All 639 (640) ** AIR 1955 Madh B 138 (142): ILR (1955) Madh B 282 (DB) ** ('05) 27 All 325 (331): 32 Ind App 123 (PC) ** 1968 MPLJ 425 (DB). (Case under Sections 65 and 70 of Contract Act, 1872.) ** 1968 BLJR 467 ** (1966) 70 Cal WN 363 (370) (DB). (Requisitioning and Acquisition of Immovable Property Act (1952), Section 11 — Appeal against award of Compensation for acquisition — Interest not specifically claimed — Interest can still be allowed over and above amount claimed.) ** AIR 1966 Ker 172 (178, 179): 1965 Ker LT 1172. (General and Special damages — No specific pleading is necessary for general damages.) ** ILR (1966) Cut 139 (143) ** 1965 BLJR 105. (Case under Section 222 of Succession Act, 1925.) ** AIR 1963 Punj 538 (548): ILR (1963) 2 Punj 463 (DB) ** AIR 1962 All 20 (22). (Dispute between parties compromised — joint application containing terms—Application supersedes original case of parties—Relief not included in plaint can be granted.) ** 1962 Jab LJ 324 ** AIR 1962 Punj 144: ILR (1961) 1 Punj 716. (Single act of adultery committed long before filing of application under Section 13 Hindu Marriage Act not sufficient — Judicial separation can however be granted in such case even if not asked for in the petition.) ** AIR 1961 Madh Pra 346 (348): 1961 Jab LJ 419.

(2) A Court can always award future interest on the sum found to be due to the plaintiff, even though the latter has not claimed it. AIR 1921 Lah 125 (126): 2 Lah 256 (DB).

(3) It may even be open to the Court to grant future mesne profits as part of a general relief to which a plaintiff is entitled. AIR 1953 Pat 289 (290) ** **AIR 1967 SC 155 (157): (1966) Supp SCR 128.**

(4) Suit for recovery of possession of disputed lands — No claim for mesne profits made in plaint — Mesne profits cannot be granted. AIR 1968 Pat 160 (165).

(5) The Court may in a suit for exclusive possession pass a decree for joint possession. AIR 1954 All 191 (192) ** ('52) ILR (1952) 2 Raj 681 (686) (DB) ** AIR 1914 Mad 128 (130): 38 Mad 1036 (DB).

Order 7, Rule 7 — Note 2 (contd.)

[See also ('49) ILR (1949) 1 Assam 109 (117).]

(6) In a suit for sale of mortgaged property the Court may pass a personal decree against the mortgagor defendant provided the claim under the personal covenant is not barred by limitation. **AIR 1925 PC 280 (288): 52 Ind App 418: 5 Pat 135** ** ('02) 24 All 456 (457) (DB) ** ('06) 29 Mad 491 (495) (DB).

[See also AIR 1942 Pat 204 (208): 20 Pat 811 (DB).]

[But see AIR 1929 Oudh 303 (304) (DB).]

(7) Where the Court cannot decree partition because all the coparceners are not paties, it can grant the plaintiffs a declaration as to their title. AIR 1931 Sind 74 (75) (DB).

(8) The relief granted should be based on facts stated or referred to in the plaint and should not be inconsistent with the case set up by the plaintiff or with the relief claimed by him. AIR 1958 Pat 133 (143) (DB) ** ('72) 11 Moo Ind App 468 (473, 474) (PC) ** ('14) 23 Ind Cas 332 (335) (PC) ** ('97) 7 Mad L Jour 50 (51) (DB). (Relief granted should not be inconsistent with relief claimed.) ** AIR 1961 Cal 411 (420) ** AIR 1959 Andh Pra 126 (128): (1957) 2 Andh WR 134 (DB) ** AIR 1959 Cal 715 (722): ILR (1959) 2 Cal 530. (Suit for declaration that shares of company are not liable to be sold in enforcement of lien for debt owed by holder of shares to company — Articles constituting contract must be pleaded.)

(9) The Court cannot pass a decree for possession of property in a suit for confirmation of possession, inasmuch as the relief of possession is not consistent with the case set up by the plaintiff or with the relief claimed by him. ('21) 63 Ind Cas 2 (3) (Pat).

(10) In a suit for injunction on the basis of title the Court cannot declare that the plaintiff is entitled to a right of easement, jointly with the defendant. ('92) 15 Mad 489 (490) (DB).

(11) For other illustrations of the principle stated in Pt. (8), see the following cases. AIR 1953 Trav-Co 518 (521): ILR (1953) Trav-Co 1021 (FB) ** AIR 1954 Hyd 41 (43, 44): ILR (1953) Hyd 642 (DB) ** ('54) 1954 Ker L Tim 975 (977) ** AIR 1965 Cal 442 (443): 69 Cal WN 584 (DB) ** AIR 1964 Orissa 75 (78) (DB). (Hindu Married Women's Right to Separate Residence and Maintenance Act (1946), Sections 2 (6), 24 — Suit for maintenance by wife on specific ground under Section 2 (6) — Court cannot take alternative ground under Section 2 (4) — Second marriage of husband proved — Wife held entitled to maintenance as general relief.)

(12) The relief granted should be based on the same cause of action as the relief claimed in the suit. ('09) 3 Ind Cas 408 (414, 415) (DB) (Cal) ** ('05) 27 All 174 (176) (DB) ** AIR 1917 Cal 367 (368) (DB).

(13) It is open to a Court to find in favour of a plaintiff on a cause of action different from that which is pleaded provided it arises from undisputed facts and also provided that the defendant is not shut out from giving evidence which he might have given if the cause of action had been differently pleaded. AIR 1956 Andh Pra 235 (237) ** AIR 1955 Sau 74 (77) (DB) ** ('53) 6 Sau LR 380 (382).

[See AIR 1944 Mad 540 (542) (DB).]

[See also AIR 1944 Mad 530 (531).]

(14) The relief granted to the plaintiff should not be of an entirely different description from the relief claimed in the plaint. The plaintiff "cannot desert the specific relief prayed; and under the general prayer ask specific relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the Court, maintain that relief. AIR 1951 Assam 101 (104, 105): ILR (1949) 1 Assam 198 (DB) ** (1837) 2 Moo Ind App 353 (389, 390) (PC) ** AIR 1916 Cal 829 (833, 834): 43 Cal 743 (FB).

[See also AIR 1947 Nag 233 (234): ILR (1947) Nag 819.]

(15) An injunction will not ordinarily be granted under the power to grant general relief. ('81) 6 Cal 485 (489, 490).

[See also AIR 1929 All 430 (431, 432).]

(16) No relief for partition can be granted in a suit for ejectment, at any rate, without amendment. AIR 1952 Trav-Co 195 (198) (DB).

(17) In a suit for possession based on exclusive title, a decree for partition may be granted notwithstanding the absence of an alternative prayer provided that such relief will not result in prejudice to the other side. AIR 1963 Andh Pra 78 (81, 82): (1962) 1 Andh WR 282 (DB).

(18) The test, in such cases, is to see whether the defendant will not be taken by surprise or be embarrassed by such relief being granted. AIR 1956 All 639 (640) ** AIR 1955 Madh B 138 (142): ILR (1955) Madh B 282 (DB) ** AIR 1916 Cal 829 (837, 838): 43 Cal 743 (FB).

(19) There can be no surprise if the relief granted is consistent with that claimed and with the case raised in the pleadings or if the parties knew the case which had to be tried. AIR 1916 Cal 829 (837, 838): 43 Cal 743 (FB) ** AIR 1955 Madh B 138 (142): ILR (1955) Madh B 282 (DB) ** AIR 1926 Lah 417 (418). (Parties aware of the case.)

(20) A declaratory decree may be passed in a suit for possession of property. AIR 1951 Mad 1047 (1051): ILR (1952) Mad 668 (DB) ** AIR 1929 All 555 (555) (DB) ** AIR 1967 Tripura 33 (37): 1967 Cri LJ 125. (Suit for possession — No plaintiff would be entitled to declaration of title on basis of plaint or to amend plaint praying

Order 7, Rule 7 — Note 2 (contd.)

for declaration of his title, after paying necessary Court-fee.)

[See AIR 1956 Bom 268 (270).]

(21) A decree for joint possession can be passed in a suit for partition by metes and bounds, where the property happens to be impartible provided there is no surprise under the circumstances of the case to the defendants. AIR 1958 Raj 257 (258): ILR (1958) 8 Raj 681 ** AIR 1921 All 106 (107):43 All 318 (DB).

[But see AIR 1957 Raj 39 (41): ILR (1956) 6 Raj 877 (DB). (General damages should be claimed: AIR 1924 Lah 713, Not foll.)]

(22) In a suit for a declaration of title to immovable property and possession thereof. there is nothing unusual in giving relief to the parties by directing a partition of the properties, where it turns out that the plaintiff is not entitled to all the interest claimed by him in the property in suit. ('50) 55 Mys HCR 240 (249) (DB) ** ('57) 1957 Andh LT 199 (201).

(23) Suit for declaration of title and partition — Relief of possession not asked for — General relief asked for — **Held,** relief of joint possession and partition on basis of such joint possession may be granted. AIR 1960 Pat 452 (457): ILR 39 Pat 673 (DB).

(24) In a suit for exclusive possession, a decree for joint possession can be given if the facts proved entitled the plaintiff to it and if the grounds on which this relief is granted is not inconsistent with the case set up by the plaintiff and does not embarrass the defendant. ('52) ILR (1952) 2 Raj 681 (685, 686) (DB).

(25) Damages may be awarded in addition to a decree for specific performance, or an account directed to be taken in a suit for money. AIR 1924 Lah 713 (716): 5 Lah 509 (DB) ** AIR 1947 All 229 (234): ILR (1946) All 591 (DB). (Suit for specific sum by partner — Decree for accounts.) ** AIR 1919 Cal 296 (305) (DB). (Suit for money — Decree for accounts.)

(26) The relief as to possession is ancillary to that for the specific performance of the contract to sell. AIR 1961 Pat 466 (469): 1961 BLJR 326.

(27) Where in a suit to enforce a mortgage, the mortgage is found to be void, the Court can grant relief under Section 65, Contract Act, by way of restitution of the money lent. **AIR 1943 PC 29 (33, 34): 70 Ind App 1.** (AIR 1937 Oudh 410, **REVERSED.**)

[See also AIR 1959 Cal 585 (591, 595): ILR (1960) 1 Cal 776 (DB). (Suit against Union of India solely on basis of contract and on allegation of failure of consideration —Contract void and unenforceable — Plea for relief for restitution under Section 65 Contract Act cannot be raised by plaintiff — Section 80, Civil P. C. operates as bar — ILR 30 Cal 36, Not foll.)]

(28) Where further facts require to be investigated, it may be necessary to insist upon an averment of a case under Section 65, Contract Act in the pleading so as not to take the defendant by surprise before granting relief under Section 65 of the Contract Act but if on the facts found there is no difficulty in granting the equitable relief, it would be unreasonable to refuse it on any such technicality. AIR 1961 Raj 6 (9): 1960 Raj LW 345 (DB).

(29) In the case of a void mortgage, if instead of bringing a suit for possession, the mortgagor brings a suit for redemption there can be no good ground for refusing him the relief asked for, or strictly speaking, the relief to which he is entitled, namely, that of possession subject to payment of the money received from the mortgagee. AIR 1956 All 639 (640).

(30) The Court cannot pass a decree for a general taking of accounts of a partnership in a suit to recover plaintiff's share alone in one item of the partnership assets. AIR 1919 Mad 146 (148) (DB).

(31) The Court cannot in a personal claim, pass a decree for sale of property in default of the payment of the sum decreed. AIR 1925 Oudh 550 (552).

(32) Land settled by landlord with defendant first party — Order made by Commissioner not to settle land with plaintiff — Suit by plaintiff for declaration without praying for consequential relief — Suit held barred — Civil P. C., Order 7, R. 7 held not applicable. 1961 Pat LR 83 (85).

(33) Where a reversioner sues a Hindu widow for an injunction restraining her from committing waste and in such a suit prays for the appointment of a receiver, he is not entitled to a declaration of his reversionary right if he fails to establish his right to the reliefs claimed. **AIR 1916 PC 117 (119)** ** 39 Mad 634: 43 Ind App 207.

(34) In a suit for dissolution of marriage or in the alternative for a declaration that the marriage is a nullity, it is not open to the Court to pass a decree for judicial separation, such relief not being 'general or other relief' within the meaning of this rule. AIR 1938 Bom 65 (67).

(35) Where in a suit for possession, the plaintiff asks for mandatory injunction for demolition of structures built upon the land by the defendant, and the plaintiff is found entitled to the possession the Court has no discretion to refuse the relief of possession though it may in its discretion refuse the relief of mandatory injunction. Court can however grant a decree for compensation by way of damages after framing proper issues on the question of the value of improvements and also on the question of the applicability of Section 51 of the Transfer of Property Act. AIR 1951 Ajmer 18 (19, 20).

(36) A Court cannot, under the power to grant further relief, pass a decree in favour

Order 7, Rule 7 — Note 2 (contd.)

of a pro forma plaintiff if it is found that the real plaintiff is not entitled to the relief claimed. ('03) 31 Cal 433 (440) (DB).

(37) In a suit for possession of common property by one of the co-owners against a trespasser, the plaintiff can be given delivery of possession on behalf of himself as well as on behalf of other co-sharers who were made pro forma defendants. AIR 1953 Orissa 285 (287, 288): ILR (1954) Cut 380.

(38) An equitable relief under this rule may be granted even by the Appellate Court though it will be slow to interfere with the discretion exercised by the trial Court in granting appropriate relief under this rule. AIR 1925 Cal 434 (435) (DB) ** AIR 1926 Lah 417 (418).

(39) Suit for arrears of salary by dismissed Government servant without seeking relief for quashing order of dismissal — Decree for arrears of salary can be granted -- Relief of declaration is implicit in residuary item on prayer clause under description "any other relief". AIR 1959 Madh Pra 46 (48): 1958 MPLJ 681.

3. Alternative relief.— (1) A person may rely upon one set of facts, if he can succeed in proving them, and he may rely upon another set of facts, if he can succeed in proving them. ('72) 9 Bom HCR 1 (6) (FB).

[See also AIR 1945 Nag 281 (284): ILR (1945) Nag 651.]

(2) A suit can lie for reliefs in the alternative which could be given under different sections of an enactment. (1967) 1967 All WR (HC) 704 (705).

(3) It is open to a plaintiff to pray for alternative reliefs which may be inconsistent with one another. AIR 1952 Nag 115 (117): ILR (1952) Nag 604 (DB).

[See also 1961 MPLJ 31: 1961 MPC 91. (A relief can be founded on the alternate case, however inconsistent, made out by the defendants.)]

(4) A plaintiff may claim specific performance of a contract, or, in the alternative, cancellation of the contract and damages. AIR 1924 Bom 119 (127): 48 Bom 259 (DB).

[See AIR 1951 Mad 282 (283) (DB).]

(5) Plea for declaration that particular contract is void — Plaintiff cannot alternatively pray for specific performance of the same contract — Provisions of O. 7, Rule 7 do not entitle plaintiff to make such a plea. **AIR 1968 SC 1355 (1358): (1968) 2 SCWR 482.**

(6) Suit for specific performance — Only prayer for compelling defendant to sell house — Alternative prayer for refund of advance not made — Even then refund must be ordered payment made being genuine. AIR 1967 Orissa 100 (103) (DB).

(7) Where A and B are tenants of the same landlord, in a suit for khas possession by A against B and the landlord refund of salami or rent paid to the landlord can be granted if the right to khas possession is found against. AIR 1925 Cal 193 (194) (DB).

(8) A plaintiff may in a suit on a negotiable instrument claim in the alternative a decree on the original consideration. AIR 1918 PC 146 (146): 46 Ind App 33 ** AIR 1955 Sau 74 (77) (DB) ** AIR 1954 Madh B 117 (118): ILR (1954) Madh B 20.

[See however AIR 1933 All 109 (109).]

(9) In a suit based on tenancy, the plaintiff can claim damages for use and occupation in the alternative. AIR 1954 Assam 156 (157): ILR (1953) 5 Assam 361 ** AIR 1926 Mad 1071 (1072) (DB).

[See AIR 1967 Goa 97 (98) (DB) ** AIR 1942 Pat 86 (87).]

[See also 1963 Ker LT 219. (Preliminary decree adjudging right to redeem — Person seeking eviction is not precluded from involving Section 51 of T. P. Act before final decree.) ** AIR 1933 Lah 15 (17): 13 Lah 561 (DB).]

(10) A pre-emptor may allege that the vendor has no title to part of the property and may alternatively offer to pre-empt the whole if the Court finds that the vendor had title to sell the whole. AIR 1929 All 398 (399) (DB).

Also see O. 6, R. 2.

(11) A plaintiff suing the transferee from his co-owner can claim pre-emption as his main relief and in the alternative partition of his share. AIR 1947 Cal 426 (427): ILR (1948) 1 Cal 248.

(12) When a plaintiff bases his suit on title, he can claim relief on the strength of his anterior possession alternatively as an independent ground of claim. AIR 1940 Mad 71 (71, 72).

(13) Petition under Section 153-C Companies Act (1913) with alternative relief of winding up — Petitioner can abandon relief under Section 153-C and claim relief of winding up. AIR 1962 Guj 269 (275): (1962) 3 Guj LR 165.

(14) A plaintiff claiming a declaration of title and recovery of possession can, in the alternative, claim specific performance of the contract of lease and possession on that basis. AIR 1952 Nag 115 (117): ILR (1952) Nag 604 (DB).

(15) Suit for declaration and possession — Court can pass decree for partition. (1960) 26 Cut LT 514.

(16) It is open to the plaintiff to claim ownership of certain land and in the alternative a right of easement in respect of the same land. AIR 1959 Raj 235 (239): 1959 Raj LW 490.

(17) Even though the contracts for sale relied by the parties fail, yet the plantiff will be given so much relief as relates to declaration of title and recovery of possession when the entire suit proceeds on the assumption of title in the plaintiff. AIR 1958 Pat 133 (143) (DB).

Order 7, Rule 7 — Note 8 (contd.)

(18) Suit for injunction — Amendment seeking alternative relief of possession — Can be allowed even if it deprives defendant of his plea as to maintainability of suit. AIR 1966 Him Pra 1 (2, 3).

(19) An injunction, it has been held, is an alternative relief within the discretion of the Court and not an independent relief under Section 35 (a) of the Easements Act. AIR 1929 All 430 (431, 432).

(20) In all such cases of alternative relief plaintiff has to set out the facts relied on by him in his alternative claim distinctly and separately. AIR 1920 Cal 93 (95) (DB) ** AIR 1959 J and K 52 (53).

[See also Order 6, Rule 2 and O. 7, R. 8.]

(21) The plaintiff cannot be allowed to pick out such of the allegations as will support any alternative case put forward by him. ('10) 37 Cal 856 (859) (DB).

(22) The ordinary rule is that the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleading and which the other side was not called upon nor had an opportunity to meet. AIR 1958 Pat 133 (143) (DB)**('55) 1955 BLJR 334 (336) (DB).

(23) If the facts are not stated in the plaint, plaintiff cannot claim the alternative relief wihout amending the plaint. See AIR 1944 Pat 276 (277, 278) ** AIR 1928 Sind 103 (104): 23 Sind LR 370.

[See also AIR 1963 Andh Pra 78 (81, 82): (1962) 1 Andh WR 282 (DB). (Suit for possession based on exclusive title — Decree for partition may be granted, even without amendment.)]

(24) In a suit by a son to get aside a transfer by his mother, the plaintiff specifically alleged that his mother was of unsound mind, and stated further that she was under the control of the donee. The Privy Council was inclined to the view that the claim based on undue influence could not be entertained as it was not specifically pleaded. ('06) 33 Cal 773 (782, 783): 33 Ind App 86 (PC).

[See AIR 1933 Lah 1045 (1046) (DB).]

(25) In a suit on a hundi, a decree on the original consideration was declined because such an alternative relief had not been prayed for. **AIR 1918 PC 146 (146): 46 Ind App 33.**

(26) Where in a suit all the facts giving rise to the alternative claim are fully stated in the plaint, the fact that the plaintiff has not formally asked for the relief on the alternative claim is no bar to the granting of the relief on that basis. AIR 1956 Hyd 140 (142, 143): ILR (1956) Hyd ILR (1957) Andh Pra 443 (DB) ** AIR 1958 Assam 51 (54) (DB). (Election peti- 439 (DB) ** AIR 1959 Andh Pra 126 (128): tion — Corrupt practice alleged under Section 123 (4), R. P. Act — Finding of corrupt practice under Section 123 (2) (A).) ** ILR (1965) 1 All 99 ** AIR 1961 Madh Pra 346 (348): 1961 MPLJ 645.

[See also 1965 BLJR 214: ILR 44 Pat 694. (Absence of a formal amendment for an alternative relief in the plaint will not stand in the way of dispensation of justice if such absence does not cause any prejudice or surprise to the other party.)]

(27) Where the alternative case which the palintiff could have made in the plaint but in fact did not make, is not only admitted by the defendant in his written statement but was expressly put forward as an answer to claim which the plaintiff made in the suit, there is nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes out in his written statement. **AIR 1951 SC 177 (180): 1951 SCR 277** ** AIR 1957 Madh Pra 238 (240). (A, Hindu woman, marrying with B, and on B's death, remarrying C — A in possession of B's estate even after B's death for 15 years — Suit by B's heir for possession of B's property after death of A — C pleading acquisition of absolute estate by A — Plea of absolute estate not established — A held to have prescribed for limited estate — Plaintiff can succeed on basis of C's failure to establish his case, though that case was not raised in his pleading by the plaintiff.) ** AIR 1968 Ker 57 (58) ** AIR 1965 Madh Pra 100 (102): 1964 MPLJ 101 (DB) ** AIR 1963 Madh Pra 51 (53, 55, 56): 1962 MPLJ 1102 (DB) ** AIR 1962 Pat 296 (298): 1962 BLJR 261 ** 1962 Raj LW 345 ** AIR 1961 Raj 21 (24): 1960 Raj LW 321. (Claim for damages on basis of resale — Award of damages on basis of difference in contract price and market-price — Permissible when defendant has himself led evidence on latter basis.) ** ILR (1960) 39 Pat 714 (738) (DB) ** AIR 1969 Andh Pra 294 (297) (DB).

[See also AIR 1967 Guj 1 (3): ILR (1965) Guj 835 (DB). (Plaintiff's failure to establish his case — He can still get decree on basis of case made out by defendant but not when plaintiff's claim on this basis is barred by limitation.)]

(28) Where the case each party puts turns out to be against his own interest and granting of such relief is going to prejudice one of the parties by reason of a statute intervening the Court ought to dispose of the case on merits. AIR 1968 Ker 57 (58).

(28-A) The plaintiff can claim in his plaint two alternative reliefs. He might rely upon different allegations in the alternative claim even though they may be inconsistent with each other. This circumstance might in certain cases militate strongly against the plaintiff succeeding in the suit but the Court would not be justified on this ground alone in rejecting the plaint. The only restriction is that the plaintiff cannot be permitted to allege two absolutely inconsistent state of facts each of which is destructive of the other, but a plaintiff in certain circumstances can rely upon several different rights alternatively

Order 7, Rule 7 — Note 3 (contd.)
though they may be inconsistent. He may put forth two distinct titles on the same basis of facts. ('54) Madh BLJ 1954 HCR 824 (825).

[See AIR 1968 Ker 57 58). (Alternate allegations — Case set up by party turning out against himself — Prejudice likely to be caused in accepting the allegations — Relief should not be granted by accepting such allegations — Proper course is to dispose of the case on merits.)]

See also O. 6, R. 2.

(29) Where the chellas of a mutt who instituted a suit for declaration and possession of the deity in the mutt and asked the Court at the argument stage to give possession of the deity to their Guru who was a witness in the case, if it were held that they had no right, it was held that the relief could not be given as there was no prayer for it in the plaint and the Guru was not a party to the suit. ('55) 55 Mys HCR 30 (37) (DB).

(30) A prayer for alternative relief cannot be converted into one for additional relief. AIR 1924 All 271 (272).

(31) A plaintiff praying for a relief and also for a lesser relief in the alternative, cannot be deemed to have waived his right to the relief originally claimed. AIR 1914 Lah 204 (206): 1915 Pun Re No. 4 (DB).

(32) Where the plaintiff asks for one of two alternative reliefs and is granted one, he cannot, in appeal, contend that he should be given the other relief. AIR 1951 Mad 282 (283) (DB) ** AIR 1924 Cal 445 (446) (DB).

[See however AIR 1946 Pat 231 (234): 25 Pat 1 (DB).]

(33) Where the land-owner is personally estopped from recovering possession of the property from the trespasser, he would not be entitled to recover any damages for the portion of the land occupied by the trespasser. AIR 1965 Mad 318 (320, 321): 77 Mad LW 629 (DB).

(34) Where the plaintiff has set up the alternative case that the only way in which he could pass the natural water from his land was over the defendant's land through a defined channel and the evidence also has established that fact, the plaintiff would be entitled to relief on basis of easement under Section 7, Easements Act. AIR 1961 Punj 414 (415): 63 Pun LR 90.

(35) Plaintiff in their suit for declaration that deed of surrender executed by widow of one R was not binding on them stating in plaint that R died issueless leaving behind him plaintiffs as his legal heirs and that they came into possession of property of R after disappearance of his widow — They further setting up alternative case on basis of their adverse possession — **Held,** fact that plaintiffs had set up alternative case would not mean that suit by them was not as reversioners of R. AIR 1963 Pat 337 (341) (DB).

4. Suit under Section 77 of the Registration Act.— (1) In a suit under Section 77 of the Registration Act, 1908, no other claim, such as a claim for possession and mesne profits, can be coupled with the prayer to enforce registration of the document. The allowing of another claim to be included in such a suit will completely alter its scope and character. AIR 1924 Cal 600 (610) (DB) ** AIR 1933 Cal 196 (197).

5. Events happening after suit.— (1) The ordinary rule is that the rights of parties must be determined as at the date of the action, and not on the basis of rights which accrued to them after the institution of the suit. AIR 1954 Madh B 181 (183): ILR (1954) Madh B 426 (FB) ** AIR 1956 Raj 12 (15): ILR (1955) 5 Raj 85 (DB) ** AIR 1945 PC 62 (62): 72 Ind App 114.

(2) Where the plaintiff has no cause of action at all to institute the suit, he will not ordinarily be allowed to take advantage of a cause of action arising subsequent to the suit and claim relief on that basis. AIR 1956 Raj 12 (15): ILR (1955) 5 Raj 85 (DB) ** 1956 Madh BLJ 383 (385) ** AIR 1936 Mad 504 (506) ** 1960 Raj LW 385.

[See also AIR 1936 Oudh 250 (253): 12 Luck 101 (DB).]

[But see AIR 1950 Mad 321 (322) ** AIR 1947 Pesh 33 (35) ** AIR 1925 Mad 63 (64) (DB) ** AIR 1926 Lah 145 (146) (DB).]

(3) Where a plaintiff has cause of action on the date of the suit, relief will not be ordinarily refused to him on that basis by reason of subsequent events. AIR 1948 Bom 396 (399) ** AIR 1922 All 526 (526) (DB) ** AIR 1924 Mad 309 (310) (DB).

[But see AIR 1933 Lah 481 (483): 14 Lah 421 (DB).]

(4) Where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, the Courts may depart from the general rule and mould the relief on the basis of the altered circumstances, provided that the substantive rights of the parties are unaffected. AIR 1954 Madh B 193 (195): ILR (1954) Madh B 415 (FB) ** AIR 1958 Andh Pra 582 (584) (DB) ** AIR 1958 Cal 472 (474). (Party's rights altered retrospectively by legislation subsequent to preliminary decree.) ** AIR 1958 Ker 245 (246) (DB) ** AIR 1958 Pat 613 (617) (DB) ** AIR 1957 Orissa 199 (200, 201). (When the new ground arises before the filing of the written statement by the defendant, it would be open to the defendant to take it as a defence in the written statement.) ** AIR 1968 Pat 422 (425): ILR 47 Pat 326 ** AIR 1967 Cal 603 (607) ** AIR 1967 Mad 220 (221): 79 Mad LW

Order 7, Rule 7 — Note 5 (contd.)

486 ** (1967) 2 Mad LJ 468: ILR (1968) 2 Mad 577 ** AIR 1966 All 216 (217, 218): 1964 All LJ 1008. (Section 17 of Displaced Persons (Debts Adjustment) Act (1951) is retrospective — Change of law effected during pendency of suit — Change can be taken notice of by Court.) ** AIR 1966 Cal 63 (67) (DB) ** AIR 1966 Pat 97 (109): ILR 45 Pat 1019 (DB) ** AIR 1965 Andh Pra 98 (101): ILR (1963) Andh Pra 931 (DB) ** 1965 BLJR 214: ILR 44 Pat 694 ** AIR 1964 Tripura 36 (40) ** AIR 1963 Raj 198 (201): 1963 Raj LW 304 ** AIR 1962 Pat 168 (177) (DB) ** 1961 MPLJ 501 ** AIR 1959 Andh Pra 9 (11, 12, 13): (1958) 2 Andh WR 447 (DB). (AIR 1926 Mad 594, **HELD NO LONGER GOOD LAW.**) ** AIR 1959 Bom 491 (495): 59 Bom LR 1144 ** AIR 1959 Pat 562 (566): 1959 BLJR 376. (Inchoate title to suit property perfected during pendency of suit by registration of sale-deed — Court can take note of registration.)

[See also AIR 1967 Bom 250 (252): 68 Bom LR 524 (DB). (Principle cannot apply where intervening circumstances do not effect any alteration in the rights of the parties. Case under Section 33-B, Bombay Tenancy and Agricultural Lands Act, 67 of 1948.) ** AIR 1967 Cal 338 (341, 342): 18 STC 379 (DB). (High Court is justified in deciding question referred to it in the light of new law, provided no new facts need be investigated. Case under Section 21 (1) of Bengal Finance (Sales Tax) Act (6 of 1941).) ** AIR 1963 Mad 217 (222): (1963) 1 Mad LJ 113 (FB). (Case under Sections 9 (e) and 21 of Presidency Town Insolvency Act (1909) — AIR 1942 Mad 306, **OVERRULED.**) ** AIR 1941 PC 85 (88): ILR (1941) Kar (PC) 134.]

(5) Subsequent events during pendency of suit — Amendment of pleadings, issue on them and evidence of parties are necessary. AIR 1964 Manipur 1 (2).

(6) Where pending a suit for a declaration of title the defendant takes possession of the property in dispute, the plaintiff may amend the plaint by adding a prayer for possession instead of bringing another suit. AIR 1942 Cal 394 (398, 399) (DB) ** ('12) 16 Ind Cas 734 (735) (DB) (Mad) ** AIR 1930 Mad 405 (410) (DB).

(7) If, pending a suit for partition by A against his brothers B and C, B dies, A can amend his plaint and claim a half share instead of one third. ('93) 16 Mad 350 (353) (DB) ** AIR 1926 Mad 6 (12) (DB) ** AIR 1921 Bom 455 (456): 45 Bom 983 (DB).

(8) Where in a suit for money the real cause of action arose only after the institution of the suit, it was held in the following cases that the Court should not reject the plaint and drive the plaintiff to file a fresh suit but should pass a decree on the basis of such subsequent cause of action. AIR 1956 Raj 12 (15): ILR (1955) 5 Raj 85 (DB) ** AIR 1923 Lah 590 (591) (DB) ** AIR 1926 Mad 377 (377, 378).

[See also ILR (1953) Trav-Co 764 (769) (DB).]

(9) It is not only in the power but sometimes the duty of the Court to take notice of subsequent events where, if it is not so done, the Court might decide matters no longer in controversy or deliver judgment which could not be carried into effect or grant a relief which is inappropriate and ineffectual. ILR (1951) 1 Raj 254 (255, 256) ** AIR 1930 Bom 254 (260): 54 Bom 125 (DB).

(10) Where in the case of successive breaches of a contract, the plaintiff claims compensation for the breaches that arose previous to the date of the suit, and it is established that the defendant had committed fresh breaches after the instiuttion of the suit, the Court can properly take notice of the fact and pass a decree for compensation in respect of the breaches of the contract occurring after the institution of the suit. To subserve the ends of justice it would not be proper to deny to the plaintiff the relief to which he might be entitled at the time of the decree merely on the ground that at the time of the suit the cause of action for that relief had not accrued. Madh BLJ 1954 HCR 1732 (1735).

(11) Where the facts are not in dispute and the accrual of a cause of action subsequent to the suit is under the terms of a statute of which the Courts must take notice, a formal amendment of the plaint is unnecessary, for the Court is bound to administer the law of the land at the date when it gives its decision on a dispute. AIR 1950 Mad 321 (322) ** AIR 1941 FC 5 (12, 13, 14): 20 Pat 429: 1940 FCR 84: ILR (1941) Kar (FC) 1 ** Madh BLJ 1955 HCR 805 (806).

(12) The discretionary power to depart from the general rule and to take notice of subsequent events will not be exercised where it would have the effect of taking away the jurisdiction of the Court, or there is great delay in making the application or if a fresh enquiry into other facts becomes necessary. AIR 1926 Mad 6 (12) (DB).

[But see AIR 1955 Bom 55 (57).]

(13) Discretionary power to take notice of subsequent events will not be exercised where to do so would be to give manifest advantage or disadvantage to one party. AIR 1951 Madh B 63 (66) (DB).

(14) The discretion will not be exercised where the subsequent cause of action is alleged to arise by virtue of something done in the suit itself. ('91) 15 Bom 407 (411, 414) (DB) ** AIR 1929 Cal 830 (830, 831) (DB).

(15) In a suit for possession against a tenant on the ground of forfeiture by denial of title, the plaintiff on failing to prove such denial before suit cannot take

R. 8. Relief founded on separate grounds.—Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

[R.S.C., O. 20, R. 7; See O. 1, Rr. 1 to 7 and O. 2, Rr. 1 to 6.]

Order 7, Rule 8 — Note 5 (contd.)

advantage of a denial in the written statement of the defendant. **AIR 1919 PC 1 (4): 42 Mad 589: 46 Ind App 109** ** 1956 Madh BLJ 383 (384) ** ('09) 36 Cal 927 (932) (DB) ** AIR 1959 Andh Pra 9 (11, 12, 13): (1958) 2 Andh WR 447 (DB). (Suit for eviction on ground of forfeiture of lease — Expiry of lease during pendency of such suit — Alternative ground of claim for possession on basis of expiry of lease should be allowed.)

[But see ('84) 8 Bom 228 (230) (DB).]

(16) The Court will not exercise such discretionary power if the subsequent cause of action is entirely different and distinct from the cause of action as originally alleged. AIR 1927 Cal 56 (57) (DB) ** AIR 1917 Mad 198 (200) (DB).

(17) Where the subsequent events alleged to have happened are neither admitted nor proved nor found as a fact, the Court will not be justified in taking notice of the same or afford relief to a party on the basis of the alleged altered conditions. AIR 1951 Pat 318 (319).

(18) A decree which is good and valid at the date it was passed cannot by reason of a subsequent event become bad. AIR 1933 Cal 321 (322) (DB).

(19) Any moulding in the relief granted by the decree which the plaintiff might be required to resort to can sometimes appropriately be regarded as the one relating to execution and satisfaction of the rights determined unless the original Court before passing its judgment or the Court of appeal takes, notice of subsequent events and directs the moulding of such a relief. The latter course is permissible but failure to follow the same for some reason or the other cannot render the decree invalid or void. AIR 1954 Madh B 181 (183, 184): ILR (1954) Madh B 426 (FB).

(20) Where subsequent to the date of judgment of the first Court events happen which entitle the palintiff to a change in the relief the Appellate Court cannot take notice of such events and mould the relief accordingly. (1863) 9 Moo Ind App 287 (299, 300) (PC).

[See also AIR 1934 Pat 21 (23).]

(21) In exceptional cases the Appellate Court may take notice of events happening after the date of the judgment of the first Court. ('07) 6 Cal L Jour 102 (104) (DB) ** ('01) 25 Bom 606 (613, 614) (DB) **** AIR 1959 SC 577 (579): 1959 Supp 1 SCR 968.** (Appellate Court is entitled to take into consideration any change in the law.) ** AIR 1967 All 231 (236, 238): 1967 All LJ 536 (DB) ** AIR 1966 All 216 (217, 218): 1964 All LJ 1008. (Displaced Persons (Debts Adjustment) Act (1951), Section 17 — Section is retrospective — Change of law effected during pendency of suit or appeal can be taken cognizance of by appropriate Court.) ** AIR 1966 Orissa 1 (3): 31 Cut LT 996 ** AIR 1964 Tripura 36 (40) ** AIR 1963 Madh Pra 344 (348): 1963 MPLJ 542 (DB). (Change in the legal position as a result of the passing of M. P. Abolition of Proprietary Rights, Estates, Mahals, Alienated Lands Act, 1951.) ** AIR 1960 All 601 (601): 1960 All LJ 246 (DB). (AIR 1955 All 364, REVERSED.) ** AIR 1960 Ker 158: 1959 Ker LT 1287 ** AIR 1959 Bom 491 (495): 59 Bom LR 1144.

(22) The introduction of new Rule 33 in Order 41 enables the Appellate Court not only to pass any order which ought to have been passed or made, but to pass such further or other decree or order as the case may require. It makes it now perfectly clear that on appeal such a judgment may be given as ought to be given if the case came at that time before the Court of first instance. AIR 1956 Orissa 175 (176) (DB) ** AIR 1956 Trav-Co 203 (204) (DB) ** **AIR 1941 FC 5 (12, 13, 14): 1940 FCR 84** ** ('10) 36 Mad 439 (441, 443) (FB).

[See however AIR 1945 Pat 87 (92): 23 Pat 508 (DB).]

[But see AIR 1929 All 699 (701).]

(23) Even though an appeal is in the nature of a re-hearing and the Courts can take into account the facts and events which have come into existence after the decree appealed against, it can be only for moulding the relief to be granted in the appeal. **AIR 1956 SC 655 (674). (AIR 1941 FC 5,** Relied on.)

[See also AIR 1969 Andh Pra 45 (47). (The proposition is subject to the finality attached to the remand order under Section 105 (2) and Order 41, Rule 23.)]

(24) An appellate Court cannot take notice of a law passed subsequently which is not retrospective in effect. AIR 1951 All 205 (219): ILR (1952) 2 All 467 (DB) ** AIR 1953 Nag 361 (365, 367): ILR (1953) Nag 702 (FB).

(25) The power conferred by Order 41, Rule 33 cannot be exercised in this respect so as to affect a vested right. AIR 1953 Nag 361 (364, 367): ILR (1953) Nag 702 (FB) ** AIR 1944 Lah 319 (320, 321): ILR (1944) Lah 443 (FB).

(26) Change in law during pendency of writ petition — Change is of no consequence and cannot be taken into consideration in deciding writ petition. AIR 1965 Punj 21 (22): 66 Pun LR 552.

Order 7, Rule 8

1. Relief founded on separate grounds.— (1) Plaintiff may, in a proper case, rely upon one set of material facts for his relief and also on another and even incon-

R. 9. Procedure of admitting plaint: Concise statements.—(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.

[1882 and 1877, S. 58; See O. 7, Rr. 4 and 5.]

HIGH COURT AMENDMENTS

Allahabad

(a) For the semicolon after "it" in clause (1), substitute a full stop and delete the rest of this clause as well as clauses (2) and (3); and

(b) Re-number clause (4) as clause (2), deleting the words "or statements" therein.

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as in Calcutta — Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Sections 13 and 15 (1-12-1963).

Bombay: Dadra and Nagar Haveli[a]

For Rule 9, substitute the following:—

"**9. Chief Ministerial Officer to sign lists and copies produced along with plaint.**—(1) The plaintiff shall endorse on the plaint or annex thereto a list of documents (if any) which he has produced along with it.

(2) The Chief Ministerial Officer of the Court shall sign such lists and the copies of the plaint with annexures presented under R. 1 of Order IV, if on examination he finds them to be correct. (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965].

Calcutta: Andaman and Nicobar Islands

Cancel clause (1) and substitute therefor the following :—

"(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it.

(1A) The plaintiff shall present with his plaint :

Order 7, Rule 8 — Note 1 (contd.)

sistent set of material facts for relief in the alternative; but where such alternative cases are alleged, the facts belonging to them respectively should not be mixed up but should be stated separately so as to show on what facts each alternative relief is claimed. (1878) 7 Ch D 473 (489). (Per Thesiger, L. J.) ** AIR 1920 Cal 93 (95) (DB) ** (1887) 35 Ch D 492 (499).

[See also AIR 1929 Nag 347 (347).]

(2) Relief for possession does not include relief for demolition of structures — No separate decree for demolition of structures necessary. 1967 All WR (HC) 199.

(3) It is open to the plaintiff to join two causes of action and to pray for several reliefs provided the requirements of C. P. Code are satisfied. AIR 1964 Guj 174 (176, 177): (1964) 5 Guj LR 678.

(4) Court can give plaintiff relief on basis of alternative case although no such case was made out in plaint. ILR (1962) 12 Raj 733: 1962 Raj LW 345.

Order 7, Rule 9

1. Procedure of admitting plaint. — (1) This rule relates to the procedure adopted when a plaint is admitted. AIR 1941 Oudh 30 (31).

(2) The rule does not provide for filing by the plaintiff forms of summons for the first appearance of the defendant. AIR

(i) as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements;

(ii) draft forms of summons and fees for the service thereof." [As amended on 3-2-1933.]

Kerala: Laccadive, Minicoy and Aminidvi Islands[a]

In Rule 9—

(i) for sub-rule (1), the following sub-rule shall be substituted, namely :—

"9. (i) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it, and shall present along with the plaint as many copies on plain paper of the plaint as there are defendants."

(ii) sub-rules (2) and (3) shall be omitted..

(iii) in sub-rule (4) the words "or statements" shall be omitted. (9-6-1959):

[a] See Act 37 of 1956 and Reg. 8 of 1965.

Madhya Pradesh

Substitute the following for Rule 9:—

"9. (1) The plaintiff shall endorse on the plaint or annex thereto a list of the documents (if any) which he has produced along with it.

(2) The Chief Ministerial Officer of the Court shall sign such lists and the copies of the plaint presented under Rule 1 of Order 4, if on examination, he finds them to be correct." (16-9-1960.)

Madras and Pondicherry

After the word "and" occurring in clause (1), delete the comma and the five words following, viz., "if the plaint is admitted" and insert the expression "along with the plaint" after the words "shall present". [R.O.C. No. 1810 of 1926]; Act 26 of 1968, Section 3 and Schedule Pt II. [w. e. f. 5-9-1968].

Mysore

For Rule 9, substitute the following:—

'9. The plaintiff shall present along with the plaint as many copies on plain paper of the plaint as there are defendants, unless by reason of the length of the plaint or the number of the defendants or for any other sufficient reason, the Court permits him to present a like number of concise statements of the nature of the claim made or of the relief claimed in the suit, in which case he shall present such statements. Where the plaintiff sues or the defendant or any of the defendants is sued in a representative capacity, such statements shall show in what capacity the plaintiff or the defendant sues or is sued. The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint. The copies or concise statements, as the case may be, shall bear an endorsement signed by the party or the pleader filing the same to the effect that they are true and correct. (30-3-1967.)

Orissa

Same as that of Calcutta. (7-5-1954.)

Order 7, Rule 9 — Note 1 (contd.)

1957 Pat 152 (154, 155). (Desirability of amending the rule on the line adopted by Calcutta High Court suggested.)

(3) Details of the averments too compendious for being included in the election petition may be set out in the schedules or annexures to the election petition which when verified and signed are treated as integrated with the election petition. In the instant case they are in no sense an integral part of the averments of the petition but are only evidence of those averments and in proof thereof. The pamphlet is a document and not a part of the election petition in so far as averments

R. 10. Return of plaint.—(1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

(2) **Procedure on returning plaint.**—On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it and a brief statement of the reasons for returning it.

[1882 and 1877, S. 57; 1859, S. 30; See S. 21.]

HIGH COURT AMENDMENT

Bombay: Dadra and Nagar Haveli[a]

In Order VII, Rule 10, for the existing sub-rule (1) and its marginal note, substitute the following as sub-rule (1) and marginal note:—

"10. **Return of plaint.**—(1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted. The plaintiff or his pleader shall be informed of the date fixed for the return of the plaint. (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965].

Order 7, Rule 9 — Note 1 (contd.)

are concerncd. **AIR 1968 SC 1079 (1082, 1083): (1968) 3 SCR 13.** (Case under Representation of the People Act (1951), Section 81 (3).)

(4) Whenever a plaint is presented in a Court, a suit is not necessarily 'instituted'. The words "on a suit or proceedings being instituted" should be interpreted as "on a suit being admitted" as under O. 7, Rule 9. (1963) 67 Cal WN 334.

(5) When a suit has been admitted under Order 7, Rule 9 it cannot be rejected under Order 7, Rule 11. AIR 1963 Guj 79 (79): 4 Guj LR 437.

ORDER 7, RULE 10 — SYNOPSIS

1. Scope.
2. "At any stage of the suit".
3. Return of plaint by Appellate or Revisional Court.
4. Return of plaint by Small Cause Court.
5. Return of plaint by Civil Court to Revenue Court and vice versa.
6. Return of applications.
7. Case in which suit should not have been instituted.
8. Costs.
9. Limitation.
10. Chartered High Courts.
11. Appeal.
12. Revision.

1. Scope.— (1) Where the Court has no jurisdiction over the suit, a judgment given by it will be a determination coram non judice and it would be a futile proceeding for the Judge to go on with an investigation which would have no jural effect. AIR 1955 Bhopal 6 (7) ** (1884) 8 Bom 313 (317) (FB) ** 1968 Jab LJ 151 (152) ** (1964) 77 Mad LW 458 (462) ** AIR 1961 Andh Pra 327 (328). (Appeal lying to High Court wrongly entertained by District Judge and allowed — Second Appeal filed before High Court — Proper course to be followed in appeal to High Court was to direct the lower appellate Court to return the memorandum of appeal for presentation to proper Court.)

[See also AIR 1956 Hyd 177 (178): ILR (1956) Hyd 462 (DB).]

(2) Suit for damages and for accounts instituted at M, where part of cause of action arose — Plea that suit being for accounts it should have been instituted at C, where account books were kept — Plaint returned for presentation to proper Court — Court while returning plaint giving findings on some of issues — Return of plaint held not proper — Finding on other issues not forming part of decree — Jurisdiction of appellate Court confined to order returning plaint. AIR 1963 Mad 30 (30): (1962) 2 Mad LJ 270 (DB).

(3) This rule does not compel a Court of higher grade to return a plaint for being presented to the Court of lower grade irrespective of the circumstances of each case. It only vests the Court of higher grade with a discretion to be exercised in accordance with legal principles after considering the facts of each case. AIR 1954 Pat 34 (36) (DB).

[See also AIR 1957 Andh Pra 654 (657): ILR (1956) Andhra 162.]

(4) Applicability — Suit on Negotiable Instruments — Suit must be instituted in Court of lowest grade — Institution of suit in Court of higher grade — Court may entertain or return the plaint. AIR 1965 Mys 248 (250): (1964) 2 Mys LJ 348.

(5) Joinder of several causes of action in one suit — Want of jurisdiction over some — Proper course is to return plaint. AIR 1966 Madh Pra 286 (292): 1966 MPLJ 335 (DB).

(6) Where in a case instituted in the Court of higher grade the evidence has been gone into and concluded, and the objection is raised at the time of arguments, the Court should instead of returning the plaint, proceed to decide the same. AIR 1943 Cal 450 (451) (DB).

(7) Before returning the plaint under Rule 10 it is enough for the Court to find that it has no jurisdiction to entertain the plaint filed before it. Whether other Courts have jurisdiction or not is not the concern of the Court acting under O. 7,

Order 7, Rule 10 — Note 1 (contd.)

Rule 10 for the simple reason that a Court without jurisdiction cannot determine any matter. AIR 1957 Pat 324 (325) (DB) ** AIR 1959 Manipur 9 (10).

[See however AIR 1968 Madh Pra 112 (115): 1967 MPLJ 875. (A plaint can be returned only if at the time it was filed there was another Court in which the suit should have been instituted.)]

(8) Where the Court comes to the conclusion that the suit should have been instituted in another Court, the only thing that it can do is to return the plaint for presentation to that Court and not to dismiss the suit, or to transfer the suit to the proper Court. AIR 1946 All 488 (488): ILR (1946) All 702 (DB) ** AIR 1942 Pat 1 (3, 16): 21 Pat 1 (FB) ** AIR 1952 Pepsu 65 (65): ILR (1952) Patiala 43. (It cannot transfer the suit.) ** AIR 1966 Andh Pra 334 (336): (1966) 1 Andh WR 282.

[See AIR 1940 Mad 689 (690) (DB).]

[See also AIR 1961 Tripura 22 (22): 1966 Cri LJ 1484. (Court holding that counter claim must be agitated by separate suit — Court-fee not exhausted and can be used in second suit instituted on counter claim — Court should return counter claim to be presented to proper Court.) ** AIR 1926 Pat 28 (29) ** AIR 1935 All 157 (160) (DB).]

[But see 2 Hay 386.]

(9) Return of plaint under this rule for presentation to proper Court does not amount to failure of suit within Order 23, Rule 2 (a). AIR 1967 Pat 246 (247) (DB).

(10) Suit found beyond pecuniary jurisdiction — Proper order to be passed is under Rule 10 and not under Rule 11 — When order is passed under Rule 11 defect can be cured under Section 151 — On failure of trial Court to exercise that jurisdiction, High Court can pass suitable order in revision. 1965 All WR (HC) 604 (606).

(11) It has been held that a British Indian Court has no jurisdiction to return a plaint for presentation to a Court outside British India. (1911) 9 Ind Cas 824 (824) (DB) (All).

(12) A Court returning a plaint under this rule cannot fix a time within which the plaintiff should re-present it to the proper Court. (1941) 45 Cal WN 524 (525) (DB).

(13) The provisions of this rule are wide enough to cover all cases where the Court is unable to entertain the suit for want of jurisdiction whatever may be the nature of the objection to its jurisdiction. AIR 1930 Lah 394 (395) (DB) ** AIR 1938 Sind 124 (125): ILR (1939) Kar 50 (DB).

[See also AIR 1955 All 669 (670) (DB).]

(14) Contents of the plaint filed in civil Court showing it to be an application under Section 12 of the U. P. Agriculturists Relief Act (1934) — Application under that section not maintainable in Civil Judge's Court — Provision of Order 7, Rule 10 applies to such application by virtue of Section 141 of the Code. 1964 All LJ 70 (72).

(15) Whether the plaint should be returned for presentation to proper Court or not should be determined on basis of allegation made in the plaint. 1958 All WR (HC) 21 (22).

(16) The shape in which the suit is originally instituted is the test of jurisdiction. Therefore, where it is found in the course of the hearing, as the result of admissions made by the parties or of the evidence led by them, that the relief which the plaintiff was really entitled to was not cognizable by that Court, the rule does not apply. AIR 1944 Sind 98 (100): ILR (1943) Kar 491 ** AIR 1940 Nag 331 (333): ILR (1941) Nag 96 ** (1886) 8 All 111 (113) (FB).

[See also AIR 1957 Orissa 17 (21): ILR (1956) Cut 677 (DB). (Suit filed as against trespasser who is found to be a tenant must be dismissed; the question of return of plaint in such a case does not arise.)]

(17) Where a suit instituted properly in a competent Court is sent for disposal to another Court and that other Court finds that the suit sent to it is beyond its pecuniary jurisdiction that Court should send the suit back to the Court from which it was sent and not return the plaint under this rule. AIR 1941 Bom 69 (71): ILR (1941) Bom 131 (DB) ** AIR 1952 Pat 280 (280, 281).

[See AIR 1922 Bom 152 (154): 46 Bom 229 (DB).]

[See however AIR 1957 Pat 324 (325) (DB). (Return of plaint to be filed in another Court — Other Court also having no jurisdiction — It will be matter for decision by that Court and Courts superior to it.)]

(18) It is the defect of presentation of the plaint in the first instance in the wrong Court that attracts the applicability of this rule. AIR 1952 Pepsu 105 (106): 3 Pepsu LR 231 ** (1896) 20 Bom 675 (676, 677) (DB) ** AIR 1920 Nag 47 (49).

(19) This rule is sufficiently wide to cover a case in which by operation of legislation the situation arises even after a suit has been instituted, that it should have been instituted in another Court. AIR 1938 Oudh 224 (225): 14 Luck 218 (DB).

[But see 1949 Bur LR (SC) 132 (134).]

(20) Where after presentation of a plaint in a Court not having jurisdiction to entertain it such jurisdiction is conferred on it, the Court cannot thereafter act under this rule. AIR 1941 Oudh 161 (163): 16 Luck 402 (DB).

[See also AIR 1962 Andh Pra 442 (443): (1962) 1 Andh WR 174. (Plaint properly filed as original suit in District Munsif's Court — Subsequent enlargement of Small Cause Jurisdiction of Subordinate Court — Plaint wrongly returned for representation

Order 7, Rule 10 — Note 1 (contd.)

to proper Court — Decree passed by Court of representation — Decree is valid.)]

(21) A Court has no jurisdiction to act under this rule after it has passed a decree in the suit. AIR 1930 Cal 147 (147) (DB) ** (1884) 8 Bom 380 (389, 390) (DB).

(22) The Court cannot act under this rule unless it comes to a definite finding that the suit should have been instituted in another Court. AIR 1929 Lah 248 (249) ** AIR 1926 All 58 (59, 60): 48 All 168 (DB).

[See AIR 1935 Rang 310 (314) (DB).]

(23) Court has no power to return the plaint for presentation to the proper Court merely on the ground that it would be more advantageous to the defendant to have the suit tried in that Court. AIR 1927 Cal 87 (88) (DB).

(24) Where a Court returns a plaint for presentation to the proper Court on the ground that it was beyond its jurisdiction, the plaintiff is entitled to relinquish a portion of the claim, so as to bring the suit within the pecuniary jurisdiction of the former Court and to re-present the plaint in the same Court. There can be no question of an abuse of the process of Court involved in such a case. AIR 1931 Mad 8 (9) ** AIR 1939 Mad 397 (398). (Note — This case is **REVERSED** on another point in AIR 1940 Mad 689.) ** AIR 1954 All 749 (750). (No abuse of process of Court.)

(25) Where the plaintiff relinquishes a portion of his claim to bring the suit within pecuniary jurisdiction of the Court and represents it in the same Court, the Court cannot treat it as a continuation of the original plaint and the suit must be deemed, for purposes of limitation, as instituted on the day of representation. AIR 1940 Mad 689 (690) (DB). **(AIR 1939 Mad 397, REVERSED.)**

[See also AIR 1951 Mad 841 (842).]

(26) The Court in which the suit is instituted by representation of the plaint cannot record a compromise reached and filed by the parties in the Court of wrong jurisdiction when the suit was pending before that Court. AIR 1950 Pat 473 (478): 29 Pat 699 (DB).

(27) Where two reliefs are claimed in a plaint, one of which the Court is not competent to grant, it is competent for the Court to return the plaint in respect of the cause of action which is not within its jurisdiction, and proceed with the suit in respect of the cause of action within its jurisdiction on a certified copy of the plaint. AIR 1927 Pat 254 (255): 6 Pat 358 (DB) ** AIR 1921 All 193 (193) (DB).

[But see AIR 1942 All 130 (134): ILR (1942) All 129 ** AIR 1926 Bom 283 (283, 284) (DB).]

(28) Suit for maintenance and alternatively for partition of immovable property — Court having jurisdiction to grant the first relief only — Court may suo motu delete the alternative prayer for partition if plaintiff does not do so at the first instance — Plaint cannot be returned under Order 7, Rule 10 since the Court can grant one of the reliefs prayed for. ILR 1966 Cut 926 (931): 33 Cut LT 1056.

(29) It is open to a Court to ignore a relief as being based on no cause of action and then to return the plaint under this rule, if it finds that the rest of the claim is within the jurisdiction of an interior Court. AIR 1920 Oudh 21 (23) (DB).

(30) When a plaint is returned by a superior Court to a lower Court, it is not strictly speaking, because the superior Court is without jurisdiction to entertain it but only in conformity with the provision of Section 15, Civil Procedure Code, which requires that "a suit shall be instituted in the Court of the lowest grade competent to try it" — The position is different when a suit which ought to be filed in a superior Court is instituted in a lower Court — That would be a case of real want of jurisdiction — Even then, of course, if the suit is tried by the lower Court and ends in a decree, that decree cannot be attacked on the ground of undervaluation of the suit. AIR 1957 Andh Pra 654 (657): ILR (1956) Andhra 162.

(31) Where the Court finds that the suit has been undervalued in a palpably absurd and manifestly unfair manner in order to bring it within the jurisdiction of that Court and orders the return of the plaint, that order will not be interfered with. AIR 1956 Nag 195 (199): ILR (1956) Nag 514 (DB) ** AIR 1954 Hyd 220 (221): ILR (1954) Hyd 347 (DB).

(32) Suit for ejectment of tenant holding over and his sub-lessees — Court finding sub-lessees as trespassers against plaintiff — Court cannot insist on plaintiff to base his suit on title as against them also and return the plaint for want of jurisdiction. AIR 1964 Tripura 1 (2).

(33-34) Plaint returned for presentation to proper Court — Latter Court bound to give credit for fee already paid. AIR 1959 Punj 629 (631): ILR (1959) Punj 1770.

(35) Even where a plaint has been returned for presentation to proper Court, it is only the date of the representation in proper Court that would determine the question of Court-fee. AIR 1963 Andh Pra 68 (69): (1962) 1 Andh LT 461. (AIR 1926 Cal 355 and AIR 1950 Pat 473, Foll.)

(36) The difficulty experienced by a plaintiff in giving a precise valuation does not entitle him to arbitrarily and deliberately undervalue the relief sought by him. If the valuation given by him bears no relation to reality, the Court can and must intervene and exercise its powers under Order 7, Rules 10 and 11. (1968) 2 Andh LT 1 (FB).

(37) The Court can return a plaint when it finds that the plaint has been overvalu-

Order 7, Rule 10 — Note 1 (contd.)

ed. (1885) 8 Mad 384 (387) (DB) ** AIR 1938 Nag 149 (150): ILR (1939) Nag 300 (DB) ** AIR 1935 All 157 (160) (DB) ** AIR 1969 Ker 75 (77): 1968 Ker LT 479. (Amendment if allowed, suit falling out of jurisdiction of Court — Court should allow amendment and then return the plaint for presentation to proper Court.) ** AIR 1963 Madh Pra 194 (196, 197): 1963 MPLJ 87 (DB). (Amendment of plaint carrying subject-matter beyond pecuniary jurisdiction of trial Court. Proper course is to return plaint for presentation to proper Court.)

(38) Return of the plaint which has been overvalued will be justified only when the overvaluation has not been due to a bona fide mistake — In such a case the Court can only return the plaint for presentation to the proper Court and not for presentation to a particular named Court. AIR 1942 Rang 10 (10, 11) (DB).

(39) Where the Court finding that it had no jurisdiction in the suit as originally valued refused to allow the plaintiff to amend the plaint relinquishing a part of his claim and thus bring the suit within jurisdiction and ordered the return of the plaint for presentation to the proper Court, the order was held to be not wrong. 1954 Raj LW 583 (585).

(40) A Court which has once returned the plaint for presentation to another Court has no jurisdiction to re-entertain it although the latter Court has returned it for presentation to the former Court, unless the order of the former Court is set aside by a superior Court. AIR 1922 Pat 368 (369).

(41) Choice between two forums — Suit instituted in one forum returned — Same presented in other forum — Order returning plaint set aside in appeal — Plaintiff not entitled to return of plaint for presentation in Court of his first choice. AIR 1962 Mad 249 (250): (1962) 2 Mad LJ 83.

(42) Where a Munsif's Court returns a plaint for presentation to the proper Court, and in appeal against that order, the District Court holds that the Munsif's Court has jurisdiction to entertain the plaint, the Munsif's Court is bound by such order. AIR 1915 Mad 613 (613, 614) (DB).

(43) Where a Munsif returns a plaint for presentation to the Revenue Court and the Revenue Court returns it as being not cognizable by it and the District Judge in an appeal from the order of the Revenue Court holds that it is a suit cognizable by the Civil Court, the Munsif is not bound by the order of the District Judge. He may make such order on the plaint as he thinks proper, when it is represented to him. AIR 1926 Mad 365 (365) (DB).

(44) Where a plaint is returned under this rule the vakalatnama should also be returned as it enures for the suit in the Court in which it is subsequently presented. AIR 1957 Andh Pra 654 (657): ILR (1956) Andhra 162 ** AIR 1923 Nag 182 (187): 19 Nag LR 36.

(45) The plaint that should be returned under this rule is the plaint which is the basis of the suit at the time when its return is ordered and so, where at such time an application for amendment of the plaint is pending, the plaint that should be returned under this rule is the original plaint and not the proposed amended plaint. AIR 1935 Rang 310 (314) (DB).

(46) If the plaint is to be altered materially before being presented to a proper Court, it is not a case at all of returning a plaint for presentation to a proper Court. 1958 All WR (HC) 21 (23).

(47) Suit for dissolution of partnership and rendition of accounts — Valuation of suit under Section 37 — Application made subsequently for amendment of plaint by adding additional reliefs. **Held,** suit was properly valued even if additional reliefs were included — No question of return of plaint for presentation to proper Court would arise. (1967) 2 Andh WR 49 (52).

(48) The provisions of this rule are applicable to proceedings under the Divorce Act, applications under Section 19 of the Madras Agriculturists Relief Act of 1938 and proceedings under the Chota Nagpur Tenancy Act. (1943) 47 Cal WN 707 (709). (Divorce proceedings.) ** AIR 1941 Mad 362 (363). (Application under Section 19, Madras Agriculturists Relief Act.)

See Bengal Act VI of 1908, Section 265 (3) (m).

(49) This rule read with Section 141, applies to an election petition. AIR 1950 Nag 212 (214) ** 1966 BLJR 897 (898).

(50) Landlord's petition under Section 7-B, U. P. Temporary Control of Rent and Eviction Act — Tenant making necessary deposit and filing objection — Landlord given option under sub-section (7) to pay necessary court-fee and have the application treated as plaint in suit for arrears of rent — Landlord availing of option.

Held, the Court under the circumstances had jurisdiction to hear and decide the suit and therefore, order for return of plaint for presentation to Small Cause Court could not be upheld. 1954 All L Jour 708 (709).

(51) Returning the plaint without any of the endorsements required under Clause (2) of the Rule is an irregularity. AIR 1954 Hyd 39 (40): ILR (1953) Hyd 637 (DB).

(52) Return of plaint for presentation to competent Court of another State — Court-fee purchased in first State can lawfully be received by Court in another State. AIR 1969 Delhi 130 (132).

2. "At any stage of the suit". — (1) The direction in this rule is imperative. AIR 1943 Cal 450 (452) (DB) ** AIR 1927 Bom 257 (258): 51 Bom 236 (DB) ** AIR 1935 All 157 (160) (DB).

(2) The Court is entitled to pass orders under this rule at any stage of the suit.

Order 7, Rule 10 — Note 2 (contd.)
AIR 1957 Pat 324 (324, 325) (DB) ** AIR 1959 All 37 (43): ILR (1957) 2 All 349. (Obiter — Rule 10 deals with the return of a plaint at any stage of the suit to be presented to the Courts in which the suit should have been filed.)

(3) As soon as the Court arrives at a conclusion at any stage of the suit that it should have been instituted in some other Court, the plaint should at onec be returned. AIR 1957 Pat 324 (324, 325) (DB). (Issue framed — Case taken up for trial — Trial over — On application by plaintiff, Court finding that it has no jurisdiction — Court should return the plaint, in spite of delay, harassment and cost caused to parties.) ** (1884) 8 Bom 313 (318) (FB). (**OVERRULING** 7 Bom 487.) ** AIR 1938 All 76 (78) (DB) ** 1965 All WR (HC) 214 (217).

[See however (1888) 11 Mad 482 (483, 484, 485) (DB).]

[But see (1867) 8 Suth WR 46 (48).]

(4) Decision of want of jurisdiction on preliminary issue — Order for return of plaint for presentation to proper Court not bad. AIR 1962 All 572 (573).

(5) A Court which has no jurisdiction over a suit cannot pass any judicial order in such a suit except the orders which the statute empowers it to pass. AIR 1940 Mad 689 (690) (DB). (AIR 1939 Mad 397, **REVERSED.**) ** AIR 1919 Mad 1071 (1073): 41 Mad 711 (DB).

[See also (1886) 12 Cal 271 (272) (DB) ** (1884) 8 Bom 313 (317) (FB).]

(6) All the proceedings in the suit before the return of the plaint to the proper Court are of no effect. AIR 1931 Mad 575 (576, 577): 54 Mad 561 (DB) ** (1912) 15 Ind Cas 773 (774): 1912 Pun Re No. 96 ** AIR 1939 Mad 724 (728).

(7) Where a Court finds that a suit is undervalued and on re-valuation the suit is found to be beyond the pecuniary jurisdiction of that Court, the proper procedure to be followed by the Court is to return the plaint for presentation to the proper Court and not to call upon the plaintiff to pay the proper court-fee according to the correct valuation and to reject the plaint under Order 7, Rule 11 on non-payment of the additional court-fee. AIR 1930 Mad 699 (699) ** AIR 1931 Mad 67 (69) (DB) ** AIR 1927 Bom 257 (258): 51 Bom 236 (DB).

[But see AIR 1924 Mad 646 (647).]

(8) Even where the Court in which the suit was originally instituted is not without jurisdiction but the plaint is returned for presentation to a lower Court competent to try it, the suit after representation of the plaint in the latter Court is, for all intents and purposes, a new suit and not a continuation of the suit filed in the wrong Court. AIR 1943 Cal 450 (451) (DB).

(9) Suit under Section 73, Trade Marks Act, filed in Court of Additional Civil Judge — Objection to jurisdiction disallowed by Civil Judge but allowed by High Court in writ proceedings against that decision — High Court also issuing writ of prohibition to Court of Civil Judge not to proceed with trial of suit — Power of Civil Judge to return plaint under Order 7, Rule 10 not affected. AIR 1963 All 448 (449).

3. Return of plaint by Appellate or Revisional Court. — (1) When an appellate Court decides that the suit should have been instituted in another Court, it has power to direct the plaint to be returned for presentation to the proper Court. (1903) 25 All 174 (176) (FB) ** (1899) 26 Cal 275 (278) (DB) ** (1908) 7 Cal L Jour 152 (164) (DB).

[See also AIR 1946 Oudh 116 (118): 21 Luck 350 ** AIR 1930 All 869 (873) (DB).]

[But see AIR 1944 All 60 (61): ILR (1944) All 189.]

(2) Where the lack of jurisdiction in the trial Court is found to have resulted from a mere under-valuation in the plaint, objection to which was not taken in that Court itself, the appellate Court before it exercises its power to order the return of the plaint must come to a finding that the under-valuation had prejudicially affected the disposal of the suit on its merits. AIR 1953 Mad 871 (872, 873). (AIR 1947 Mad 135 and AIR 1925 Lah 290: 6 Lah 105 (FB), Rel. on.)

(3) Where the Appellate Court returns a memorandum of appeal for presentation to the proper Court on a plea raised by the respondent, and appeal is presented to the proper Court, the respondent will be estopped thereafter from contending that the former Court should not have returned the memorandum of appeal at all. AIR 1930 All 15 (16) (DB).

(4) Under Section 25, Provincial Insolvency Act, the High Court has power to direct the return of the plaint for presentation to the proper Court. AIR 1940 Oudh 245 (248).

(5) Appellate Court directing plaint to be returned to plaintiff for presentation to proper Court on ground that trial Court had no pecuniary jurisdiction to try suit — Case is governed by Order 7, Rule 10 read with Order 43, Rule 1 (a). AIR 1959 Madh Pra 253 (255): 1959 MPLJ 388.

4. Return of plaint by Small Cause Court. — (1) When a Provincial Small Cause Court finds that a suit is not cognizable by it, it should not go into the merits of the case, but should return the plaint under this rule. AIR 1918 Cal 869 (870) (DB) ** AIR 1926 Mad 679 (680) ** 1884 Pun Re No. 90, p. 262 (DB).

[But see AIR 1961 Madh Pra 152 (153, 154): 1961 MPLJ 175. (Suit entertained on allegation of plaint — Court of Small Causes found to have no jurisdiction on defence allegation — Court can dismiss suit and is not bound to return plaint.)]

Order 7, Rule 10 — Note 4 (contd.)

(2) Where a Small Cause Court returns a plaint under Section 23, Provincial Small Cause Courts Act to be presented to an ordinary Civil Court in order to decide a question of title to immovable property, the Civil Court has no jurisdiction to return again the plaint under this rule, as the reference to Civil Court by the Small Cause Court was under a special provision of law empowering the Small Cause Court to make such reference. (1913) 18 Ind Cas 325 (325) (DB) (Cal) ** AIR 1926 Cal 83 (84).

(3) Suit for arrears of rent — High Court holding suit was cognisable by Revenue Court and ordering return of plaint — Decision subsequently overruled — Land also held not to be estate within the meaning of Madras Estates Land Act by the settlement officer and the tribunal — Return of plaint by Small Cause Court when again it was presented.

Held, order was wrong and was to be set aside. (1953) 66 Mad LW 866 (868).

5. Return of plaint by Civil Court to Revenue Court and vice versa.— (1) When a Civil Court finds that a suit is triable only by a Revenue Court, and not by itself, if should return the plaint to be presented to that Court. AIR 1957 Mad 671 (673) (DB) ** (1893) 15 All 387 (390) (FB) ** 1968 Raj LW 376 (378) ** AIR 1963 Him Pra 49 (52, 53) ** 1963 Raj LW 310 (313).

(2) When the Revenue Court finds that the suit instituted before it is not triable by it but by Civil Court, it should return the plaint to be presented to the Civil Court. 1956 Raj LW 5 (6) ** AIR 1942 Pat 1 (3, 16): 21 Pat 1 (FB) ** AIR 1922 All 424 (424): 44 All 686 (DB).

(3) Section 99 of the Punjab Tenancy Act provides that where a Revenue Court or a Civil Court returns a plaint to be presented to the other Court and the latter Court is of opinion that the suit should have been instituted in the former Court, it should not again return the plaint, but refer the matter to the Chief Court. 1904 Pun Re No. 63, p. 182 (183) (DB) ** (1912) 13 Ind Cas 447 (447) (Lah).

6. Return of applications.— (1) This rule applies only to plaints and not to applications. AIR 1934 Sind 95 (95, 96) ** 143 Ind Cas 535 (535) (FB). (Hyderabad Court.) ** AIR 1935 Mad 1043 (1043).

[But see AIR 1945 Nag 214 (216): ILR (1945) Nag 781 (DB). (AIR 1949 Cal 220: ILR (1940) 1 Cal 358, Rel. on; AIR 1934 Sind 95, **Dissent.** and 143 Ind Cas 535 (Hyderabad Court), not preferred.)]

(2) A Court cannot under this rule return an application for leave to sue in forma pauperis. AIR 1950 Pat 309 (310): 29 Pat 381 (DB) ** AIR 1919 All 213 (214) (DB).

[But see AIR 1958 Punj 52 (54): ILR (1957) Punj 1555 ** AIR 1957 Andh Pra 654 (658): ILR (1956) Andhra 162 ** AIR 1949 Mad 162 (165): ILR (1949) Mad 333. (AIR 1919 All 213 and AIR 1936 All 584: ILR (1937) All 22, **Dissent.**)]

(3) An application for the ascertainment of mesne profits on the ground that the amount exceeds the Court's pecuniary jurisdiction, cannot be returned under this rule. AIR 1917 Pat 334 (334): 2 Pat L Jour 394 (DB).

7. Case in which suit should not have been instituted.— (1) Where a suit is wrongly instituted in a case in which only an application should have been made to the executing Court, the plaint can be returned for presentation as an application to the executing Court. AIR 1920 Oudh 21 (23) (DB).

(2) The words "Court in which the suit should have been instituted" necessarily imply that the provisions of this rule can only apply where there is another Court having jurisdiction to try the proceeding. An application to the High Court for revision cannot be returned for re-presentation as an appeal to the District Court as an application for revision can only be made to the High Court. AIR 1942 Mad 657 (658) ** AIR 1942 Sind 104 (105): ILR (1942) Kar 207 (DB).

(3) Where a suit of a small cause nature is filed as an original suit in the District Munsiff's Court, as at that time the Court of the Subordinate Judge did not have small cause jurisdiction, but, subsequently, the Subordinate Judge is invested with small cause jurisdiction over the local limits of the District Munsiff, the District Munsiff continues to have jurisdiction to dispose of the suit as original suit and it should not be transferred to the Subordinate Judge's Court to be decided by it in exercise of its small cause jurisdiction. AIR 1957 Andh Pra 133 (134, 135): ILR (1957) Andh Pra 270 (DB). ((1956) Andhra WR 280, **Overruled.**)

(4) Where according to the allegations in the plaint, the suit cannot be instituted in a Civil Court, in which it is instituted, and the plaint as it stood cannot also be entertained by the Revenue Court, the only alternative before the Civil Court is to dismiss the suit, since there is no proper Court to which the plaint can be presented. 1958 All WR (HC) 21 (23).

(5) Suit in Civil Court for relief of injunction and in alternative for relief of recovery of possession — Relief of injunction found inadmissible and mere suit for possession was beyond jurisdiction of Court — Suit, held was liable to be dismissed. AIR 1966 All 367 (369, 370): 1965 All LJ 549.

(6) Return of plaint for proper presentation — Suit found to be cognizable by revenue Court and not by Civil Court — Suit dismissed as plaint in existing form could not have been presented before revenue Court. AIR 1965 All 514 (517): 1965 All LJ 70.

Order 7, Rule 10 — Note 7 (contd.)

(7) Case triable partly by Civil Court and partly by Revenue Court — Plaint filed in Civil Court — Procedure of returning plaint for trial by proper Court not applicable — Plaint should be amended by deletion of portion not triable — If not amended it should be rejected. AIR 1962 Guj 296 (296, 297): (1962) 3 Guj LR 991. (AIR 1927 Pat 254, **Dissented from.**)

8. Costs.— (1) While returning a plaint for presentation to the proper Court, the Court can make an order under Section 35 directing the plaintiff to pay the costs of the defendant. But it cannot make the payment a condition precedent for representing the plaint to the proper Court. AIR 1942 Mad 35 (35).

(2) An order passed by a Court while returning a plaint for presentation to the superior Court that "costs will be costs in the cause" is without jurisdiction. AIR 1946 Mad 345 (346).

9. Limitation.— (1) Where a suit has been instituted in a Court having no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first even though the subject-matter and the parties to the suit are identical. **AIR 1929 PC 103 (107): 56 Cal 1048: 56 Ind App 128** ** AIR 1950 Pat 473 (475): 29 Pat 699 (DB) ** AIR 1939 Mad 724 (728).

[See however AIR 1941 Mad 711 (712) (DB).]

[But see AIR 1915 All 344 (344) (DB).]

(2) Plaint originally filed within time — Same returned for presentation to proper Court and filed on same day in latter Court — Plea of limitation not sustainable. AIR 1963 Andh Pra 438 (440): (1963) 2 Andh WR 245.

(3) For purposes of limitation, the date of the institution of the suit is the date on which the plaint is presented to the Court in which it ought to have been instituted. AIR 1950 Pat 473 (475): 29 Pat 699 (DB) **(1941) 45 Cal WN 524 (525) (DB) ** AIR 1921 Mad 654 (655): 44 Mad 817 (DB) ** AIR 1964 J and K 65 (66): 1964 Kash LJ 82.

[See also (1913) 20 Ind Cas 767 (767) (DB) (Mad).]

[But see (1871) 16 Suth WR 47 (48) (DB).]

(4) If at the time of the presentation of the plaint in the proper Court the law of limitation has been altered, it is the law as so altered that will apply to the case. AIR 1929 Lah 877 (878).

(5) Where the suit is barred by limitation, when the plaint is filed in a proper Court, after its being returned under this rule, the plaintiff can avail himself of the provisions of Section 14 of the Limitation Act, and claim the exclusion of the time during which the prior proceeding was prosecuted provided that such proceeding was prosecuted in good faith. AIR 1941 Oudh 161 (163): 16 Luck 402 (DB) ** AIR 1933 Cal 914 (918): 60 Cal 1122 (DB) ** AIR 1932 All 377 (378) (DB).

(6) Where the suit was filed before the proper Court having jurisdiction to entertain it, but subsequently by addition of new parties in accordance with the decisions of the High Court, and their claims, the total value of the claim to be adjudicated upon exceeds the pecuniary jurisdiction of the Court and the plaint is accordingly returned for presentation to the proper Court, the original institution of the suit being before the proper Court, the plaintiff is entitled to the benefit of the provisions of both the Sections 4 and 14 of the Limitation Act. AIR 1957 Trav-Co 261 (263): ILR (1956) Trav-Co 633 (DB).

(7) The period that can be deducted under Section 14 of the Limitation Act is only the period from the date of the filing of the plaint to the date on which it was finally returned by the Court for re-presentation. AIR 1926 Mad 178 (179) ** AIR 1937 Lah 464 (465) ** AIR 1967 J and K 18 (19): 1967 Kash LJ 7. (Period between presentation of plaint in wrong forum and its actual return should be excluded.)

[But see (1893) 3 Mad L Jour 190 (191) (DB). (**Dissented from** in AIR 1926 Mad 178.)]

(8) No period preceding the original presentation of the plaint can be deducted under Sec. 14. AIR 1929 Lah 425 (426): 11 Lah 12 (DB) ** AIR 1923 Mad 114 (119).

[But see AIR 1921 Bom 379 (380): 45 Bom 443 (DB).]

(9) The plaintiff is entitled to a deduction of the time until the endorsement of dates of presentation and return are made because till then the proceedings cannot be said to have come to an end. AIR 1951 Hyd 57 (59): ILR (1951) Hyd 632 (DB).

(10) If, after deducting the period allowed under Section 14, the limitation expires on a day on which the Court is closed, the plaint can be presented on the re-opening day. AIR 1929 Cal 315 (317, 318) (DB).

(11) Where a plaint is returned under this rule as being beyond the pecuniary jurisdiction of the Court and the plaintiff after amending the plaint so as to bring the claim within the jurisdiction of the Court, represents the plaint in the same Court the plaint cannot be treated as a continuation of the former suit. AIR 1940 Mad 689 (690) (DB). (AIR 1939 Mad 397, **Reversed.**)

(12) A plaint cannot be returned under this rule merely because the plaintiff has not mentioned in it the list of documents on which he relies. Hence, if a plaint is returned for this defect, and is then represented, the date of the institution of the suit for purposes of limitation is the

Order 7, Rule 10 — Note 9 (contd.)
date of the original presentation of the plaint. AIR 1930 Lah 480 (480).

(13) Where the Court grants time within which the plaintiff might present the plaint to the proper Court, the order granting time is a nullity and will not save the suit from the bar of limitation. AIR 1917 Cal 794 (195) (DB) ** AIR 1937 Pat 495 (496) (DB) ** AIR 1964 Ker 285 (286): 1964 Ker LT 145.

[See also 45 Cal WN 524 (525) (DB) ** AIR 1929 Lah 425 (426): 11 Lah 12 (DB).]

[But see (1910) 6 Ind Cas 637 (637) (DB) (Cal).]

(14) Claim for damages against Union of India for loss to goods consigned by railway — Suit validly instituted in Munsiff's Court within the period of limitation — Change of law pending suit prescribing District Court as forum for institution of such suit — Plaint returned for presentation to such Court, represented by plaintiff — No question of the suit in District Court being barred by limitation can arise. ILR (1964) 1 Ker 355 (360).

10. Chartered High Courts.— (1) Order 49, Rule 3, sub-rule (1) provides that this rule is not applicable to chartered High Courts. See Order 49, R. 3 (1).

(2) As to the practice of the High Court of Bombay on its original side, see the following cases. (1884) 8 Bom 313 (317) (FB). (Practice is to return plaint even in the course of the trial.) ** (1884) 8 Bom 380 (387) (DB). (The Practice of the original side is to retain the plaint unless it has been returned on presentation.)

(3) The High Court can, under its inherent powers direct, in a suit which it has dismissed for want of jurisdiction, that the plaint should be returned to the plaintiff so that he may file it in the proper Court, and thus avoid the payment of Court-fee twice over. AIR 1953 Mad 897 (898): ILR (1953) Mad 958 (DB). (AIR 1927 Mad 846: 50 Mad 770, **DISSENTED FROM.)**

(4) Suit to enforce mortgage — Property outside jurisdiction — No leave obtained — Bombay High Court has no original jurisdiction to entertain suit — Practice is not to return plaint but to dismiss suit. AIR 1963 Bom 94 (97): 63 Bom LR 969.

11. Appeal.— (1) An order under this rule, returning a plaint to be presented to the proper Court, is appealable under Order 43, Rule 1 (a), even if the order is made by the Court of the first instance. AIR 1943 Nag 293 (293): ILR (1943) Nag 603 (DB) ** AIR 1925 Bom 431 (431) (DB) ** (1912) 16 Ind Cas 575 (575) (DB) (Cal).

[See AIR 1943 Mad 490 (490).]

[See however 1947 Rang LR 98 (103) (DB).]

(2) The order is appealable even where it is made by the Court of first appeal in the exercise of its powers under Section 107. (1903) 25 All 174 (176) (FB). (3 All 456, Overruled.) ** AIR 1919 All 82 (83): 42 All 74 (DB) ** 1899 Pun Re No. 59, p. 265 (267) (DB). **(Dissenting from** 1898 Pun Re No. 15.)

[But see 1898 Pun Re No. 15, p. 31 (31).]

(3) Where the order under this rule is reversed or confirmed in appeal: a second appeal is barred by the provisions of Section 104, sub-section (2). AIR 1942 Oudh 480 (480) ** AIR 1925 Bom 431 (431) (DB) ** AIR 1918 All 415 (415) (DB).

[But see (1878) 1 All 620 (622) (DB).]

(4) The appellate order reversing that of the Court of first instance cannot be construed as an drder of remand under Order 41, Rule 23 so as to be appealable under Order 43, Rule 1 (u) inasmuch as the order is not one passed on appeal from a decree. But the aggrieved party can, under Section 105, dispute the correctness of the order in an appeal from the decree if he is otherwise entitled to do so. AIR 1942 Oudh 370 (371) (DB) ** AIR 1935 Mad 574 (575) ** AIR 1926 Mad 900 (901, 902) (DB).

(5) Section 192 of the Madras Estates Land Act excludes the applicability of O. 43 to proceedings under that Act and consequently where, in an appeal to the District Court from a decree in a suit under that Act, the District Court, holding that the Revenue Court had no jurisdiction, directed the plaint to be presented to the proper Court, it was held that no appeal lay against the order of the District Court to the High Court. AIR 1918 Mad 191 (193): 41 Mad 554 (DB).

(6) A plaintiff whose plaint is returned for presentation to the proper Court and who accordingly presents the plaint to the proper Court does not forfeit his right of appeal against the order of return simply on the ground that he chose to file his plaint in the latter Court. AIR 1919 Mad 1062 (1063): 41 Mad 721 (DB) ** AIR 1930 Nag 207 (208): 26 Nag LR 300.

[See also AIR 1925 Bom 418 (418) (DB).]

[See however AIR 1919 Cal 447 (448) (DB). (Plaintiff will not forfeit his right of appeal if he specifically reserves this right.)]

[But see (1907) 5 Cal L Jour 580 (582) (DB) ** (1908) 11 Oudh Cas 98 (100).]

(7) A plaint was returned for presentation to the proper Court. In the latter Court the plaint was rejected for non-payment of deficit Court-fees. Thereafter an appeal was filed against the order returning the plaint. In appeal, the case was remanded for trial to the first Court in ignorance of the rejection of the plaint by the other Court. It was held that there was no plaint to try and the remand was ineffectual. AIR 1929 Bom 202 (204) (DB).

(8) An appellate Court which reverses an order returning a plaint under this rule has no jurisdiction to remand the case to the lower Court for fresh disposal; the proper procedure is to annul the order of

Rule 11. Rejection of plaint.—The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law.

[1882 and 1877, Ss. 53, 54; 1859, Ss. 29, 31, 32.]

Order 7, Rule 10 — Note 11 (contd.)

the trial Court and direct it to dispose of the suit according to law. AIR 1925 Oudh 393 (394): 29 Oudh Cas 21 ** (1909) 12 Oudh Cas 388 (389). (The appellate Court cannot itself proceed to hear on the merits.)

[See also AIR 1916 Mad 1154 (1154, 1155).]

[But see 1882 All WN 45 (45) (DB). (Appellate Court must decide the case on the merits.)]

(9) The word "plaint" in this rule does not include a memorandum of appeal and that therefore no appeal lies from an order returning a memorandum of appeal for presentation to the proper Court. AIR 1921 All 177 (177, 178) (DB) ** AIR 1952 Pat 290 (291) (DB) ** AIR 1954 Raj 191 (192): ILR (1954) 4 Raj 613 (DB) ** 1961 Jab LJ 469.

[But see (1891) 14 Mad 462 (464) (DB) ** (1900) 1 Low Bur Rul 32 (33).]

(10) Where a plaintiff does not appeal against an order returning the plaint under this rule and submits to the decision of the Court on the point of jurisdiction, the question cannot be re-agitated in a subsequent suit between the same parties. AIR 1936 Oudh 222 (223) (DB).

(11) Under-valuation of plaint — Plaint returned — Appeal — Plaintiff directed to delete prayer for possession to bring suit within jurisdiction — Representation of plaint after deletion of prayer — Plaintiff entitled to refund of Court-fee already paid. AIR 1969 Ker 203 (204): 1968 Ker LT 705.

(12) Appeal properly lying to High Court wrongly entertained by District Judge and allowed — Second appeal to High Court from order of District Judge — Proper course is to direct lower appellate Court to return memorandum of appeal for presentation to proper Court. (1967) 2 Mys LJ 629.

12. Revision.— (1) Where a Munsiff's Court returned the plaint for presentation to the Small Cause Court and the latter Court returned the plaint for presentation to the Munsif's Court and the Munsif's Court refused to go back on its original order and receive the plaint, the High Court in revision against the second order of the Munsif directed the Small Cause Court to try the case. AIR 1922 Pat 368 (369) (DB).

(2) The right of filing a revision application against an order returning the plaint for presentation to the proper Court is not barred where the order returning the plaint is obeyed. AIR 1948 Mad 315 (316).

(3) Order returning plaint under Order 7, Rule 10 — Party failing to prefer appeal against that order — Though appeal alone is competent and not revision, right of High Court to exercise its revisional jurisdiction is not taken away to correct errors that come to its notice under Section 115. AIR 1968 Andh Pra 33 (34).

(4) Order returning the plaint for presentation to proper Court — Not a decree — Revision lies — Review of such order — Though appealable revision entertained since appeal did not lie to High Court. (1967) 2 Andh LT 114 (116): (1967) 2 Andh WR 432.

(5) In a suit filed against the Electricity Board for recovery of compensation for removal of trees, there is no scope for return of the plaint on the basis that the case falls within statutory arbitration provided by Section 19 (2) of Electricity Act. As such, when the plaint is returned, the Court exercises a jurisdiction not vested in it in law and hence the High Court will interfere. (1967) 71 Cal WN 298 (299).

(6) Small Cause Court trying suit excluded from its jurisdiction and delivering judgment — Proper course for High Court in revision under Section 25, Provincial Small Cause Courts Act, is to dismiss suit and not to return plaint to proper Court. AIR 1965 Cal 59 (66, 67): 69 Cal WN 545.

ORDER 7, RULE 11 — SYNOPSIS

1. Scope.
2. Non-disclosure of cause of action.
3. Undervaluation of relief claimed.
4. Plaint insufficiently stamped.
5. Memorandum of appeal insufficiently stamped.
6. Suit barred by any law — Clause (d).

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta—see Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 (w. e. f. 1-12-1963).

Calcutta: Andaman and Nicobar Islands

Add the following as clause (e) :—

"(e) where any of the provisions of Rule 9 (1-A) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so." (25-7-1928.)

Madras and Pondicherry[a]

For clause (c), substitute the following:—

"(c) where the relief claimed is properly valued, but the plaint is written on paper insufficiently stamped, and the plaintiff does not make good the deficiency within the time, if any, granted by the Court".

[a] See Reg. 8 of 1965.

Mysore

For item (c), substitute the following:—

(c) where the relief claimed is properly valued, but the court-fee actually paid is insufficient and the plaintiff does not make good the deficiency within the time, if any, granted by the Court. (30-3-1967.)

Orissa

Same as that of Calcutta. (7-5-1954.)

Order 7, Rule 11 — Synopsis (contd.)

7. Rejection of plaint on other grounds.
8. Partial rejection.
9. Stage for rejection.
10. Appeal.
11. Revision.
12. Review.

1. Scope. — (1) The classes of cases in which the Court shall reject the plaint cannot be regarded as exhaustive of all the cases in which a Court can reject a plaint or as limiting the inherent powers of the Court in respect thereof. AIR 1958 Orissa 111 (112, 113): ILR (1958) Cut 45 ** AIR 1956 Hyd 133 (134): ILR (1956) Hyd 514 (DB) ** AIR 1924 Oudh 413 (414) (DB).

[See also AIR 1947 Lah 302 (303).]

(2) A Court has jurisdiction, in a proper case, to reject the plaint filed by the next friend of a minor on the ground that it is not in the interests of the minor that the suit should be proceeded with. AIR 1915 Mad 483 (484) (DB).

(3) Where it is alleged that a suit was instituted without the signature and authority of the plaintiff, the Court will frame a preliminary issue on the point and reject the plaint if it finds the issue against the plaintiff. (1910) 7 Ind Cas 600 (600) (DB) (Sind).

(4) If there is any vagueness about the pleadings the proper course is to order the party to remove the vagueness and not to reject the plaint under O. 7, R. 11, on that ground. AIR 1958 Manipur 27 (29).

(5) An Appellate Court has the same powers of rejecting a plaint as the Court of first instance. 1885 All WN 294 (294) (DB) ** AIR 1924 Nag 80 (80).

(6) In disposing of a suit under this rule, the Court ought not to dismiss the suit but should reject the plaint. AIR 1955 Andhra 74 (77): ILR (1955) Andhra 27 (FB) ** AIR 1955 Punj 97 (99) ** (1888) 15 Cal 533 (537, 538): 15 Ind App 119 (PC).

[See AIR 1938 All 497 (500) (DB).]

[See also AIR 1950 PC 80 (81) ** AIR 1948 Pat 164 (165).]

[See however AIR 1940 Cal 451 (454): ILR (1940) 2 Cal 166 (DB).]

(7) The effect of rejection as distinguished from a dismissal is that, in the former case, the plaintiff would not under R. 13 be precluded from filing a fresh plaint in respect of the same cause of action, if he so desires. AIR 1956 Raj 164 (165): ILR (1956) 6 Raj 736 ** AIR 1955 Punj 97 (99) ** ILR (1955) Madh B 23 (28).

[See AIR 1944 Oudh 327 (328): 20 Luck 268 (DB).]

(8) Where as the rejection of a plaint takes away the very basis of the suit rendering as it were that no suit was filed at all the dismissal of a suit while recognising the existence of the suit indicates its termination. AIR 1955 Andhra 74 (77): ILR (1955) Andh 27 (FB).

[See also AIR 1954 Bom 43 (47): ILR (1953) Bom 1176.]

(9) Where the District Judge dismisses the suit not on the ground that the plaint discloses no cause of action but on the ground that the facts alleged ousts the jurisdiction of the Civil Court, the order is not one of

Order 7, Rule 11 — Note 1 (contd.)
rejecting the plaint. (1957) 61 Cal WN 789 (792) (DB).

(10) A plaintiff is not entitled to have the dismissal of a suit for default set aside under O. 9, R. 9 on the ground that the plaint should have been rejected. AIR 1924 Pat 271 (272): 2 Pat 784 (DB).

(11) Clauses (b) and (c) of this rule do not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction. But Cls. (a) and (d) do apply. See O. 49, R. 3. (1965) 69 Cal WN 667 (672).

(12) The High Court of Allahabad and the Judicial Commissioner's Court of Ajmer have held that this rule is inapplicable to their appellate jurisdiction notwithstanding the provisions of Section 107 of the Code. (1890) 12 All 129 (152) (FB) °° AIR 1954 Ajmer 15 (16).

(13) Plaintiff able to seek further relief suing for mere declaration — O. 7, R. 11 (d) held had no application because there was no statement in the plaint from which it could appear that the suit was barred by any law, and the plaint could not be rejected under that provision. AIR 1961 Punj 278 (281): 62 Pun LR 924 (DB).

2. Non-disclosure of cause of action. — (1) The Court must see that the plaint contains the necessary allegations which must be proved before a decree can be given, and if there are not the necessary allegations, to reject the plaint. AIR 1957 Assam 49 (51) (DB). (Plaint not disclosing cause of acion must be rejected before defendant is summoned.) °° AIR 1947 Nag 224 (227): ILR (1947) Nag 726 °° AIR 1942 Mad 343. (344) °° AIR 1960 Cal 381 (383). (Case of mistake made out in plaint in suit to reopen partition — Cannot be dismissed for non-disclosure of cause of action.) °° 1968 BLJR 45.

[See AIR 1942 Bom 224 (225): ILR (1942) Bom 655 (DB).]

(2) Held on facts that the plaint should have been rejected in the circumstances of the case as it did not show any ascertainable cause of action. 1960 MPLJ 687 (689): 1959 Jab LJ 693.

(3) Duty of Court is to adjudicate case on merits — Dismissal of suit under S. 151 even when it discloses cause of action not proper. AIR 1963 Raj 106 (109, 110): 1962 Raj LW 696.

(4) The Court should look at the plaint and at nothing else. AIR 1942 Lah 179 (182) °° AIR 1941 Mad 567 (568, 569) °° ILR (1937) 1 Cal 541 (549).

[See AIR 1935 Rang 497 (498) °° AIR 1935 Pat 449 (450) °° AIR 1936 Lah 35 (36).]

[But see (1871) 16 Suth WR 218 (219) (DB).]

(5) It is well settled that to find out as to whether a plaint discloses a cause of action or not, the Court has to look only into the allegations in the plaint, assume them to be true for the time being, and see whether the said allegations in the plaint disclose a cause of action or not. (1968) 70 Pun LR (D) 202 (DB).

(6) The onus is on the defendant to show that the plaint discloses no cause of action. AIR 1941 Bom 286 (287): ILR (1941) Bom 521.

[See also AIR 1946 Bom 516 (532).]

(7) The Court has to presume that every allegation made in the plaint is true. AIR 1958 Manipur 27 (28).

(8) In asking the Court to decide an issue whether the plaint discloses a cause of action or not (which is essentially a demurrer), the defendants must be taken to admit for the sake of argument that the allegations of the plaintiff in his plaint are true modo et forma — in manner and form. (1913) 40 Cal 598 (609): 40 Ind App 56 (PC).

[See AIR 1960 Cal 484 (486). (Joinder of causes of action — Plea by way of demurrer can only be taken when by reason of the plea the plaintiff is wholly non-suited.)]

(9) The power to reject a plaint under this clause must be exercised only if the Court comes to the conclusion that even if all the allegations are proved, the plaintiff would not be entitled to any relief whatever. ILR (1955) Hyd 253 (254) °° AIR 1921 Sind 106 (108): 17 Sind LR 9 °° (1873) 10 Bom HCR 17 (18) (DB).

[See AIR 1944 Pat 38 (39): 22 Pat 289.)]

[See also AIR 1931 Cal 659 (661): 58 Cal 539 °° AIR 1961 Bom 96 (97): 62 Bom LR 945. (Plaintiff making default in furnishing information as to how any cause of action was disclosed — Rejection of plaint merely on that ground not warranted by O. 7, R. 11.)]

(10) Where it is not possible for the defendant to say that the plaint as it stood did not disclose any cause of action and he therefore avoids saying so, that is no occasion for the Court to frame an issue on the point and it cannot be said that the plaint should be rejected. AIR 1957 Assam 49 (51) (DB).

(11) Where the plaint does not disclose a cause of action the Court should not reject it but should allow an amendment of the plaint. AIR 1951 Cal 262 (266): ILR (1950) 1 Cal 606. ((1946) 50 Cal WN 540, Dissent.) °° AIR 1950 Bom 345 (345): ILR (1957) Bom 364 (DB). ((1946) 50 Cal WN 540, Dissent.) °° AIR 1961 All 418 (421). (Suit held premature — Defendant's attitude responsible for suit — Suit dismissed as being premature, defendant saddled with plaintiff's costs in both lower Courts.)

[But see (1946) 50 Cal WN 540 (540).]

(12) The expression "cause of action" as used in this rule does not mean a claim which is still enforceable under the law of limitation. Where, therefore, a suit is barred by time it cannot be said that the plaint does not disclose a cause of action, and that it falls to be dealt with under cl. (a). The

Order 7, Rule 11 — Note 2 (contd.)
Court may, however, proceed under cl. (d). AIR 1932 All 543 (545): 54 All 525 (DB) °° AIR 1965 Guj 214 (214): (1965) 6 Guj LR 599.

(13) Suit for ejectment — Forfeiture one of grounds — Non-mention of service of notice in plaint will not show non-disclosure of cause of action. 1966 BLJR1006 (1009): ILR 46 Pat 446 (DB) °° ILR (1965) 2 All 343. (Plaint not averring cause of action specifically but cause of action ascertainable by reading it as a whole — Cannot be rejected.) °° AIR 1963 Manipur 43 (45). (Power to allow amendment not controlled by duty to reject a plaint — Suit for eviction of tenant on ground of forfeiture — Averment relating to notice to quit not made — Court satisfied about omission being inadvertent can allow amendment instead of rejecting plaint.) °° ILR (1960) 1 Cut 342. (Suit for damages against Magistrate for illegal and malicious detention in jail custody — Claim of protection under Judicial Officers Protection Act — Can be tried as preliminary issue of law — Allegations in plaint not showing that Magistrate had acted beyond his jurisdiction or in bad faith — Plaint can be rejected as not disclosing cause of action — Recording of evidence on merits not necessary.)

(14) Absence of notice required by S. 111 (g) of T. P. Act does not go to root of jurisdiction to make suit non-maintainable due to absence of cause of action. 1967 BLJR 574 (580) (DB).

(15) Plaint not disclosing cause of action — Proper course is to reject plaint, not to dismiss suit. (1964) 66 Punj LR 1074 (1076): 1964 Cur LJ 439 °° 1967 Cur LJ 812 (816, 817).

[See however ILR (1968) 1 Punj 452. (Cause of action not shown in petition as required by S. 100 (1) (d) (i) — Petition must be dismissed.]

3. Undervaluation of relief claimed. — (1) If the Court comes to the conclusion that the plaintiff's valuation of a suit is fictitious, it can require him to make a correct valuation and can reject the plaint on his failure to do so. AIR 1934 Cal 448 (449): 61 Cal 796 (FB) °° AIR 1956 Hyd 49 (49): ILR (1956) Hyd 138 (DB).

(2) Subject-matter of suit not capable of valuation — Court has jurisdicion to value relief where it feels that relief as valued by plaintiff is low. (1960) 1 Andh WR 106 (108).

(3) The rule enunciated in the point (1) above applies even to cases in which under the Court-fees Act it is provided that the amount of court-fee is to be determined according to the amount at which the relief sought is valued in the plaint. AIR 1956 Nag 195 (199): ILR (1956) Nag 514 (DB). (AIR 1949 Nag 4, **OVERRULED.**) °° AIR 1943 Sind 73 (75): ILR (1942) Kar 488 (DB) °° AIR 1939 Nag 50 (56): ILR (1938) Nag 558 (FB). (AIR 1937 Nag 14, **OVERRULED.**) °° AIR 1964 Madh Pra 9 (11): 1963 MPLJ 717 (DB).

[But see AIR 1942 Pesh 4 (5) (DB).]

(4) The Court cannot itself fix a valuation in place of the plaintiff's valuation. AIR 1957 Pat 450 (451) (DB). (Valuation put not unreasonable or arbitrary — Court cannot alter valuation.) °° AIR 1945 Oudh 177 (179) (DB) °° AIR 1917 All 78 (79): 39 All 723 (DB) °° AIR 1930 Cal 686 (688): 58 Cal 281.

[See however AIR 1937 Cal 748 (749): ILR (1938) 1 Cal 196.]

[But see (1907) 11 Cal WN 705 (711, 712) (DB).]

(5) In order to determine whether a suit is properly valued or not the Court must confine its attention to the plaint and should not look to other circumstances which may subsequently influence the judgment of the Court as to the true value of the relief sought. AIR 1943 Sind 73 (75): ILR (1942) Kar 488 (DB) °° AIR 1924 Cal 969 (969) (DB) °° 1965 All WR (HC) 604. (When on determination of correct valuation of plaint, munsif found that he had no jurisdiction to entertain suit, he cannot reject plaint under O. 7, R. 11 but can order under O. 7, R. 10 for return of plaint.) °° (1967) 2 Andh WR 49 (52).

[See AIR 1935 Cal 338 (340).]

[See also AIR 1935 Pat 160 (162): 14 Pat 414.]

[But see AIR 1956 Nag 195 (199, 200): ILR (1956) Nag 514. (Civil Revn. No. 275 of 1954, D/- 12-1-1954 (Nag), **OVERRULED.**)]

(6) If no objection is made to the valuation given in the plaint, that matter must be deemed to be final between the parties and cannot be raked up between them, so far as that suit is concerned. AIR 1958 Pat 430 (432): 36 Pat 1123 (FB).

(7) As to Court's powers of rejection for undervaluation in cases where the plaintiff is entitled to put his own valuation, see the following cases. AIR 1955 Hyd 23 (24): ILR (1954) Hyd 844 (FB) °° AIR 1956 Nag 195 (199): ILR (1956) Nag 514 (DB). (AIR 1949 Nag 4, **OVERRULED.**) °° 1967 Raj LW 401 (410): ILR (1966) 16 Raj 1019 (DB).

4. Plaint insufficiently stamped. — (1) Clause (c) refers to a plaint on an insufficiently stamped paper, which means that there must be some stamp on the plaint. Case in which there is no stamp on the plaint is not within the scope of the clause. AIR 1957 Pepsu 14 (16) (DB).

(2) Where the plaint is properly valued either at the time of the presentation itself or at a time subsequent thereto, in pursuance of an order of the Court under Cl. (b) but is insufficiently stamped, the Court can act under this rule. AIR 1957 Madh B 49 (50) (DB). (Plaint itself should have been written on insufficiently stamped paper —

Order 7, Rule 11 — Note 4 (contd.)

Application to file award under S. 20, Arbitration Act — Award insufficiently stamped — Award is not plaint.) ** AIR 1932 Cal 685 (686) (DB) ** AIR 1934 All 989 (990).

(3) The Court ought not to pass a composite order requiring correction of the valuation and payment of additional court-fee. There are two distinct orders with different consequences upon their non-compliance. It is only if the valuation is increased in compliance with an order under Clause (b), that an order under Clause (c) requiring additional court-fee to be paid can be passed. If the valuation is not increased the plaint must be rejected and the Court has no occasion to pass the order under clause (c). AIR 1957 All 337 (338): ILR (1956) 2 All 765 (DB).

(4) The Court cannot exercise the powers conferred under clause (c) after the suit has been decided finally so far as that Court is concerned. (1885) 7 All 528 (532) (DB) ** AIR 1935 Lah 75 (76).

(5) Where, the order for making good the deficiency in court-fee is made before the final decision in the suit, the fee can be realised in execution even after the final decision. AIR 1934 Oudh 396 (398).

(6) Section 8-B, (Bengal) Court-fees Act, 1870, casts a duty on the Court to record a finding whether sufficient court-fee has been paid and to dismiss the suit in case of insufficiency instead of rejecting the plaint under this rule where the party fails to make up the deficiency as provided by that section. AIR 1940 Cal 451 (454): ILR (1940) 2 Cal 166 (DB) ** AIR 1953 Cal 42 (44): ILR (1954) 2 Cal 176 (DB).

(7) When an objection as to court-fee is raised the Court should decide that objection first before proceeding to dispose of the suit on any other ground. If the matter requires investigation it should record the evidence of the parties bearing on the point and if it finds that the court-fee paid is insufficient should stay further proceedings in the suit and call upon the plaintiff to make good the deficiency within a specified time. Madh B LJ 1955 HCR 267 (268).

(8) A plaint cannot be rejected under this rule for undervaluation or for insufficiency of stamp unless the plaintiff is given an opportunity to correct the valuation or to supply the deficient stamp, as the case may be, within a time to be fixed by the Court, and he fails to do so. AIR 1956 Hyd 49 (50): ILR (1956) Hyd 138 (DB) ** AIR 1954 Pepsu 45 (47): ILR (1953) Patiala 271 ** AIR 1937 Pat 550 (553): 16 Pat 600 (SB) ** AIR 1967 Ker 85 (85): 1965 Ker LT 1209 ** ILR (1959) 9 Raj 306 (310): 1959 Raj LW 96.

[See also AIR 1939 Mad 200 (201) ** AIR 1924 Pat 271 (272): 2 Pat 784.]

[But see AIR 1941 Oudh 30 (32) ** AIR 1938 Lah 361 (364) (FB).]

(9) Portuguese Civil P. C., Article 415 — Plaint filed without court-fee on 25-6-1964 — Court-fee paid on 4-7-1964 — On question of limitation, held, since court-fee was not paid through inadvertence, under S. 28 of Court-fees Act when deficiency was made up plaint would be treated as if it were properly stamped and filed originally on 4-7-64 and hence within time. AIR 1967 Goa 99 (99, 100) (FB) ** AIR 1959 Bom 86 (87): 60 Bom LR 457. (Plaint insufficiently stamped — Extension of time for making up deficiency — When deficiency paid within time granted by court, suit cannot be dismissed as barred by limitation.) ** AIR 1962 Pat 189 (190): 1962 BLJR 45.

(10) After having been given an opportunity where the plaintiff fails to correct the valuation or to supply the deficient stamp, it becomes incumbent on the Court to reject the plaint because the provisions of the rule are mandatory. AIR 1955 Hyd 156 (157): ILR (1955) Hyd 56 (DB).

(11) Dismissal for failure to pay court-fee within time allowed — Suit cannot be restored under inherent powers. AIR 1962 Guj 59 (61): (1962) 3 Guj LR 71 ** AIR 1968 Pat 48 (48, 49). (Suit dismissed for non-payment of deficit court-fees — Petition under O. 9, R. 9 and S. 151 C. P. C. for restoration of suit not maintainable.)

(12) Where the Court has passed an order rejecting the plaint for deficiency of stamp, in the absence of materials on the record, the Court has jurisdiction to recall the order, on the materials being subsequently put before it. Once the order is withdrawn, the order rejecting the plaint automatically falls. AIR 1957 All 825 (826) (DB).

(13) The use of the words "shall be rejected" does not prevent the Court from exercising its powers under S. 148 of the Code and enlarge the time fixed by it from time to time. AIR 1958 Ker 88 (92) (SB). (Proviso added by Travancore-Cochin that "the time granted under Cls. (b) and (c) shall not exceed thirty days at all" does not stand in the way — Proviso is more in the nature of guidance or a direction.) ** AIR 1928 Lah 274 (275) ** AIR 1927 Oudh 507 (507) (DB) ** AIR 1925 Pat 435 (437): 4 Pat 180 (DB) ** AIR 1936 Cal 221 (223) (DB) ** AIR 1961 Manipur 50 (51) ** AIR 1969 Pat 267 (269) (DB). (Court has ample power under S. 148 to enlarge time for payment of court-fee notwithstanding O. 7, R. 11 (c).)

[See also AIR 1938 All 481 (485): ILR (1938) All 470.]

(14) Order rejecting plaint for non-payment of deficit Court-fee within time granted by Court — Non-compliance due to mistake of pleader in entering wrong date in his diary — Application under S. 151 for restoration of suit — Application held maintainable — Failure to file appeal or review held no bar. AIR 1964 Orissa 134 (136): ILR (1964) Cut 18.

(15) The plaintiff cannot, as of right, claim extension of the time fixed by the Court. The question depends on the discretion of the Court. AIR 1936 Pat 310 (311)

Order 7, Rule 11 — Note 4 (contd.)
(DB) ** AIR 1938 Mad 542 (543, 544).

(16) No express order is necessary for extension of time. An extension may be inferred from the fact that the Court has actually allowed a thing to be done beyond the prescribed time. (1907) 34 Cal 20 (24, 29) (FB).

[See also AIR 1926 Mad 676 (677).]

(17) A plaint does not automatically become rejected on the plaintiff's failure to pay deficit court-fee within the time fixed by the Court and an application for further extension of time made after the expiry of such time but before the order rejecting plaint under O. 7, R. 12 is passed is maintainable. AIR 1947 Mad 84 (85): ILR (1947) Mad 220 (DB) ** AIR 1960 Andh Pra 602 (603): ILR (1960) 2 Andh Pra 208.

(18) The rule does not apply to applications for leave to sue in forma pauperis. AIR 1956 Hyd 41 (43): ILR (1956) Hyd 143 (DB) ** AIR 1954 Mys 148 (148): ILR (1954) Mys 98.

(19) To attract the provisions of this rule there must be a proceeding which started with the presentation of a plaint and that is not the case with suits in forma pauperis. The mere fact that the application for leave is required to embody particulars prescribed for plaints would not ex proprio vigore render the application a plaint. AIR 1956 Hyd 41 (43): ILR (1956) Hyd 143 (DB) ** AIR 1955 Mad 467 (467).

(20) A Court is not bound, on its dismissing an application for leave to sue in forma pauperis, to grant time within which a properly stamped plaint could be filed. AIR 1940 Lah 446 (447): ILR (1941) Lah 652 ** AIR 1935 Mad 878 (879).

(21) When the Court refuses an application for permission to sue as a pauper and allows the applicant under Section 149 to pay the court-fee within a certain period of time on payment of the court-fee the application operates as a plaint from the date of its institution, and not from the date of payment of court-fee. When such a discretion is exercised in favour of the applicant the prayer for permission to sue as a pauper stands refused. Thus the only document that remains with the Court is obviously a plaint of the applicant and nothing else. What is then rejected, upon failure of the applicant to pay the court-fee, in such circumstances, is a plaint, and no other document. But since the plaint bears no stamps, the rejection does not fall within the scope of Clause (c) of this rule though it amounts to a decree within the meaning of S. 2 (2). AIR 1957 Pepsu 14 (16, 17) (DB).

(22) Where a plaint is written upon insufficiently stampted paper and the plaintiff does not supply the requisite stamp within the time fixed by the Court, it is open to the plaintiff to relinquish a portion of the claim in order to bring it within a certain court-fee. AIR 1948 East Punj 30 (33): ILR (1948) East Punj 70 (DB) ** AIR 1946 Mad 126 (127, 130) ** AIR 1953 Cal 755 (755): ILR (1954) 1 Cal 296 (DB).

[See also AIR 1949 Mad 640 (641) ** AIR 1949 Pat 358 (361): 27 Pat 751 (DB) **ILR (1961) Punj 484 (490).]

[But see AIR 1917 Cal 77 (78): 44 Cal 352 (DB) ** AIR 1914 Bom 117 (118) (DB).]

(23) Where a plaintiff is given time to pay additional court-fees under this rule and he does not appear on the date fixed in consequence of which the Court dismisses the suit, the order though one of dismissal must be deemed to be an order under this rule and not under Order 9, Rule 8, so that a fresh suit on the same-cause of action will not be barred under Order 9, Rule 9. AIR 1952 Assam 149 (150): ILR (1952) 4 Assam 262 ** AIR 1929 Mad 344 (345) (DB) ** AIR 1964 Manipur 7 (8).

[Also see O. 9, R. 9, Note 1.]

(24) Clause (c) of this rule does not apply to the case of failure of a plaintiff to pay stamp duty on a partition decree. AIR 1919 All 269 (270) (DB).

(25) Where plaintiff is given time to make up the deficiency in court-fees, and within the time so allowed the plaintiff applies for permission to continue the suit as a pauper the application should be considered on its merits and the plaint should not be considered as rejected for failure to pay the deficiency in court-fees. AIR 1954 Mys 148 (148): ILR (1954) Mys 98 ** AIR 1933 Mad 498 (499) (DB) ** AIR 1936 Cal 221 (222) (DB).

[See AIR 1942 Pat 302 (303).]

(26) Application for leave to sue in forma pauperis refused but time granted to pay Court-fee—Court-fee not paid and petition rejected — Remedy is by way of appeal and not revision. AIR 1959 Mad 14 (14): (1958) 1 Mad LJ 97.

(27) When a plaint is re-presented in a proper Court after being returned by the wrong Court where it was originally filed the proper Court is not debarred from requiring, the proper stamp to be affixed though no objection was taken in the wrong Court. AIR 1931 Pat 39 (40).

[See also (1954) 20 Cut L Tim 556 (557).]

(28) An Appellate Court before rejecting the plaint under this rule read with S. 107 must allow time to the plaintiff to make up deficiency in court-fee. AIR 1951 All 64 (67): ILR (1952) 1 All 461 (FB).

(29) Where the plaint is rejected under Rule 11 (c) and the plaintiff files an application under Section 151 with deposit of deficit court-fee for restoration of plaint there is nothing to debar Court from treating the application as a fresh plaint under Order 7, Rule 13. AIR 1959 Ker 406 (408): 1958 Ker LT 562. (**OVERRULED** on a different point in AIR 1964 Ker 8 (FB)) ** AIR 1966 Ker 150 (156): 1966 Ker LT 199 ** (1968) 70 Punj LR 530 (531) ** AIR 1967 Guj 154 (159): 7 Guj LR 879. (Order rejecting improperly stamped application

Order 7, Rule 11 — Note 4 (contd.)

under Section 18 of Land Acquisition Act, is not correct — Such an application not being valid reference must be dismissed.) •• AIR 1967 Pat 310 (311, 312).

(30) If the question of Court-fee is raised by defendant this may be tried as a preliminary issue and if the Court finds that plaint has been insufficiently stampted Section 6 of the Court-fees Act read with Order 7, Rule 11 comes into play. AIR 1960 Pat 527 (529): 1960 BLJR 505.

(31) Once the time for filing the deficit court-fee is extended under any of Sections 149, 148 and 151, the plaint will be taken to have been validly presented on the date it was filed in Court though the deficit Court-fee was paid much later and there would be no bar of limitation if the plaint had been originally filed within time. (1963) ILR 42 Pat 704.

5. Memorandum of appeal insufficiently stamped.— (1) This rule applies in terms to plaints insufficiently stamped. Where a memorandum of appeal is found to be presented with an insufficient court-fee, the Court, can allow time for paying the deficit court-fee. AIR 1951 Pepsu 54 (56): 3 Pepsu LR 1 (DB) •• AIR 1938 Nag 322 (323) •• AIR 1935 Lah 448 (450): 17 Lah 122.

[See AIR 1942 Oudh 209 (210): 17 Luck 502 (DB).]

[See also AIR 1941 Bom 242 (244): ILR (1941) Bom 477 (DB).]

(2) The Court is bound to grant time to the appellant to make up the deficiency — This rule applies to memorandum of appeals also by virtue of Section 107. AIR 1957 Pat 111 (112) •• AIR 1952 Trav-Co 5 (6): ILR (1951) Trav-Co 275 (DB) •• AIR 1954 Bom 43 (45): ILR (1953) Bom 1176 (DB).

[But see AIR 1957 Raj 367 (369): ILR (1957) 7 Raj 460. (Point taken for granted.) •• AIR 1951 All 64 (67): ILR (1952) 1 All 461 (FB) •• AIR 1954 Ajmer 15 (16) •• •• AIR 1938 Mad 316 (316) (DB) •• AIR 1935 Pat 201 (201) ••AIR 1963 All 476 (477): ILR (1964) 1 All 185 (DB). (Appellant deliberately valuing his appeal far above the value put on plaint so as to exclude forum of District Judge and to reach higher forum of High Court — Even if Order 7, Rule 11, applies it cannot be returned for presentation to proper Court in its unamended form and must be rejected.)]

(3) Where the Court passes a peremptory order directing that the deficit court-fee on the memorandum of appeal should be paid by a certain date, failing which the appeal would stand rejected without further reference to a Bench, and there is default on the part of the appellant to pay the deficit court-fee within the time specified, the date of the decree within the meaning of Section 2 (2) read with this rule is the date when the order demanding the deficit court-fee was passed and not when the appeal stood dismissed because of the default. AIR 1957 Pat 430 (431): 36 Pat 951 (FB).

(4) Order of dismissal of memorandum of appeal on ground of limitation, is decree — Revision does not lie from such order. AIR 1965 Orissa 102 (104, 106): ILR (1964) Cut 674 (DB). (ILR (1962) Cut 818, **OVERRULED.**)

6. Suit barred by any law — Clause (d). —(1) Clause (d) authorises the rejection of a plaint where the suit appears from the statement in the plaint, to be barred by any law. AIR 1955 Punj 97 (99) •• AIR 1955 Vindh Pra 1 (2) •• (1893) 15 All 387 (390) (FB).

[See also (1948) 52 Cal WN 808 (809) •• AIR 1948 Pat 164 (165).]

(2) It is the duty of the Court to scrutinize the plaint and either get it amended or reject it under Clause (d), if the plaintiff persisted in his default. 1958 MPLJ 27 (31, 32) (DB) •• (1966) 1 Andh WR 218 (224): (1966) 1 Andh LT 297.

(3) Suit barred by any other law — Bar under S. 46 of Administration of Evacuee Property Act — Suit should not be dismissed but stayed. AIR 1959 Madh Pra 18 (17): 1959 MPLJ 566 (DB).

(4) Suit against Life Insurance Corporation for a decree on a policy — Office-bearers impleaded as defendants — Subsequently plaintiff seeking amendment of plaint so as to implead the L. I. C. as a corporate body — From the very statement in the plaint suit appearing to be barred under Article 86 (a) of Limitation Act.

Held, the Court had no jurisdiction to allow the amendment though well merited. (1965) 69 Cal WN 667 (672).

(5) Where a plaint appears to be barred by limitation and no ground of exemption from limitation is mentioned therein, the Court may in proper cases allow an amendment of the plaint under Order 6, Rule 17 so as to make a plea of exemption, if any. (1909) 34 Bom 250 (252) (DB).

[See also AIR 1932 Cal 146 (146): ILR 59 Cal 150.]

(6) Suit for redemption of mortgage — Burden to plead and prove that suit is within time is on plaintiff. AIR 1959 Ker 377 (379): 1959 Ker LT 475 (DB).

(7) Where it is contended that a suit is barred under the Arbitration Act, 1940, an application to take the plaint off the file must be made in the suit itself under O. 7, R. 11 and not as an independent application under the Arbitration Act. (1948) 52 Cal WN 397 (400).

(8) Suit by landlord for eviction of tenant — Tenant denying landlord and tenant relationship and claiming title in himself — Rent Court (Small Cause court) is competent to go into the question of title to the property — Tenant's plea does not oust the jurisdiction of the Court — Enquiry on the question of title is incidental to the decision of the main question. (1966) 7

Order 7, Rule 11 — Note 6 (contd.)

Guj LR 1018 (1022): ILR (1966) Guj 1021.

(9) The civil Court to which jurisdiction to entertain or adjudicate upon the question whether a property is evacuee property or not has been expressly denied by Sec. 46 of the Administration of Evacuee Property Act should not reject the plaint under this rule when it finds that such a question about the suit property has arisen, but refer the same for adjudication by the custodian and stay the suit pending such adjudication. AIR 1954 Punj 87 (88): ILR (1954) Punj 713 °° AIR 1961 Punj 48 (50): 63 Pun LR 6 (DB).

[See also (1968) 70 Pun LR (D) 202 (DB).]

(10) Averment about notice, under Section 80, Civil P. C., having been given, made in scheduled portion instead of in body of plaint, held sufficient — It neither contradicted nor proved false by defendant, plaint not liable to be rejected. AIR 1967 Tripura 19 (21, 22) °° AIR 1968 J and K 98 (108): 1968 Kash LJ 374. (Plaint has to be rejected for want of notice under Section 80, Civil P. C.) °° AIR 1963 Tripura 48 (49) °° AIR 1961 Andh Pra 488 (488, 489): 1961 Andh LT 117 °° AIR 1961 Pat 200 (201).

(11) Sale of property under Revenue Recovery Act — Suit for injunction restraining public officer from taking delivery of property — Absence of statement in plaint as to service of notice under Section 80, Civil P. C. — Suit barred by Section 80 and plaint liable to be rejected under Order 7, Rule 11 (d). ILR (1962) 1 Ker 479 (480, 481).

[But see AIR 1964 Pat 275 (283): 1964 BLJR 291.]

(12) Notice under Section 80, Civil P. C. defective — Dismissal — Order 7, Rule 11 deals with rejection of plaint before notice is issued to the defendant — Where it is found notice under Section 80, Civil P. C. is defective the proper course is to dismiss the suit but not reject the plaint under O. 7, R. 11. AIR 1960 Ker 135 (137): 1959 Ker LT 933 (DB).

7. Rejection of plaint on other grounds.— (1) Though the instances given in this rule are not exhaustive of the cases in which a Court may reject a plaint, a Court has no power to reject a plaint merely because it is defective in that it does not comply with some provisions of law. AIR 1956 Hyd 133 (135): ILR (1956) Hyd 514 (DB) °° ILR (1953) 2 Cal 279 (284).

[See (1897) 1 Cal WN 574 (576).]

[See also AIR 1942 All 170 (171): ILR (1942) All 289 (DB).]

(2) The proper procedure in a case of non-compliance with some law is to call on the plaintiff to cure the defect and on his failure to do so, to proceed to decide the suit forthwith and to dismiss it under Order 17, Rule 3 or to reject the plaint under the Court's inherent powers. AIR 1958 Orissa 111 (112, 113): ILR (1958) Cut 45 °° AIR 1956 Hyd 133 (135): ILR (1956) Hyd 514 (DB) °° AIR 1942 All 170 (171): ILR (1942) All 289 (DB).

(3) Section 203, sub-section (4) of the Madras Estates Land Act (1 of 1908) provides that the following clause shall be deemed to be added to this rule as Cl. (e), viz.

"(e) In any suit to which Section 203 of the Madras Estates Land Act, 1908, applies if the certified copy therein mentioned is not annexed to the plaint and the plaintiff on being required by the Court to produce it fails to do so within the time allowed by the Court."

(4) Where the plaintiff rightly files the plaint originally in right Court, he cannot be prejudiced by illegal order of the Court returning the plaint for filing it in another Court. The suit must be deemed to have been filed within time in the right Court. AIR 1960 Pat 82 (84): 1959 BLJR 564.

(5) Mortgage suit — Persons claiming adversely to mortgagor and mortgagee not necessary parties — Effect of non-joinder — Plaint must not be rejected. (1959) 61 Pun LR 832 (835) (DB).

8. Partial rejection.— (1) A plaint cannot, under this rule, be rejected in part and retained in part. It should be rejected as a whole. AIR 1952 Punj 38 (39) °° AIR 1931 Mad 175 (176): 54 Mad 416 °° AIR 1936 Lah 1021 (1022) (DB) °° 1968 All LJ 1102. (AIR 1951 Nag 419, Dissented from.)

[See however AIR 1937 Lah 800 (801).]

[But see AIR 1962 Raj 36 (39): 1962 Raj LW 49. (Suit barred against some of defendants but maintainable against rest — Whole suit is not necessarily to be thrown out.)]

(2) Where in a suit by two plaintiffs against the Secretary of State for India, one of them has failed to give notice as required by Section 80 of the Code, the plaint should be rejected as a whole and not merely as regards the plaintiff who had failed to give notice. AIR 1931 Mad 175 (176): 54 Mad 416 °° AIR 1935 Mad 389 (390) (DB).

[See also AIR 1941 Pat 461 (463) °° AIR 1941 Pat 385 (387): 20 Pat 417 (DB).]

[See however AIR 1951 Nag 419 (425): ILR (1949) Nag 560 (577) (DB) °° (1948) 52 Cal WN 389 (393). (Plaint disclosing cause of action in respect of some reliefs only — Plaint cannot be rejected under this rule.)]

9. Stage for rejection.— (1) The registration of a plaint does not prevent its rejection under this rule. AIR 1943 Pat 102 (105): 21 Pat 720 °° Madh BLJ 1955 HCR 267 (268) °° (1900) 27 Cal 376 (378) (DB) °°(1895) 18 Mad 338 (341) (DB).

[See also (1899) 3 Cal WN 220 (221).]

[But see (1882) 8 Cal 192 (195). (Dissented from in 27 Cal 376.) °° (1880) 2 Mad 308 (309) (DB). (Dissented from in 18 Mad 338).]

Order 7, Rule 11 — Note 9 (contd.)

(2) Where a suit was dismissed after the trial of the suit to completion for non-payment of additional court-fee it was held that the dismissal amounted to rejection of plaint under this rule. AIR 1949 Nag 373 (375): ILR (1949) Nag 391.

(3) Where the defendant had full opportunity of knowing what the dealings between the parties on the basis of which the claim of the plaintiff was based were, it was held that the defendant could not, for the first time, contend in second appeal that the plaint did not set out all the dealings between the parties and was liable to be rejected. AIR 1946 Nag 266 (268): ILR (1946) Nag 301 (DB).

(4) Where a plaint is rejected in the early stages of the suit, there is no justification for allowing excessive costs to the defendant. AIR 1914 Lah 268 (269): 1914 Pun Re No. 35 (DB).

(5) A plaint is to be rejected in the circumstances mentioned in Order 7, Rule 11 at the preliminary stage and not at any other stage of the suit. AIR 1959 All 37 (43): ILR (1957) 2 All 349 °° AIR 1963 Guj 79 (79, 80): (1963) 4 Guj LR 437. (Plaint cannot be rejected after issues have been framed.) °° AIR 1962 Assam 137 (140): ILR (1962) 14 Assam 453 (DB). (Inadequacy of Court-fee — Dismissal at the stage of arguments not proper.)

[See however AIR 1968 J and K 98 (99, 100): 1968 Kash LJ 374. (Court has power to reject plaint at any stage after its admission.)]

10. Appeal.— (1) An order rejecting a plaint, whether under this rule or not is a decree as defined in Section 2, sub-sec. (2) and hence is appealable as such. AIR 1958 All 596 (598, 599): ILR (1958) 1 All 353 (DB). (Dismissal of election petition under Representation of the People Act 1951.) °° AIR 1956 Raj 164 (165): ILR (1956) 6 Raj 736 °° AIR 1955 Hyd 156 (157): ILR (1955) Hyd 56 (DB) °° AIR 1961 Cal 491 (493) (FB). (AIR 1953 Cal 42, **OVERRULED.**)

[See AIR 1957 Madh B 22 (23) (DB). (Order not one under Arbitration Act but one of rejection of plaint under Order 7, Rule 11 — Section 39, Arbitration Act does not apply — Order is appealable.) °° (1957) 61 Cal WN 789 (792) (DB). (Dismissing suit on ground that facts disclosed in plaint ousted civil Court's Jurisdiction — Order is not one rejecing plaint.) °° AIR 1937 All 280 (281): ILR (1937) All 484.]

[See also AIR 1955 Andhra 74 (77, 78): ILR (1955) Andhra 27 (FB) °° AIR 1923 Pat 354 (355): 2 Pat 504 °° AIR 1926 Cal 427 (427).]

[But see (1910) 5 Ind Cas 371 (372) (All).]

(2) Appeal rejected as incompetent — Order amounts to decree and an appeal would lie from it. AIR 1961 Andh Pra 112 (113): (1960) 2 Andh WR 4.

(3) In cases coming under Clause (b) of this rule if the order is based merely upon a valuation of the subject-matter of the suit and the only question involved is as to the amount upon which the court-fee has to be paid, the decision of the first Court is final under Section 12 of the Court-fees Act. **AIR 1953 SC 28 (32): 1953 SCR 197** °° (1898) 20 All 11 (16) (FB) °° (1886) 10 Bom 610 (616) (FB) °° AIR 1968 Andh Pra 239 (265, 266): 1968-2 Andh WR 301 (FB).

[See also (1890) 14 Mad 169 (170) (DB).]

(4) Rejection of plaint under Order 7, Rule 11 (b) — Appeal — Court-fee payable under Sch. I, Article 1, Court-fees Act is on undervaluation found and not on subject-matter of suit. AIR 1968 Ker 58 (59): 1967 Ker LT 1009. (Difficulty in applying Section 52, Kerala Court-fees and Suits Valuation Act (10 of 1960), in such a case pointed out.)

(5) When a suit is dismissed by trial Court as barred under Section 46 of Evacuee Property Act, assuming such dismissal amounts to rejection of plaint under R. 11 such rejection will amount to decree and an appeal will be against decree and the same Court-fee as on original plaint will have to be paid. (1968) 1 Andh WR 367: (1968) 1 Andh LT 387.

(6) Where the question is, what provision of the Court-fees Act applies to the relief sought for in the plaint or under what category the suit falls the decision is not final under Section 12 of the Court-fees Act and an appeal is not barred. **AIR 1953 SC 28 (32): 1953 SCR 197** °° AIR 1919 Lah 323 (331, 332): 1919 Pun Re No. 16 (FB) °° (1886) 10 Bom 610 (616) (FB) °° (1871) 16 Suth WR 10 (12) (FB) °° (1890) 12 All 129 (153) (FB).

(7) Where the question is about the sufficiency of the stamps affixed an appeal is not barred, the decision not being final under Section 12 of the Court-fees Act. (1893) 17 Bom 56 (59) (DB) °° (1889) 11 All 91 (93) (FB) °° (1881) 6 Cal 249 (250, 251) (DB).

[See also AIR 1949 Mad 121 (121) (DB).]

(8) Section 12 of the Court-fees Act does not apply to an order dismissing a suit for non-payment of the additional court-fee ordered. (1891) 14 Mad 169 (170) (DB).

(9) An Appellate Court can reject a memorandum of appeal under this rule read with Section 107. AIR 1954 Bom 43 (45): ILR (1953) Bom 1176 °° AIR 1937 All 280 (281): ILR (1937) All 484.

(10) A memorandum of appeal cannot be rejected on the ground that the Court-fee on the plaint in the trial Court has not been paid by the plaintiff-appellant. AIR 1937 All 280 (281): ILR (1937) All 484.

(11) Where a plaint returned under R. 10 for presentation to the proper Court is rejected by the latter Court for not making up the deficiency in court-fee and the order of return is reversed on appeal, the plaintiff having suppressed the fact of rejection,

Order 7, Rule 11 — Note 10 (contd.)

the appellate order is void and the only remedy of the plaintiff is to appeal against the order of rejection. AIR 1929 Bom 202 (204, 205) (DB).

(12) Where the Court refuses to extend time for payment of deficit court-fee and by a later order rejects the plaint for non-payment of court-fee but on review sets aside its order refusing to extend time, the order rejecting the plaint is automatically set aside and it is not necessary for the plaintiff to appeal against that order. AIR 1947 Mad 84: ILR (1947) Mad 220 (DB).

[See also AIR 1957 All 825 (826) (DB).]

(13) Order returning plaint for presentation to proper Court falls under Order 7, Rule 10 and not this Rule and hence no second appeal lies from such order. AIR 1942 Oudh 480 (481).

(14) Appeal from order rejecting plaint under Order 7, Rule 11 — Appellate Court setting aside order and remanding case — Order of remand falls under Order 41, Rule 23 and is appealable under Order 43, Rule 1 (u). AIR 1941 Nag 304 (305): ILR (1941) Nag 629 •• AIR 1957 Pepsu 14 (16) (DB). (Rejection of unstamped plaint)

(15) Order rejecting plaint for failure to pay additional court-fee is a complete and final determination of rights of parties — Appeal from such order — Subject-matter in appeal is same as that in suit and same court-fee is payable on appeal as on plaint. AIR 1935 Nag 83 (86) (FB).

(16) Order rejecting plaint under O. 7, R. 11 (a) or (d) — Appeal from — Subject-matter of appeal incapable of valuation — No court-fee payable in Andhra Pradesh under Andhra Pradesh Court-fees and Suits Valuation Act (7 of 1956). AIR 1968 Andh Pra 239 (248): (1968) 2 Andh WR 301 (FB).

11. Revision.— (1) An order rejecting a plaint being a decree and appealable as such, a revision against such an order is incompetent. AIR 1952 Mad 86 (87): ILR (1952) Mad 77 (FB) •• AIR 1957 Madh B 22 (23) (DB) •• AIR 1949 Nag 373 (375): ILR (1949) Nag 391 •• AIR 1968 Orissa 163 (165): 34 Cut LT 549. (AIR 1950 Pat 470, Diss.)

[See however AIR 1953 Cal 42 (44, 45): ILR (1954) 2 Cal 176 (DB).]

(2) Where appeal is barred under S. 12 of the Court-fees Act, or where an appeal against an order under this rule is rejected as incompetent or where the plaint is rejected by a Provincial Small Cause Court, the order is revisable if the conditions of Section 115 are satisfied. AIR 1919 Pat 270 (275): 4 Pat L Jour 57 (DB). (Appeal barred under Section 12, Court-fees Act.) •• (1886) 10 Bom 610 (616) (FB). (Do.) •• AIR 1929 Lah 125 (125). (Appeal against order under Rule rejected as incompetent.) •• AIR 1928 Lah 274 (275). (Rejection of plaint by Small Cause Court.)

(3) An order demanding additional, court-fee is not open to revision, so long as the order has not resulted in the rejection of the plaint for non-compliance with the order since the plaintiff has another remedy open to him by way of appeal on the rejection of the plaint. AIR 1954 Punj 205 (205) •• AIR 1930 Pat 277 (278) (DB).

[But see AIR 1959 Mad 155 (156): 1959 Mad LJ 151 •• AIR 1954 Mad 880 (881). (Question is one of jurisdiction.) •• (1954) 20 Cut L Tim 556 (557). (Do.) •• AIR 1925 Mad 722 (723). (Do.) •• AIR 1924 Pat 673 (676): 3 Pat 930 (DB). (Do.)]

(4) Where the plaintiff's valuation is accepted by the Court as correct on an examination of the facts alleged, the order is not open to revision inasmuch as such an order does not fall within Section 115 and as the decision could be challenged in an appeal from the decree in the suit. AIR 1925 Cal 814 (815, 816) (DB).

(5) When a question of Court-fee is decided and it is held that the court-fee paid by the plaintiff is sufficient or insufficient no case is decided by the Court and the order is not revisable. AIR 1957 All 339 (340). (AIR 1934 All 620 (FB) and AIR 1957 All 337, Rel. on.)

(6) Where the appellate Court orders deficit court-fee on the plaint and the memorandum of appeal to be paid by a certain date and upon the failure of the plaintiff to pay the same within the time allowed, the appellate Court rejects both the plaint and the memorandum of appeal and the plaintiff files a revision before the High Court against the earlier order demanding the deficit court-fee and not against the order rejecting the plaint and the memorandum of appeal, the High Court cannot grant time to the plaintiff to make up the deficiency in court-fee, the appellate order rejecting the plaint and the memorandum of appeal having become final. AIR 1958 Pat 560 (562).

(7) See also the following case. AIR 1957 Pat 450 (451) (DB). (If the question of valuation and court-fee is decided against the plaintiff the plaintiff can come up in revision against that order but, if the valuation and court-fee matter is decided in favour of the plaintiff, then the defendant cannot come up in revision, inasmuch as the matter of court-fees is not between the plaintiff and the defendant but is between the State and the plaintiff.) •• AIR 1952 Punj 38 (39). (Plaint rejected — Appeal — Appellate Court upholding rejection at to part and setting aside rejection in regard to other part — Revision on appellate Court's order allowed.) •• AIR 1962 Raj 157 (159, 160): 1961 Raj LW 262.

(8) Rejection of pauper application — Court-fee not paid within time as ordered — Rejection of plaint — No revision lies but only appeal. AIR 1960 Mys 140 (140): 38 Mys LJ 51 •• AIR 1964 Manipur 7 (8).

12. Review.— (1) An order rejecting a plaint can be reviewed if the conditions of Order 47, Rule 1 are satisfied. AIR 1957 Pat

R. 12. Procedure on rejecting plaint.—Where a plaint is rejected, the Judge shall record an order to that effect with the reasons for such order.

[1882 and 1877, S. 55.]

R. 13. Where rejection of plaint does not preclude presentation of fresh plaint.—The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

[1882 and 1877, S. 56; 1859, S. 36.]

HIGH COURT AMENDMENT

Bombay: Dadra and Nagar Haveli[a]

For Rule 13, substitute the following:—

"13. The rejection of the plaint on any of the grounds hereinbefore mentioned or on the ground mentioned in Rule 21 of this Order shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

DOCUMENTS RELIED ON IN PLAINT

R. 14. Production of document on which plaintiff sues.—(1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

Order 7, Rule 11 — Note 12 (contd.)

430 (431): 36 Pat 951 (FB). (No review lies on the ground that although the appellant had sent the money for deficit court-fee within specified time, the lawyer had failed to deposit the same in the High Court.) °° AIR 1955 Hyd 156 (157): ILR (1955) Hyd 56 (DB) °° 1954 BLJR 600 (601).

[See AIR 1935 Cal 336 (337): 62 Cal 61 (DB).]

[See also AIR 1956 Raj 164 (165): ILR (1956) 6 Raj 736.]

(2) The Court has power to restore the suit to the file after it has rejected a plaint under this rule. AIR 1939 All 452 (453).

(3) Even where the plaint dismissed under this rule could not be restored under O. 47, R. 1, the Court could do so under its inherent powers. AIR 1954 All 719 (720) (DB).

(4) The Court can treat an application for restoration as a fresh plaint under O. 7, R. 13. AIR 1955 Hyd 156 (158): ILR (1955) Hyd 56 (DB) °° AIR 1935 All 985 (986).

Order 7, Rule 12

1. Rejection of memorandum of appeal.—(1) Where a memorandum of second appeal is rejected by virtue of this rule read with section 107, the procedure prescribed by this rule should be followed. (1893) 15 All 367 (370) (DB). (Per Aikman J.)

[See also AIR 1939 Sind 221 (221): ILR (1939) Kar 527 (DB). (Rule assumed to apply to rejection of appeal by High Court.)]

(2) Non-payment of deficit court-fee within time fixed cannot operate as automatic dismissal. AIR 1961 Manipur 50 (52).

Order 7, Rule 13

1. Rejection of plaint does not preclude fresh plaint.— (1) Where a plaint is rejected under Rule 11, the plaintiff is not thereby precluded from presenting a fresh plaint in respect of the same cause of action provided his right of action is not barred by the law of limitation. AIR 1949 Pat 358 (361): 27 Pat 751 (DB) °° AIR 1944 Oudh 327 (328): 20 Luck 268 (DB) °° (1888) 15 Cal 533 (538, 539): 15 Ind App 119 (PC)

[See also (1890) 12 All 129 (148) (FB) °° (1886) 8 All 282 (287) (DB).]

(2) Where the order is in substance one of dismissal though in form one of rejection as where the Court purports to reject the plaint after a full trial on the merits and after recording a finding adverse to the plaintiff, a subsequent suit in respect of the same subject-matter based upon the same cause of action will be barred as res judicata. AIR 1943 Lah 121 (122) °° AIR 1920 Mad 449 (451) (DB).

(3) Where after the rejection of a plaint under Order 7, Rule 11 (b), the plaintiff files an application under Section 149 read with Section 151 accompanied with deficit court-fee and asking the Court to restore the suit to its original number, there is no bar to the Court treating it as a fresh plaint under this rule. AIR 1955 Hyd 156 (158): ILR (1955) Hyd 56 (DB) °° AIR 1959 Ker 406 (408): 1958 Ker LT 562. (OVERRULED on a different point in AIR 1964 Ker 8 (FB).)

(4) Dismissal for failure to pay court-fee within time allowed — Order amounts to a decree — Suit cannot be restored under inherent powers. AIR 1962 Guj 59 (61): (1962) 3 Guj LR 71.

ORDER 7, RULE 14 — SYNOPSIS

1. Scope and object.
2. Right of defendant to inspect documents relied on by plaintiff.

2. List of other documents.—Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

[1882, S. 59; 1877, Ss. 58, 59, 62, 63; 1859, S. 39.]

HIGH COURT AMENDMENT

Mysore

For Rule 14, substitute the following:—

"14. (1) The plaintiff shall endorse on the plaint or annex thereto a list of documents required to be produced or disclosed as hereinafter provided in this rule.

(2) Where the plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

(3) Where the plaintiff relies on any other documents (whether in his possession or not) as evidence in support of his claim, he shall enter such documents in the list above referred to showing separately which of the documents are in his possession or power and which are not, which of the documents in his possession or power he has produced with the plaint and which are not so produced. In regard to any such documents which are not produced, the list shall contain a statement of the reason for their non-production and the steps which the plaintiff has taken or will take to produce them or cause their production." [30-3-1967].

Order 7, Rule 14 — Synopsis (contd.)

3. Failure to comply with this rule.—See Note 1 and Rule 18.

4. Loss of document after production — See Note 1.

1. Scope and object.— (1) This rule makes a distinction between a document sued on and a document relied on by the plaintiff as evidence in support of his claim. AIR 1920 Cal 416 (416).

(2) Documents merely mentioned in list filed under Order 7, Rule 14 but not referred to in pleadings or affidavits — Order 11, Rule 15 does not contemplate inclusion of such documents. AIR 1967 Orissa 156 (157): 33 Cut LT 206. (AIR 1931 Mad 825, **DISSENT FROM.**)

(3) Where a plaintiff sues upon a document he should produce the document in Court when the plaint is presented. AIR 1958 Ker 124 (124): ILR (1957) Ker 853 °° AIR 1920 Bom 94 (95): 44 Bom 625 (DB).

[See AIR 1937 Lah 464 (465).]

(4) When a contract is set out in the plaint and accepted by both the parties, it is not necessary either to produce it or for the Court to look at it if produced. AIR 1946 Nag 336 (341): ILR (1946) Nag 334 (DB).

(5) Where the plaintiff relies on any document as evidence in support, of his claim, he should enter such document in a list to be annexed to the plaint, whether the document is in his power or not. AIR 1952 Trav-Co 445 (446) (DB) °° (1908) 12 Cal WN 312 (315) (DB). (When a list of documents has been attached to the plaint he need not produce them all at the first hearing.) °° AIR 1918 PC 118 (119): 41 All 63: 45 Ind App 284.

[See also AIR 1931 Cal 458 (461): 58 Cal 418.]

(6) Documents relied upon as evidence should, if they are in his possession or power be produced in Court at or before the first hearing of the suit. AIR 1922 Pat 569 (571) (DB).

[See also 1956 Madh B LJ 1 (2, 3).]

(7) The documents which are filed with the plaint have to be accompanied by one copy of those documents which is not expected to be delivered with the copy of the plaint to the answering defendants when summons is served on them. **AIR 1968 SC 1079 (1082, 1083): (1968) 2 SCJ 650,** (Case under Representation of the People Act (1951), S. 81 (3). Election petition No. 10 of 1967, Dated 21-9-1967 (M. P.), **Reversed.**)

(8) A document on which the plaintiff has not in terms sued, and which is not produced in Court when the plaint is presented, can only be treated, if subsequently produced, as a piece of evidence and not as creating any rights in favour of the plaintiff. **AIR 1916 PC 217 (219)** °° AIR 1937 Mad 122 (123).

(9) Order 7, Rule 14 read with Order 7, Rule 18, disable a plaintiff from producing in evidence documents whether in his possession or power, if he had not included them in a list to be filed with the plaint there are no similar provisions so far as the defendants are concerned. The defendant has an unqualified right to produce in evidence documents at any stage so long as his evidence has not been closed, provided they were not in his possession or power. AIR 1961 Raj 21 (23): 1960 Raj LW 321 (DB).

(10) The object of this rule is to exclude documents as to the existence of which

R. 15. Statement in case of documents not in plaintiff's possession or power.—Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is.

[1882 and 1877, S. 60.]

R. 16. Suits on lost negotiable instruments.—Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

[1882 and 1877, S. 61.]

Order 7, Rule 14 — Note 1 (contd.)

at the date of the suit, there may be reasonable doubt and as to the genuineness of which suspicions might arise when subsequently tendered. AIR 1957 Andh Pra 784 (791) (DB) ** (1909) 2 Ind Cas 946 (948) (DB) (Cal) ** AIR 1920 Pat 811 (812).

[See also AIR 1952 Trav Co 445 (446) (DB).]

(11) The production of the basic document affords protection to the person liable under it against a similar claim in a subsequent suit brought by a party who might claim to have legally acquired the rights under the document and produce it in support of his claims. The possibility of such risk is greater in the case of negotiable instruments. Possession of it by the holder in due course will be prima facie evidence of the liability not having been discharged. AIR 1958 Ker 124 (124): ILR (1957) Ker 853.

(12) The provisions of this rule are imperative and compel the plaintiff to produce or disclose all documents on which he relies in support of his claim. (1909) 2 Ind Cas 946 (948) (DB) (Cal) ** AIR 1917 PC 6 (8): 40 Mad 402: 44 Ind App 98.

(13) The plaintiff's failure to produce or disclose the documents as provided by this rule does not entail the return or rejection of the plaint or the dismissal of the suit. AIR 1943 Mad 645 (645) ** (1898) 22 Bom 971 (972) (DB) ** AIR 1921 All 218 (218) (DB).

(14) The only penalty for default in producing or disclosing the documents is that the plaintiff cannot produce the documents in evidence at the hearing without the leave of the Court. AIR 1957 Andh Pra 784 (791) (DB).

See Order 7, Rule 18.

(15) This rule does not apply if the plaintiff himself is not aware of the existence of any documents which he subsequently discovers as supporting his claim. AIR 1921 Nag 49 (49, 50).

(16) If the plaintiff produces the document sued on, as required by this rule, and the document is lost subsequently from the custody of the Court, the plaintiff should be allowed to adduce secondary evidence of the document under Section 65 of the Evidence Act, 1872, without showing how the original document was lost. AIR 1925 PC 80 (82).

(17) A suit for recovery of mortgage-money based on a registered copy of the mortgage-bond will not be maintainable if the loss of the original mortgage bond is not properly accounted for, as in that case the copy will not be admissible in evidence. AIR 1959 Orissa 126 (128): 25 Cut LT 66 (DB).

(18) Though it is doubtful whether entries in books of account are basis of suit in view of Section 34 of Evidence Act, such entries are treated as basis of the suit for purposes of production and inspection of documents. AIR 1968 Pat 474 (474).

(19) Document in Order 7, Rules 14 and 17 means only entry or entries in the accounts and not whole book of accounts. AIR 1968 Pat 474 (475, 476).

(20) The Court is given discretion to order a party to produce documents in its possession if in its opinion it is necessary for disposing of the suit fairly or for saving cost. AIR 1959 Punj 189 (192): 61 Pun LR 118. (Case under Industrial Disputes Act (1947), Section 11 (3) (b).)

(21) The accounts relating to the suit must be produced along with the plaint, when it is filed into the Court. Where accounts are not produced in Court, no copy of accounts is filed with plaint, nor are they shown in the schedule mentioning the documents relied on by the plaintiff, it is a lacuna in the case of the plaintiff. AIR 1969 Tripura 26 (29).

2. Right of defendant to inspect documents relied on by plaintiff.— (1) If a defendant is to be permitted to inspect documents referred to in the plaint even before filing his written statement, the circumstances must be very very extraordinary and he will have to satisfy the Court that without their inspection he will not be able to plead any defence. AIR 1964 Tripura 25 (26, 27).

(2) See also Order 11, Rule 15.

3. Failure to comply with this rule.— See Note 1 and Rule 18.

4. Loss of document after production.— See Note 1.

Order 7, Rule 16

1. Suit on a lost negotiable instrument.— (1) Before a Court can pass a decree as contemplated by the rule, it must be proved

R. 17. (1) Production of shop-book.—Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop-book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.

(2) **Original entry to be marked and returned.**—The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification and, after examining and comparing the copy with the original, shall certify it to be so and return the book to the plaintiff and cause the copy to be filed.

[1882, S. 62; 1877, Ss. 58, 62, 63; 1859, S. 39.]

HIGH COURT AMENDMENTS

Allahabad

Add the following proviso to sub-rule (2):—

"Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use, the procedure laid down in O. 13, R. 12, as to verification shall be followed, and in that case the Court or its officer need not examine or compare the copy with the original."

Bombay: Dadra and Nagar Haveli

Add at the end of sub-rule (2):—

"Provided that where the entry referred to in this rule is in a language other than English or the language of the Court, the plaintiff shall file with the plaint a

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Order 7, Rule 16 — Note 1 (contd.)

that the negotiable instrument upon which the suit is based is lost. AIR 1958 Ker 124 (125): ILR (1957) Ker 853 °° (1968) 2 Andh WR 567.

(2) The plaintiff should give sufficient indemnity against possible claims of persons in respect of the lost instrument which is sued upon. (1912) 16 Ind Cas 769 (771) (DB) (Lah) °° AIR 1920 Mad 336 (336) (DB) °° (1968) 2 Andh WR 567.

Order 7, Rule 17

1. Shop-book or account.— (1) Section 4 of the Bankers' Books Evidence Act provides that a certified copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of the existence of such entry and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry is now by law admissible, but not further or otherwise. See Section 4 of Act XVIII of 1891.

(2) The term "banker's books" includes ledgers, day-books, cash books, account books and all other books used in the ordinary course of business of a bank. See the Bankers' Books Evidence Act (1891), Section 2 (3).

(3) If the document sued on is a banker's book it is not necessary to produce the original book itself along with the plaint: it is enough if a certified copy of the entry or entries is produced. But it should be shown that the bank is one to whose books the provisions of the Bankers' Books Evidence Act have been extended. (1900) 4 Cal WN 433 (434) (FB).

See Act VIII of 1891, S. 2 (2) and S. 8.

(4) If the document sued on is not a banker's book but is an entry in a shop-book or account, the plaintiff should produce the book or account at the time of filing the plaint together with a true copy of the entry sued on. AIR 1920 Lah 136 (140): 1 Lah 6 (DB).

[See however AIR 1928 Pat 555 (557): 7 Pat 589 (DB). (In this case it was held that the accounts were not sued on but were only relied on.)]

(5) Upon production of the shop-book or account the Court or its officers should mark the document for identification. (1865) 3 Bom HCR (AC) 92 (93) (DB) °° (1891) 15 Bom 687 (689, 690, 691) (SB).

(6) The fact that the original document is not presented along with the plaint as provided by this rule and the plaint is registered, is not a ground for rejecting the plaint: but the plaintiff cannot afterwards produce the document in evidence except with the leave of the Court as provided by Rule 18. AIR 1956 Bom 272 (272) °° (1897) 22 Bom 971 (972) (DB).

[See also AIR 1953 Hyd 227 (227): ILR (1953) Hyd 336.]

(7) It is the uniform practice of the Courts that copies of account books filed under this rule and certified and exhibited as per provisions of Order 13, Rules 5 to 7 need not bear any stamp. AIR 1952 Hyd 151 (152): ILR (1952) Hyd 319 (DB).

(8) Original account book must be produced before the Court. AIR 1965 All 189 (190): 1964 All LJ 738.

(9) 'Document' in Order 7, Rules 14 and 17 means only entry or entries in the accounts and not whole book of accounts. AIR 1968 Pat 474 (475).

true copy of the entry together with its translation either in English or in the language of the Court, such translation being verified as regards its correctness by an affidavit of the person making the translation:

Provided further that the Court may accept a plaint without the translation and permit the party to file the said translation within a time to be fixed by the Court.

In either of such cases the Court or its officer need not examine and compare the copy with the original and certify the same to be correct." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17.

Gujarat

Same as that of first proviso of Bombay without the words "English or" and the words "either in English or" which are deleted, and addition of last sentence with words "In such a case" substituted for first five words (17-8-1961).

Mysore

Add the following as sub-rule (3) to Rule 17:—

"(3) Where the document is not in the language of the Court, the Chief Ministerial Officer of the Court shall take the directions of the Judge or Presiding Officer of the Court as to whether the procedure prescribed in Rule 12 of Order XIII, of this Code shall be followed." (30-3-1967).

Punjab and Haryana and Chandigarh

After sub-rule (2) add the following Explanation :—

"Explanation.—When a shop-book or other account written in a language other than English or the language of the Court is produced with a translation or transliteration of the relevant entry, the party producing it shall not be required to present a separate affidavit as to the correctness of the translation or transliteration, but shall add a certificate on the document itself, that it is a full and true translation or transliteration of the original entry, and no examination or comparison by the Ministerial Officer shall be required except by a special order of the Court." (9-3-1935); Act 31 of 1966, Ss. 29 and 32 (1-11-1966).

R. 18. Inadmissibility of document not produced when plaint filed.—(1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court be received in evidence on his behalf at the hearing of the suit.

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory.

[1882, S. 63; 1877, Ss. 58, 62, 63; 1859, S. 39.]

HIGH COURT AMENDMENTS

Rules 19 to 25 (Allahabad)

Add the following Rules 19 to 25:—

Order 7, Rule 18

1. Scope and object. — (1) The policy underlying this rule is to exclude evidence, the existence of which at the date of the suit is doubtful, and as to the genuineness of which suspicion may arise because it was produced at a late stage of the suit. AIR 1952 Trav-Co 445 (446) (DB) °° (1909) 2 Ind Cas 946 (948) (DB) (Cal).

[See also AIR 1957 Andh Pra 784 (791) (DB).]

(2) Order 7, Rule 18 bars the plaintiff from subsequently filing the documents which it should have filed under O. 7, R. 14 to be admitted in evidence. AIR 1969 Tripura 26 (29).

(3) The Court has a wide discretion with regard to the reception of documents which were not produced with the plaint or entered in the list of documents. AIR 1950 PC 68 (69): 77 Ind App 15: Pak LR (1950) Lah 192 °° AIR 1953 Hyd 227 (227): ILR (1953) Hyd 336 °° AIR 1948 Nag 44 (48): ILR (1947) Nag 381 (DB).

(4) The Court is given discretion to order a party to produce documents in its possession if in its opinion it is necessary for disposing of the suit fairly or for saving

"19. Every plaint or original petition shall be accompanied by a proceeding giving an address written in English in block letters at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court suo motu or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service, and no agent or adult male member of his family on whom a notice or prócess can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present, another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by regis-

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Order 7, Rule 18 — Note 1 (contd.)

cost. AIR 1959 Punj 189 (192): 61 Pun LR 118. (Case under Industrial Disputes Act (1947), S. 11 (3) (b).) °° (1969) 1 Mad LJ 237.

(5) Where there can be no doubt about the genuineness of the documents produced, such as certified copies of public documents or records of judicial proceedings, Courts will not as a rule shut them out. AIR 1954 Him Pra 36 (38) °° AIR 1953 Him Pra 52 (53) °° (1908) 12 Cal WN 312 (315) (DB) °° (1884) 8 Bom 377 (379) (DB) °° AIR 1918 Cal 329 (330) °° AIR 1920 Pat 811 (812).

[See also AIR 1950 PC 68 (69): 77 Ind App 15: Pak LR (1950) Lah 192.]

(6) Even in such cases leave may be refused where there has been unreasonable delay in the production of documents, unless satisfactory reasons are assigned for the delay. AIR 1954 Him Pra 36 (38) °° AIR 1920 Bom 94 (95): 44 Bom 625 (DB) °° AIR 1935 Lah 648 (649): 17 Lah 218 (DB).

(7) From the mere fact that the documents were not originally disclosed, but disclosed at a very late stage during the trial the Court will not be justified in holding that the documents have been manufactured. AIR 1959 Cal 302 (303): 1959 Cal LJ 269.

(8) An Appellate Court will not ordinarily interfere with the discretion exercised by the lower Court under this rule. AIR 1950 PC 68 (69): 77 Ind App 15: Pak LR (1950) Lah 192 °° AIR 1953 Him Pra 52 (53) °° (1885) 8 Mad 373 (374, 375) (DB).

(9) The leave granted by the Court need not be express, but may be gathered from the records and the circumstances of the case. (1913) 20 Ind Cas 331 (332) (DB) (All) °° (1869) 12 Suth WR 32 (32) (PC).

(10) See also the following case. AIR 1940 All 393 (393). (Defendant producing account books when other evidence in case was produced — No protest by plaintiff nor opportunity asked for production of further evidence to rebut evidence of account books — Plaintiff held not prejudiced.)

(11) While O. 7, R. 14 read with O. 7, R. 18 disable the plaintiff from producing in evidence documents whether in his possession or power, if he has not included there in his list of document filed with the plaint there is no such provision so far as defendants are concerned, the defendant can produce in evidence documents at any stage before closing his evidence provided they were not in his possession. AIR 1961 Raj 21 (22): 1960 Raj LW 321 (DB).

2. Cases where leave is not necessary. — (1) Sub-rule (1) does not apply to the following cases:

(a) Where the document is to be handed over to the witness for the purpose of refreshing his memory and not to be relied upon as a probative document in itself in support of the plaintiff's case. AIR 1918 PC 118 (119): 41 All 63: 45 Ind App 284 °° (1862) 1 Mad HCR 168 (170) (DB).

(b) Where the documents are produced in answer to any case set up by the defendant. 1956 Madh B LJ 1 (3) °° AIR 1916 Lah 262 (264) °° AIR 1934 Lah 126 (127) °° AIR 1922 Pat 569 (571) (DB).

[See also AIR 1936 Lah 1016 (1017).]

(c) Where they are produced for the cross-examination of the defendant's witnesses. The words "defendant's witnesses" include also plaintiff's witnesses who have turned hostile to the plaintiff and whom the plaintiff is permitted to cross-examine. AIR 1937 All 55 (56) °° AIR 1920 Nag 43 (43, 44).

[See also AIR 1933 Cal 65 (66): 60 Cal 841 (DB).]

3. Revision. — (1) The question of admission of evidence is not ordinarily a question of jurisdiction but is merely one of law and no revision will lie in such cases. AIR 1914 Cal 826 (827) (DB).

tered post and such service shall be deemed to be as effectual as if the notice or process had been personally served.

Notes.—Where service had been effected by affixture of the notice on the outer door of the house, but the party is not present on the date fixed for his appearance, the Court ought under this rule to order notice by registered post. Otherwise the service cannot be considered to be sufficient.

This rule applies also to appellate proceedings by virtue of O. 41, R. 38 (3) (added by Allahabad High Court).

23. Where a party engages a pleader, notices or processes for service on him shall be served in the manner prescribed by O. 3, R. 5, unless the Court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so."

Rules 19 to 26 (Bombay: Dadra and Nagar Haveli[a])

The following shall be added as Rules 19 to 26:—

"19. **Address to be filed with plaint or original petition.**—(1) Every plaint or original petition shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a memorandum in writing of this nature.

(2) This address shall be called the "registered address", and it shall, subject to R. 24 of this Order, hold good in all proceedings in the suit and in appeals and also for a further period of six years from the date of final decision for all purposes including those of execution.

20. **Nature of address to be filed.**—The registered address filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed or, if a party cannot conveniently give an address as aforesaid, at a place where the party ordinarily resides.

21. (1) **Consequences of failure to file address.**—Where a plaintiff or petitioner after being required to file the registered address within a specified time, fails to file the registered address, he shall be liable to have his plaint or petition rejected by the Court suo motu, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

(2) **When default may be condoned.**—Where a plaint or petition is rejected under sub-rule (1) the plaintiff or the petitioner may apply for an order to set aside the rejection and, if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing a registered address at proper time, the Court shall set aside the rejection on such terms as to costs or otherwise as it deems fit and shall appoint a date for proceeding with the suit or petition.

22. **Procedure when party not found at the place of registered address.**—Where a party is not found at the registered address and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present, another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address of that party by registered post pre-paid for acknowledgment (which payment shall be made within one month from the date

originally fixed for hearing) and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23. Service of process where party engages a pleader.—Where a party engages a pleader, notice or process on him shall be served in the manner prescribed by Order 3, Rule 5, unless the Court directs service at the registered address of the party.

24. Change of registered address.—A party who desires to change the registered address given by him as aforesaid shall file a fresh memorandum in writing to this effect, and the Court may direct the amendment of the record accordingly. Notice of such memorandum shall be given to such other parties as the Court may deem it necessary to inform, and may be served either upon the pleaders or such parties or be sent to them by registered post pre-paid for acknowledgment as the Court thinks fit.

25. Rules not binding on Court.—Nothing in Rules 19, 22, 23 and 24 of this order shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

26. Applicability to notice under Order 21, Rule 22.—Nothing in Rules 19, 22, 23 and 24 of this Order shall apply to the notice prescribed by Clause (b) of sub-rule (i) of R. 22 of O. XXI of this Code."

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Rules 19 to 25 (Delhi and Himachal Pradesh)

Same as that of Punjab — See Act 26 of 1966, Ss. 7 and 17.

Rules 19 to 26 (Gujarat)

The following shall be added as Rules 19 to 26:

"19. Address to be filed with plaint or original petition.—Every plaint or original petition shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a memorandum in writing of this nature. The address so given shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

20. Nature of address to be filed.—An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides.

21. Consequences of failure to file address.—Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court suo motu or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Procedure when party not found at the place of address.—Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the address supplied by that party by registered post pre-paid for acknowledgment (which payment shall be made within one month from the date originally fixed for hearing) and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23. Service of notice on pleaders.—Where a party engages a pleader, notice or processes on him shall be served in the manner prescribed by Order 3, Rule 5, unless the Court directs service at the address for service given by the party.

24. Change of the registered address.—A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this

effect and the Court may direct the amendment of the record accordingly. Notice of such memorandum shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. **Service of notice or process in any other manner.**—Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

26. **Applicability to notice under Order 21, Rule 22.**—Nothing in these rules shall apply to the notice prescribed by Order 21, Rule 22" [17-8-1961].

Rules 19 to 23 (Madhya Pradesh)

Added the following as Rules 19 to 23 :

"19. **Registered address.**—Every plaint or original petition shall be accompanied by a memorandum giving an address at which service of process may be made on the plaintiff or the petitioner. The address shall be within the local limits of the Civil District in which the plaint or original petition is filed or, if an address within such Civil District cannot conveniently be given, within the local limits of the Civil District in which the party ordinarily resides.

This address shall be called the "registered address' and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision for all purposes including those of execution.

20. **Registered address by a party subsequently added as plaintiff or petitioner.**—Any party subsequently added as plantiff or petitioner shall in like manner file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

21. **Consequence of non-filing of registered address.**—(1) If the plaintiff or the petitioner fails to file a registered address as required by Rule 19 or 20, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court suo motu or on the application of any party.

(2) Where a suit is dismissed or a petition rejected under sub-rule (1) the plaintiff or the petitioner may apply for an order to set the dismissal or the rejection aside and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the registered address at the proper time, the Court shall set aside the dismissal or the rejection upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or petition.

22. **Affixing of process and its validity.**—Where the plaintiff or the petitioner is not found at his registered address and no agent or adult male member of his family on whom a process can be served is present, a copy of the process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the process had been personally served.

23. **Change of registered address.**—A plaintiff or petitioner who wishes to change his registered address shall file a verified petition and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform" [16-9-1960].

Order 7 (Orissa)

Same as those of Patna except Rules 19, 20, 21 and 22 of Order 7 (Patna Amendment) [7-5-1954].

Rules 19 to 22 (Patna)

Add the following as Rules 19 to 22 :

"19. Every plaint or original petition shall be accompanied by a statement giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner, and every plaintiff or petitioner subsequently added shall, immediately on being so added, file a similar statement.

20. An address for service filed under the preceding rule shall state the following particulars :—

(1) the name of the street and number of the house (if in a town);

(2) the name of the town or village;

(3) the Post Office;

(4) the district; and

(5) the munsiff (if in Bihar) or the District Court (if outside Bihar).

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court suo motu, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit."

Rules 19 to 25 (Punjab; Haryana and Chandigarh)

Add the following as Rules 19 to 25 :

"19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the territorial jurisdiction of the Court of Judicature at Lahore (i. e. Punjab).

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court suo motu or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice, summons or other process can be served is present, a copy of the notice, summons or other process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice, summons or other process had been personally served.

23. Where a party engages a pleader, notices, summonses or other processes for service on him shall be served in the manner prescribed by O. 3, R. 5, unless the Court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice, summons or other process in any other manner, if for any reasons, it thinks fit to do so". [24-11-1927]; see Act 31 of 1966, S. 32 [1-11-66].

Rules 19 to 25 (Rajasthan)

Add the following as Rules 19 to 25:

"19. (1) Every plaint or original petition shall be accompanied by a memorandum giving an address at which service of process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a memorandum of this nature.

(2) This address shall be called the registered address and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of Rajasthan.

21. (1) Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court suo motu or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

(2) Where a suit is dismissed or a petition rejected under sub-rule (1) the plaintiff or the petitioner may apply for an order to set the dismissal or the rejection aside and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the registered address at the proper time, the Court shall set aside the dismissal or the rejection upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit or petition.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a process can be served, is present, a copy of the process shall be affixed to the outer door of the house. If on the date fixed, such party is not present and the process is not declared by the Court under R. 19 of O. V, to have been duly served, another date shall be fixed and a copy of the process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the process had been personally served.

23. Where a party engages a pleader, processes for service on him shall be served in the manner prescribed by Order 3, Rule 5, unless the Court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a process in any other manner, if for any reasons it thinks fit to do so". [24-7-1954].

ORDER VIII

WRITTEN STATEMENT AND SET-OFF

R. 1. Written statement.—The defendant may, and if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence.

[1882 and 1877, S. 110; 1859, S. 120.]

Order 8, Rule 1

1. Written statement. — (1) The filing of a written statement by a third person on behalf of the defendant is not sanctioned by the Code. AIR 1931 All 333 (335): 53 All 466 (DB).

(2) Discretion to file a written statement given to the defendant by this rule can be exercised at any time before the first hearing or upto some date fixed by the Court. 1954-2 Mad L Jour (Andh) 251 (254) °° AIR 1945 All 352 (353): ILR (1945) All 499 (DB) °°

HIGH COURT AMENDMENTS

Allahabad

The full stop shall be omitted and the following added at the end of the rule namely—

"and shall file with his written statement a list of full documents (whether in his possession or power or not) on which he relies as evidence in support of his defence" [17-1-1953].

Bombay: Dadra and Nagar Haveli

(i) For the title of the order substitute the following :—

"Written statement, Set-off, Counter-claim and Third Party Procedure". [1-11-1966].

(ii) For R. 1 substitute the following :—

"1. Written statement.—(1) The defendant may, and if so required by the Court, shall within such time as may be specified in this behalf or within such extended time as the Court may permit, present a written statement of his defence together with a copy thereof for plaintiffs :

Provided that the first adjournment for filing the written statement shall not ordinarily exceed six weeks and no further adjournment shall be granted except for reasons to be recorded in writing.

Order 8, Rule 1 — Note 1 (contd.)

AIR 1961 Andh Pra 102 (104, 105): ILR (1961) 2 Andh Pra 480.

(3) Failure of defendant t file a written statement on day fixed by Court or before issues are framed, will not entitle him as of right, thereafter, to file it. AIR 1957 All 283 (284) °° AIR 1949 Mad 622 (622): ILR (1949) Mad 804 (DB).

(4) Where the Court requires defendant to file a written statement it should grant an adjournment for that purpose. AIR 1930 Oudh 171 (172): 4 Luck 529.

(5) The Court cannot forfeit the right of a defendant to file a written statement on the ground of his failure to file the same at or before the first hearing in spite of its order to do so. For the reason of the non-compliance with its order it can only in exercising its discretion to extend time impose stricter terms on the defendant. AIR 1961 Andh Pra 102 (104, 105): ILR (1961) 2 Andh Pra 480.

(6) Where the Court after giving time twice to the defendant to file his written statement refused his request for further time and also to accept the written statement presented subsequently and adjourned the case for judgment it was held that the Court could not be said to have acted arbitrarily in exercising its discretion. AIR 1969 Goa 53 (54).

(7) Omission to file a written statement does not amount to an admission of facts stated in plaint. 1954-2 Mad L Jour (Andh) 251 (254) °° AIR 1935 Pat 306 (331): 14 Pat 70 (DB).

[But see AIR 1961 Pat 152 (154): 1961 BLJR 478.]

(6) Court cannot permit substitution in toto of one written statement for another already filed. AIR 1950 Mad 46 (47).

(9) A plea in written statement is no evidence in case. AIR 1954 All 221 (222).

(10) Plea raised in written statement cannot be used against plaintiff unless there exists no dispute on facts. 1965 All LJ 677: 1965 All WR (HC) 367.

(11) Return to a rule issued in Civil Writ case is not a written statement in the nature of pleading and has to be made on affidavits satisfying requirements of O. 19, R. 3. 1966 Cur LJ 318 (Punj).

(12) Scope — Statement under O. 10, R. 1 cannot replace written statement — Former is for clarifying only those allegations of fact made in the plaint or written statement which are not expressly or by necessary implication admitted or denied by the parties against whom they are made — Admissions in the statement under O. 10, R. 1, though conclusive for the purpose of the case and can be used against the party making an admission, cannot replace other pleas taken in the written statement. 1966 Raj LW 580: ILR (1967) 17 Raj 517.

2. First hearing, meaning of. — (1) The "first hearing" of a suit means the day on which the Court goes into pleadings in order to understand the contentions of parties. AIR 1949 All 445 (446) °° AIR 1939 Nag 110 (112): ILR (1939) Nag 452.

(2) In suit in which issues have to be framed, the day on which such issues are framed is the first hearing of the suit. AIR 1953 Sau 106 (107) °° AIR 1926 Mad 347 (348, 349) °° AIR 1961 Pat 152 (155): 1961 BLJR 478.

(3) Where summons is issued for final disposal, first day of appearance is date of first hearing. AIR 1953 Sau 106 (107).

(2) Where the defendant bases his defence or claim for set-off or counter-claim upon a document in his possession or power, he shall produce it in Court along with his written statement and shall at the same time deliver the document or a copy thereof to be filed with the written statement.

(3) Where he relies on any other document (either in his possession or power or not) as evidence in support of his defence or claim for set-off or counter-claim, he shall enter such documents in a list to be added or annexed to the written statement.

(4) Where any such document is not in possession or power of the defendant, he shall, if possible, state in whose possession or power it is.

(5) A document which is required to be produced in Court by the defendant with his written statement or to be entered in the list to be added or annexed to the written statement and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(6) Nothing in the foregoing sub-rule of this rule applies to documents produced for cross-examination of the plaintiff or other defendants or their witnesses or handed over to a witness merely to refresh his memory." [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Delhi and Himachal Pradesh

Same as that of Punjab — See Act 26 of 1966, Ss. 7 and 17.

Gujarat

Substitute the following for Rule 1 :—

"1. (1) The defendant may, and, if so required by the Court, shall at or before the first hearing or within such time as the Court may permit, present written statement of his defence :

Provided that the first adjournment for filing the written statement shall not ordinarily exceed four weeks and no further adjournment shall be granted except for the reasons to be recorded in writing. [17-8-1961].

(2) The defendant shall file with his written statement a list of all documents on which he relies as evidence in support of his defence or any claim for set-off and shall also produce with his written statement such of the documents on which his defence or claim for set-off is based as are in his possession or power.

(3) A document which ought to be entered in the list referred to in sub-rule (2) or produced thereunder but which has not been so entered or produced, shall not, without the leave of the Court, be received in evidence on the defendant's behalf at the hearing of the suit.

(4) Nothing in this Rule applies to documents to be used for cross-examination of the plaintiff's witnesses or handed to a witness merely to refresh his memory" [17-8-1961].

Kerala: Laccadive, Minicoy and Amindivi Islands[a]

For Rule 1 substitute the following rule, namely :—

"1. Written statement.—(1) The defendant may, and if so required by the court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence and with such written statement shall produce in Court all documents, in his possession or power on which he bases his defence or any claim for set-off.

(2) Where he relies on any other documents as evidence in support of his defence or claim for set-off, he shall enter such documents in a list to be added or annexed to the written statement.

(3) A document which ought to be produced in Court with the written statement under sub-rule (1) or to be entered in the list referred to in sub-rule (2), but which has not been so produced or entered accordingly, shall not, without the leave of the Court, be received in evidence in the defendant's behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents produced for cross-examination of the plaintiff's witnesses or handed to a witness merely to refresh his memory." [9-6-1959].

[a] See Act 37 of 1956, S. 60 and Reg. 8 of 1965 S. 3.

Mysore

Renumber R. 1 as 1 (1) and add the following as sub-rules (2) and (3):—

"(2) The defendant shall endorse on the written statement or annex thereto a list of documents on which it relies, whether in his possession or power or not, as evidence in support of his defence or case, and the provisions of sub-rules (2) and (3) of Rule 14 of Order VII of this Code shall as far as may apply thereto.

(3) Along with the written statement the defendant shall file into Court an acknowledgment signed by the plaintiff or his pleader in token of having received a copy thereof or if no such copy has been so delivered to the plaintiff or his pleader a copy thereof certified to be true by defendant or his pleader which copy shall be furnished to the plaintiff or his pleader by the office of the Court" [30-3-1967].

Orissa

Read the existing Rule 1 as Rule 1 (1) and add the following as Rule 1 (2)—

"(2) The defendant shall file with his written statement a list of all the documents (whether or not in his possession or power) on which he relies as evidence in support of his defence" [7-5-1954].

Punjab and Haryana and Chandigarh[a]

In its application to the Punjab, this rule as amended on 19-6-1939 and 1-9-1953 reads as follows :

"1. (1) The defendant may, and if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence in duplicate one for the Court and the other for the plaintiff, and with such written statement, or if there is no written statement, at the first hearing, shall produce in Court all documents in his possession or power on which he bases his defence or any claim for set-off.

(2) Where he relies on any other documents as evidence in support of his defence or claim for set-off, he shall enter such documents in a list to be added or annexed to the written statement, or where there is no written statement, to be presented at the first hearing. If no such list is so annexed or presented, the defendant shall be allowed a further period of ten days to file this list of documents.

(3) A document which ought to be entered in the list referred to in sub-clause (2) but which has not been so entered, shall not, without the leave of the Court, be received in evidence on the defendant's behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents produced for cross-examination of plaintiff's witnesses or handed to a witness merely to refresh his memory" [15-6-1939 and 1-9-1953].

[a] See Act 31 of 1966, S. 32 [1-11-66].

R. 2. New facts must be specially pleaded.—The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

[R. S. C., O. 19, R. 15. See O. 6, Rr. 4 and 8.]

ORDER 8, RULE 2 — SYNOPSIS

1. Scope.
2. Special defences.
3. Technical pleas.
4. Facts showing illegality.

1. Scope. — (1) The defendant should particularise in his defence all points, either of fact or of law, which he desires to take. ILR (1955) Cut 45 (50) °° AIR 1967 Andh Pra 202 (206) (DB). (Challenge to detention order — Plea of mala fides must be raised at initial stage.) °° AIR 1967 Cal 390 (398). (Ejectment suit on ground of sub-letting — Sub-tenancies whether pre-Act or post-Act not stated in plaint — Defendant must raise matter in pleadings.) °° AIR 1965 Raj 132 (139): 1964 Raj LW 428. (Plea that a contract was a contingent contract has to be pleaded.) °° 1963 BLJR 486 (488) °° AIR 1961 Madh

Order 8, Rule 2 — Note 1 (contd.)

Pra 237 (239): 1961 Jab LJ 427. (Case under S. 53-A, Transfer of Property Act (1882).)

[See ('58) AIR 1958 Raj 306 (306): ILR (1957) 7 Raj 932. (Pleas as to validity of notice to quit.)]

[See however AIR 1964 Andh Pra 71 (73): (1963) 2 Andh WR 190.]

(2) Defendant will not be allowed to raise a new plea depending upon evidence for first time in appeal. ('54) AIR 1954 SC 263 (266) ** ('58) AIR 1958 Orissa 145 (148): ILR (1957) Cut 725 (DB). (Plea of limitation based upon special statute.) ** 1956 All L Jour 730 (732) ** AIR 1966 SC 292 (294): (1966) 2 SCJ 290 ** AIR 1963 SC 1607 (1612): (1964) 2 SCR 324 ** AIR 1969 Tripura 26 (28) ** AIR 1961 Orissa 94 (95) ** AIR 1960 Pat 410 (411): 1960 BLJR 382 (DB). (Point that suit by Union of India is not maintainable in view of S. 172 (1),Government of India Act and Art. 294 of the Constitution—Mixed question of law and fact — Not allowed in second appeal.)

[See also AIR 1960 Pat 400 (403): 1960 BLJR 224. (Suit on contract — Plea of account stated or of novation or alteration of contract raised by defendant after plaintiff had closed its case — Procedure cannot be allowed unless party affected given fresh opportunity to meet plea.)]

[But see AIR 1963 Assam 197 (199): ILR (1963) 15 Assam 394 (DB). (Suit for damages against Government for breach of contract — Facts alleged in plaint disclosing that contract did not comply with requirements of Art. 299 of the Constitution — Defendant not taking such plea in written statement but only in appeal — Still, Court should refuse to enforce the contract.)]

(3) Defendant will not be entitled, as of right, to rely on any ground of defence which he has not taken in his written statement. AIR 1956 Cal 625 (629) ** AIR 1943 Pat 327 (337): 22 Pat 220 (DB) ** AIR 1936 Bom 10 (11): 60 Bom 34 (DB) ** AIR 1937 Mad 571 (574): ILR (1937) Mad 990 (DB) ** AIR 1969 Tripura 26 (28). (Plea of denial of contract — Raised in reply argument in appeal — Not admissible.) ** 1968 Raj LW 407 (408). (Although there was no mention in plaint about compliance with Section 271 Rajasthan Municipal Act 38 of 1959.) ** 1968 Raj LW 167: ILR (1967) 17 Raj 879. (Plea not taken in written statement — Even if some evidence was introduced on that plea during course of trial, it cannot be looked into.) ** 1968 Raj LW 30 (33): ILR (1967) 17 Raj 747. (Election petition — Recount of votes cannot be asked unless pleaded in written statement.) ** 1966 Ker LJ 1076 (1079): 1967 Ker LT 790 ** AIR 1963 Madh Pra 356 (358): 1963 MPLJ 356 (DB). (Preliminary objection relating to maintainability of election petition raised by mere applications without filing written statement.) ** (1962) All LJ 1035 (1036). (Doctrine of suspension of rent — Portion of premises taken out of tenant's possession with his consent — Possession restored — Plea not raised in written statement — Doctrine held did not apply.) ** AIR 1962 Mad 132 (135): (1962) 2 Mad LJ 452 (DB) ** 1960 MPLJ 673 (677) ** AIR 1960 Mys 222 (223, 224): 38 Mys LJ 323 (DB) ** AIR 1959 All 29 (30) (DB).

(4) Courts are bound to take notice of any ground of illegality appearing on facts stated in a party's pleadings or disclosed otherwise, though his opponent does not raise it in his pleadings. AIR 1957 Pat 586 (601, 602): 36 Pat 635 (DB). (Non-compliance with S. 175 (3), Government of India Act.) ** AIR 1955 Vindh Pra 31 (32) ** AIR 1952 Bhopal 32 (32, 33) ** AIR 1950 Nag 71 (74): ILR (1950) Nag 105 ** AIR 1965 SC 1364 (1370): (1965) 1 SCR 861 ** AIR 1964 Pat 127 (130) (DB) ** AIR 1960 Pat 145 (146): 1959 BLJR 549 (DB).

(5) A plea of estoppel can be allowed to be raised for first time in appeal under O. 41, R. 2 though not raised in written statement. AIR 1915 Cal 373 (374) (DB).

[See also AIR 1961 Mad 114: (1962) 1 Mad LJ 258 (DB). (Plea of estoppel is mixed question of law and fact — Without definite allegations in pleadings party should not be permitted to resort to plea of estoppel.)]

[See however AIR 1959 SC 504 (510): 1959 Supp 1 SCR 698. (Plea of estoppel by conduct raised by adoptive son — He could not be allowed to set up a case different to his case in written statement.)]

(6) Point of law on facts admitted or established — Allowable for first time even in second appeal. (1968) 9 Guj LR 1082.

(7) Where a matter has been pleaded sufficiently to give the Court the right to form a judgment depends upon allegations and form of pleadings; Courts must not look to the mere wordings of plaint, but to issues settled and the manner of the treatment in the lower Court. AIR 1915 Mad 770 (772) (DB).

(8) Where defendant has stated in his written statement all the facts on which he bases his defence without deducing his legal position properly from those facts, it would not be right to reject the defence merely because a plea in so many words has not been raised in the written statement. AIR 1955 Madh B 49 (52): ILR (1954) Madh B 237 (DB) ** AIR 1969 Cal 360 (361). (Plea of non-joinder of necessary parties raised vaguely at earlier stage — Plea allowed in Art. 227 proceeding.) ** AIR 1962 Pat 64 (65): 1961 BLJR 752 (DB).

[See also AIR 1963 SC 1150 (1153): (1963) Supp 2 SCR 55 ** AIR 1967 Punj 159 (161).]

(9) A plea though not taken in statement can be raised provided it is taken before trial has commenced and no prejudice is caused to plaintiff. AIR 1925 All 241

R. 3. Denial to be specific.—It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

[R. S. C., O. 9, R. 17.]

Order 8, Rule 2 — Note 1 (contd.)

(242, 243): 47 All 291 (DB) °° AIR 1960 Orissa 119 (121): 26 Cut LT 74 (DB).

[See also AIR 1967 Cal 390 (399). (Facts showing non-maintainability of suit not pleaded by defendant — Cannot be pleaded at close of trial.)]

(10) Where service of notice on defendant by plaintiff is foundation of defendant's liability, and where no allegation of service of such notice is made in plaint plaintiff is not relieved from proving service of such notice merely because defendant has not raised the plea in his written statement but raises it at time of argument. AIR 1933 Cal 632 (634): 60 Cal 733 (DB).

[See also AIR 1967 Cal 390 (397).]

[See however AIR 1944 Pat 77 (86): 22 Pat 513 (DB).]

(11) It is open to defendant to defeat plaintiff's claim by all means in his power and the fact that he taken a certain plea and fails in it is not a ground in itself for an action against him. AIR 1948 East Punj 18 (19) (DB).

(12) The defence must be to the case made in the plaint and not to a different case even though that is a true case. ILR (1951) 1 Cal 443 (452).

[See also AIR 1965 Orissa 201 (204): 31 Cut LT 533 (DB).]

(13) If in his written statement defendant raises plea of non-joinder of necessary parties the burden of proof is on him to prove that such parties were necessary parties. (1967) 71 Cal WN 302 (306).

(14) The rule refers only to a plea relating to maintainability of suit and not to one for safeguarding a right of appeal in the possible event of defendant failing. AIR 1961 Mad 511 (514): (1962) 1 Mad LJ 65 (FB).

(15) Suit for arrears of rent — Defence of reduction in rent on ground of landlord's failure to give possession of part of premises not raised in trial Court but of suspension of rent raised — Former defence can be raised in revision. **AIR 1966 SC 1361 (1363): (1966) 3 SCR 458.** (It would be inequitable to allow plaintiff to recover full rent when he has not delivered possession of whole of premises. AIR 1960 Cal 346, **REVERSED.**)

(16) Petition under — Maintainability — To be judged on facts, existing at time of its presentation — Addition of party without fresh consent in writing — No objection raised — Objections as to maintainability of petition cannot be raised subsequently. AIR 1962 Orissa 202 (222). (**REVERSED** on another point in AIR 1963 Ori 189.)

(17) Sale by coparcener with limited interest — Suit by alienee for declaration of title and confirmation of possession — Defendant pleading defect in plaintiff's title — Not necessary for him to plead further about want of legal necessity. AIR 1963 Pat 277 (281): 1963 BLJR 536 (DB).

2. Special defences. — (1) In a suit on basis of a contract, defendant may admit that he made the contract, but may avoid the effect of that admission by pleading performance, fraud, release, limitation, etc. AIR 1955 Pepsu 51 (57): ILR (1954) Patiala 563 (DB) °° AIR 1953 Raj 59 (65): ILR (1952) 2 Raj 919.

(2) Suit for possession — Defendant need not point out in pleadings defects in plaintiff's title but can utilize them in course of trial. AIR 1947 Oudh 174 (177): 22 Luck 164 (DB).

(3) Defendant may set up invalidity of a transaction though he has not avoided it by a suit within limitation. ('06) 30 Mad 169 (175, 178) (FB).

(4) Defendant must specifically allege ancestral nature of property and his relationship — Mere framing of issues or leading evidence not sufficient. **AIR 1966 SC 1861 (1862, 1863): (1962) 1 SCJ 162.**

3. Technical pleas. — (1) When the State deals with a citizen, it should not ordinarily rely on technicalities, and if the State is satisfied that the case of the citizen is a just one, it must act as an honest person even though legal defences may be open to it. AIR 1954 Bom 50 (54): ILR (1953) Bom 1301 (DB) °° AIR 1955 Madh B 214 (223): ILR (1955) Madh B 306 (DB).

4. "Facts showing illegality." — (1) A plea of illegality of consideration for a bond which is subject of suit must be definitely pleaded in the written statement. The plea cannot be raised for first time in arguments. AIR 1925 Lah 345 (346): 6 Lah 442.

(2) The party, denying merely the factum of contract and not alleging its unenforceability in law, must be held bound by pleadings and be precluded from raising legality or validity of contract at time of arguments. **AIR 1954 SC 165 (168, 169): 1954 SCR 958.** (AIR 1952 Pat 393, **REVERSED.**)

[See also AIR 1961 Pat 286 (288): 1961 BLJR 121.]

(3) A point of law can always be taken even if it is not specifically taken in the written statement. AIR 1961 Cal 620 (622): ILR (1962) 1 Cal 118. (Plea of illegality of contract.)

Order 8, Rule 3

1. Scope. — (1) Defendant denying allegations in plaint must do so clearly and explicitly. AIR 1952 J & K 29 (30): 11 J and K LR 75 °° AIR 1949 Nag 394 (396): ILR

R. 4. Evasive denial.—Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

[R. S. C., O. 19, R. 19.]

Order 8, Rule 3 — Note 1 (contd.)

(1949) Nag 478 (DB) °° AIR 1947 Cal 434 (436) °° AIR 1947 Pat 446 (449) (DB) °° AIR 1946 PC 59 (61): ILR (1946) Kar (PC) 24 °° AIR 1964 SC 538 (545, 547): (1964) 4 SCR 19 °° (1959) 63 Cal WN 253 (255) °° AIR 1961 Pat 152 (156): 1961 BLJR 478.

(2) The rule is not limited to denial alone; it includes non-admission as well, so that where a defendant pleads that he does not admit a particular allegation in the plaint, it would be a sufficient traverse. AIR 1927 All 225 (226) °° (1909) 4 Ind Cas 318 (318) (PC).

(3) A mere statement in general terms that, plaintiff's allegations are "not admitted" will not be enough. AIR 1949 All 173 (174): ILR (1949) All 414 °° AIR 1949 Orissa 64 (65): ILR (1949) Cut 281 (DB).

[See also AIR 1962 Orissa 78 (82): 27 Cut LT 266 (DB).]

(4) A bare denial of adoption set up by plaintiff can only amount to a denial of the fact of adoption and not a specific denial of its validity to do which the defendant must plead the specific grounds on which he claims the adoption as invalid. AIR 1953 Nag 239 (240) (DB). (AIR 1945 Nag 60: ILR (1944) Nag 796, Foll.) °° AIR 1957 Madh B 179 (180).

(5) Specific denial of a mortgage to come within S. 68, Evidence Act must be an unambiguous statement denying its execution. Merely putting plaintiff to proof of truth of mortgage cannot amount to any such specific denial. (1955) 68 Mad LW 417 (417).

(6) Where a plaintiff based his claim on a deed of gift and sought a declaration that he had become a shebait on the basis of the deed and there was also an issue where the deed of gift was valid and where it was contended that the defendant did not specifically plead that the gift deed was invalid in his written statement and consequently the plaintiff was likely to be taken by surprise it was held that in view of the declaration prayed for by the plaintiff and the issue raised for decision the contention was not tenable. AIR 1965 Orissa 201 (204) (DB).

2. "Except damages." — (1) Defendant need not deny the claim to or amount of damages. AIR 1917 Cal 269 (272): 43 Cal 1001 (DB).

Order 8, Rule 4

1. Plaint allegations not to be denied evasively. — (1) Where in a suit for dissolution of partnership the defendant in his written statement admits that he agreed to enter into partnership as alleged but adds that "the terms of the arrangement between himself and the plaintiff were not definitely agreed upon as alleged," it amounts to an evasive denial of the fact of partnership and is not permissible. AIR 1929 Sind 7 (8) (DB).

(2) Where several circumstances are set out in the plaint as constituting the details of certain transactions, and the defendant, instead of denying the several circumstances specifically, denies them as a whole using almost the precise language of the allegations denied, the denial will, as a rule, be considered evasive. AIR 1929 All 721 (723) (DB) °° AIR 1923 Cal 578 (578) (DB).

(3) An averment in the written statement that the plaintiff is put to proof of the document being true is dubious and cannot amount to a specific denial of the execution of the document which alone can bring into operation the proviso to S. 68 of the Evidence Act. (1955) 68 Mad LW 417 (417).

(4) Where the plaintiff, claiming title under one S, alleged that she died on the 28th September, 1906, and the defendant pleaded that he did not admit that S died on the 28th of September, 1906, and that the suit was barred by limitation, the denial is not evasive. AIR 1924 Mad 838 (839).

(5) Suit on promissory note — Very vague denial of execution by defendant — Denial not specific — Execution must be taken to have been admitted. AIR 1962 Madh Pra 348 (350): 1962 MPLJ 692 (DB).

(6) Where plaintiffs had precisely and definitely given particulars of correspondence that passed between the parties, and the defendants did not specifically deny the passing of the correspondence, it was held their denial was vague and evasive so far as the correspondence was concerned. AIR 1964 SC 538 (547): (1964) 4 SCR 19.

(7) Where allegations in a particular paragraph of the plaint were asserted to be wholly false, held allegations were specifically denied and that after that denial it was thoroughly unnecessary to have again refuted plaint allegations word by word. (1964) 30 Cut LT 463.

(8) General allegations in plaint — Cannot be said to be admitted because of general denial in written statement. AIR 1962 SC 630 (633): (1961) 2 Lab LJ 427. (AIR 1959 Bom 134, REVERSED.)

(9) Constitution of India, Art. 226 — Petitioner making certain statement in his affidavit — A vague reply in counter-affidavit to the effect that there is nothing on

R. 5. Specific denial.—Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

[R. S. C., O. 19, R. 13.]

Order 8, Rule 4 — Note 1 (contd.)
record to show that the statement of the petitioner is correct will not amount to a denial of the facts alleged in that statement. AIR 1962 Orissa 78 (82): 27 Cut LT 266 (DB).

ORDER 8, RULE 5 — SYNOPSIS

1. Scope.
2. Facts not denied specifically will be taken as admitted.
3. "Except as against a person under disability."
4. Admission if binds co-defendants.
5. Court may require the facts so admitted to be proved.
6. Rule does not apply where no written statement is filed.

1. Scope. — (1) A general denial cannot mean a denial by implication. AIR 1925 Mad 950 (957, 958) (DB).

(2) An express denial of an allegation in a statement of claim is called a traverse and when the matter is within the knowledge of the defendant he generally denies any statement which he disputes by usually stating that he does not admit it. AIR 1956 Nag 27 (31): ILR (1954) Nag 935.

[See also AIR 1964 Raj 39 (40): .1964 Raj LW 196. (Defendant not only denying execution but requiring plaintiff to prove due execution of gift deed which included attestation — This was specific denial.)]

(3) The rule permits the traversal of a statement in the plaint by saying that it is not admitted. AIR 1934 Mad 579 (579). (AIR 1924 Mad 838, Followed.)

(4) A refusal to admit must be stated, specifically. AIR 1925 Mad 950 (957) (DB).

[See also AIR 1965 Manipur 38 (39).]

(5) Every allegation of fact in the plaint will be deemed to be admitted, if in the written statement it is neither specifically denied nor specifically stated to be not admitted. AIR 1958 Pat 430 (432): 36 Pat 1123 (FB). (Valuation in plaint.) °° AIR 1955 All 573 (575) (DB) °° AIR 1955 Mad 555 (557) °° AIR 1966 SC 292 (294): (1966) 2 SCJ 290 °° AIR 1964 SC 538 (545, 547): (1964) 4 SCR 19. (Evasive or vague denial of facts in written statement — Such facts may be taken to have been admitted.) °° AIR 1961 Cal 92 (92, 93) (FB) °° 1967 All LJ 369 (370) °° 1966 Ker LJ 1076 (1079): 1967 Ker LT 790 °° AIR 1965 All 527 (530): 1965 All LJ 432 (DB) °° (1964) 1 Andh LT 326 (330): (1964) 2 Andh WR 95 (97) °° AIR 1964 Pat 348 (350): 1964 BLJR 19 (DB) °° AIR 1964 Pat 2 (9). (Reversed on another point in AIR 1965 SC 282.) °° AIR 1964 Punj 117 (119): 65 Punj LR 567 (DB). °° AIR 1963 Madh Pra 15 (16): 1963 Jab LJ 113 °° 1963 MPLJ 157 (159, 160): 1963 Jab LJ 305 (DB) °° AIR 1963 Orissa 54 (55): 28 Cut LT 331 (DB). (Case of notice under S. 142, Railways Act (1890).) °° AIR 1962 Madh Pra 348 (350): 1962 MPLJ 692 °° 1960 Ker LJ 472 (474): 1960 Ker LT 348. (Where a defendant simply puts the plaintiff to proof of the several allegations in the plaint, he will be deemed to have admitted the facts alleged in the plaint.) °° AIR 1959 Raj 291 (292): 1959 Raj LW 19 °° AIR 1959 Raj 24 (27): 1959 Raj LW 162 °° AIR 1965 Pat 311 (313, 314) (DB). (Case of determining monthly tenancy.)

[See AIR 1963 Orissa 133 (135). (Assertion in plaint that plaintiff was 20 years old on date of suit not challenged in written statement — Held, on the bare assertion in the plaint not challenged in the written statement it was open to the appellate Court in second appeal to record a finding that plaintiff was 20 years old on the date of the suit.) °° AIR 1959 Pat 102 (106): 1958 Pat LR 194 (DB). (Statement in proposal not challenged by insurance company in its written statement — No evidence to prove or disprove statement admissible.)]

[See also AIR 1968 Delhi 68 (73) (DB) °° AIR 1965 Pat 311 (314) (DB) °° (1962) All LJ 1035 (1036). (Transfer of Property Act (1882), S. 108 (1) — Portion of premises taken out of tenant's possession with his consent — Possession restored — Plea of suspension of rent not raised in written statement — Doctrine of suspension of rent held did not apply.)]

(6) Petition under Art. 226 of the Constitution — Opposite party who fails to traverse the averments made in the petition can be held to have admitted the averments. AIR 1956 Nag 27 (31): ILR (1954) Nag 935 °° AIR 1969 Orissa 80 (85): ILR (1968) Cut 587 (DB) °° (1967) 69 Punj LR 890 (894) °° AIR 1963 Bom 121 (132): 65 Bom LR 65 (DB).

(7) The principle of the rule does not apply to allegations in the written statement. AIR 1948 Nag 127 (130): ILR (1947) Nag 802 °° AIR 1937 Pat 428 (429).

[See however AIR 1941 Nag 177 (177): ILR (1942) Nag 456 °° AIR 1938 Nag 163 (164): ILR (1938) Nag 469 (DB).]

(8) This rule does not apply where the allegation in the plaint itself is vague and inconclusive. AIR 1937 Sind 11 (12): 30 Sind LR 345 (DB) °° 1968 BLJR 847. (Deter-

Order 8, Rule 5 — Note 1 (contd.)
mination of tenancy by such notice also not alleged in plaint — Tenant in written statement merely stating to have replied to notice — **Held** such statement was no admission of determination of tenancy and of service of notice as required by S. 106 of T. P. Act.) ** AIR 1961 Pat 152 (156): 1961 BLJR 478.

(9) Defendant is ordinarily under no obligation to traverse in its written statement that which is not pleaded in the plaint. AIR 1967 Cal 390 (398) ** AIR 1965 Orissa 201 (204): 31 Cut LT 533 (DB).

(10) In the absence of an allegation in plaint in relation to a gift deed it cannot be deemed that the defendant by pleading that the gift deed was bogus had impliedly admitted the execution of that deed. AIR 1953 Nag 339 (340): ILR (1953) Nag 507 (DB).

(11) The principle of this rule may be applied to a judgment-debtor on whom a notice of application for execution of a decree containing an allegation of fact is served. AIR 1936 All 21 (32, 33): 58 All 313 (FB).

(12) If the plaintiff does not specify grounds of relief in plaint, defendant is not bound to plead on them. 68 Bom LR 891 (897).

(13) Provisions of Rule cannot be extended to show cause petition filed by defendant in reply to application for injunction filed by plaintiff against defendant. 1968 Lab IC 1487 (Pat).

(14) Rule of implied admission by non-traverse — Not strictly applied to pleadings in India — Facts can be proved by other evidence — Loses much of its rigour and stringency in writ proceedings though one cannot deny its existence. AIR 1964 Punj 15 (19). (Rule of implied admission.) ** AIR 1966 Cal 605 (609). (Admission of averments in para 15 of the plaint — Denial of each averment in para 16 of the plaint — Plaintiff claiming decree on the basis of admission in para 45 — **Held**, if plaintiff wishes to rely on admissions in pleadings the admission is to be taken in its entirety.)

2. Facts not denied specifically will be taken as admitted. — (1) The effect of this rule is to relieve plaintiff from the obligation of proving such allegations in his plaint as are neither specifically denied nor stated to be not admitted in written statement. AIR 1955 Assam 102 (104) (DB) ** AIR 1957 Cal 479 (481) (DB) ** (1957) 61 Cal WN 170 (173) ** 1957 Ker LT 925 (926) ** AIR 1955 Mad 555 (557).

(2) Suit for ejectment of tenant from land alleged to be 'old waste' under Madras Estates Land Act, 1908 — Non-traverse by defendant — Defendant cannot afterwards plead that the land is not 'old waste'. AIR 1919 Mad 927 (927): 42 Mad 315 (DB).

(3) Plea that defendant does not admit any of the allegations in plaint except such as have been expressly admitted and that he puts the plaintiff to the proof of allegations not so admitted is not a sufficient denial. Every allegation so denied will be deemed to have been admitted. AIR 1955 Vindh Pra 24 (27) ** AIR 1925 Mad 950 (957) (DB) ** (1965) 2 Com LJ 145 (149, 150): 70 Cal WN 399. (The words 'not admitted' is no denial. The words 'no knowledge' are worse than 'not admitted'. Where an allegation of fact need be specifically denied, a bare denial does not serve any purpose.)

(4) A plea in a written statement that a particular allegation in plaint is not admitted is a sufficient denial so as to put plaintiff to proof thereof. AIR 1933 All 521 (522): 55 All 700 ** AIR 1934 Mad 579 (579) ** (1966) 2 Andh LT 416 (422). (Possible defects in title need not be pleaded — When such defects manifest themselves, defendant could avail of them.) ** AIR 1963 Madh Pra 230 (231): 1961 MPLJ 135. (Allegation stated to be not admitted — No implied admission.) ** AIR 1961 Pat 152 (156): 1961 BLJR 478.

(5) A plea which denies the fact and in the alternative alleges illegality cannot be said to amount to an admission of the fact. AIR 1954 Sau 8 (11).

(6) A denial of knowledge of a particular fact is not a denial of the fact and has not the effect of putting the fact in issue. ILR (1954) Mys 340 (343) ** AIR 1967 SC 109 (111): (1966) Supp SCR 280 ** 1963 Cur LJ 559: ILR (1964) 1 Punj 602 (603) ** AIR 1959 Madh Pra 305 (308): 1959 MPLJ 605 (DB).

[See also AIR 1962 Orissa 78 (82): 27 Cut LT 266 (DB).]

(7) Where a plaintiff suing as a curator of the estate of a deceased person stated in the plaint that he was authorised by the Court to sue, and the defendant stated in reply that those allegations were not known to him, it was held that it was not open to him to raise again the question of the plaintiff's authority to sue. AIR 1931 All 423 (424) (DB).

(8) As to the effect of admissions made in the written statement, see the under-mentioned cases. AIR 1941 Bom 144 (145) (DB) ** AIR 1941 Nag 95 (96) (DB) **AIR 1940 Cal 393 (394).

(9) Though the rule requires the pleading of a defendant to be precise, plaintiff cannot make a grievance of that at the close of a case when he was aware what the case of the defendant really was, and was not taken by surprise by the want of precision. AIR 1945 Sind 177 (182): ILR (1945) Kar 224.

(10) An admission in a pleading must be taken as a whole. What applies to an admission in the pleading would not apply to statements made by a witness in evidence. AIR 1965 SC 364 (404): (1964) 7 SCR 267: 66 Bom LR 681 ** AIR 1967 Cal 294 (309, 310). (Where a written statement con-

Order 8, Rule 5 — Note 2 (contd.)
tains admission of mortgage but also allegation about illegality of mortgage because of it violating Defence of India Rules the admission should be accepted as a whole or left altogether.)

(11) A conditional admission in a pleading cannot be dissected as to accept a part and reject the rest. It must be either accepted subject to conditions or not accepted at all. Where there is an unqualified admission of a claim a decree can be given on its basis. 1965 Raj LW 523: ILR (1965) 15 Raj 1023 (1030, 1033).

(12) Suit for eviction — Landlord giving notice to tenant asking him to quit and to deliver possession by end of month — Notice giving more than 15 days' time — Notice by registered post — Tenant claiming to have received notice on much later date — Plaint clearly stating cause of action to have arisen on date of notice — Such facts not specifically denied in written statement — Notice held was in accordance with S. 106 T. P. Act and valid. AIR 1969 Pat 257 (264) (DB).

3. "Except as against a person under disability." — (1) The rule of admission by non-denial does not apply where defendant is a person under disability such as a minor. AIR 1923 Mad 114 (115) (DB) °° ILR (1969) 1 Punj 602 (603) °° AIR 1961 Pat 152 (156): 1961 BLJR 478.

(2) If at the time of the framing of issues or at the trial, the person representing a minor defendant admits certain allegations of fact it cannot be said that this rule in any way affects such admissions. AIR 1919 Mad 698 (698) (DB) °° AIR 1936 Pat 428 (429) °° ILR (1964) 1 Punj 602 (603): 1963 Cur LJ 559.

4. Admission, if binds co-defendants. — (1) As to whether and when an admission made by a defendant in his written statement will bind co-defendants, see the undermentioned cases. ILR (1951) 1 Raj 705 (707) °° AIR 1943 Cal 319 (330): ILR (1943) 1 Cal 274 (DB) °° (1875) 2 Ind App 113 (125): 15 Beng LR 10 (PC) °° AIR 1928 Lah 769 (770, 771) (DB).

5. Court may require the facts so admitted to be proved. — (1) The proviso to this rule makes it clear that failure of defendant to deny allegations in plaint does not necessarily amount to proof and that the Court can, in its discretion, require proof of such allegations. ILR (1954) Mys 340 (343) °° AIR 1941 Nag 95 (96) (DB) °° AIR 1914 Cal 842 (842, 843) (DB) °° AIR 1924 All 180 (182): 46 All 55 °° AIR 1964 SC 538 (545, 547) °° AIR 1966 Pat 75 (80) (DB) °° AIR 1962 Pat 319 (321, 322) °° AIR 1961 Madh Pra 127 (133, 134): 1961 MPLJ 1361 (DB) °° AIR 1961 Pat 152 (156) °° AIR 1959 Bom 414 (419, 420): 61 Bom LR 333 (DB). (Plaintiff in New York — Proof was dispensed with.)

[See AIR 1958 SC 886 (895).]

[See also AIR 1964 Madh Pra 62 (68, 69): 1963 MPLJ 891. (General allegations in plaint denied in general manner — Amounts to proper denial within O. 8, R. 5.)]

(2) The discretion under the proviso must be exercised by a Court having regard to the justice of a cause with particular reference to the nature of the parties, the standard of drafting obtaining in locality and the traditions and conventions of a Court wherein such pleadings are filed. AIR 1964 SC 538 (545, 547).

(3) In the matter of mofussil pleadings courts presumably relying upon the proviso tolerated more laxity in the pleadings in the interest of justice. AIR 1964 SC 538 (545, 547).

(4) In construing pleading drafted by trained lawyers the proviso can be invoked only in exceptional circumstances to prevent obvious injustice to the party. AIR 1964 SC 538 (545, 547).

(5) The discretion should be exercised where the Court suspects that the admission is made collusively, or to avoid a rule of public policy. AIR 1920 Mad 588 (589) (DB).

(6) Where the defendant's failure to deny the allegation is due to ambiguous and unsatisfactory assertions in the plaint Court may in its discretion require proof. AIR 1924 All 150 (152): 45 All 571 (DB).

(7) Where defendant is taken by surprise or misunderstands plaint Court should exercise its discretion. AIR 1923 Mad 114 (115) (DB).

(8) The discretion should usually be exercised by the Court of first instance. AIR 1920 Mad 588 (589) (DB).

(9) The proviso should not generally be used to support a plea of limitation as there are no equities in favour of a person who pleads limitation. AIR 1947 Pat 275 (276) (DB).

(10) In divorce cases as in other civil proceedings, it is not correct to say that the Court could in no circumstances base its decision on admission of parties. The rule that in divorce cases the Court usually does not decide merely on the basis of the admission in pleadings of the parties is a rule of prudence and not a requirement of law. Where there is no room for supposing that parties are colluding, there is no reason why admission of parties should not be treated as evidence just as they are treated in other civil proceedings. AIR 1965 SC 364 (370, 371): (1964) 7 SCR 267. (Case under Hindu Marriage Act (1955), S. 12 (1) (d). AIR 1960 Bom 17, REVERSED.)

6. Rule does not apply where no written statement is filed. — (1) Rule is not intended to apply to a case where the defendant has not put in a written statement. A Court is not justified in passing a decree on no evidence where defendant does not file a written statement. 1954-2 Mad L Jour (Andh) 251 (254) °° AIR 1917 Cal 269 (272, 274): 43 Cal 1001 (SB) °° AIR 1968 Madh

R. 6. Particulars of set-off to be given in written statement.—(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

(2) **Effect of set-off.**—The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

ILLUSTRATIONS

(a) A bequeaths Rs 2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Rs. 1,000 as surety for D; then D sues C for the legacy. C cannot set-off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(c) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set-off. The amount not being ascertained cannot be set-off.

Order 8, Rule 5 — Note 6 (contd.)
Pra 185 (186, 187): 1968 MPLJ 325 •• AIR 1962 Pat 319 (321, 322): 1962 BLJR 549 (DB) •• AIR 1961 Pat 152 (156): 1961 BLJR 478.

[But see AIR 1936 Bom 285 (285, 286): 60 Bom 788 (DB).]

ORDER 8, RULE 6 — SYNOPSIS

1. Scope and applicability.
2. Suit must be for recovery of money.
3. "Any ascertained sum of money."
4. Equitable set-off.
5. "Legally recoverable by him from the plaintiff."
6. Separate debt not to be set off against joint debt.
7. "Not exceeding the pecuniary limits of the jurisdiction of the Court."
8. Both parties must fill the same character.
9. Effect of not claiming set-off.
10. Counter-claim.
11. Solicitor's lien for costs.
12. Advocate's or pleader's lien for costs.
13. Appeal.
14. Court-fee.

1. Scope and applicability. — (1) To claim a set-off the following conditions must exist:

(1) Suit must be for recovery of money.
(2) Defendant's claim must be for an ascertained sum of money.
(3) It must be legally recoverable.
(4) Both parties must fill same character as they fill in plaintiff's suit.
(5) The sum claimed by way of set-off should not exceed the pecuniary limits of jurisdiction of Court. AIR 1941 All 278 (279): ILR (1941) All 415 •• AIR 1931 Nag 12 (13) •• AIR 1920 Mad 819 (820, 821): 42 Mad 873 (DB) •• AIR 1932 Bom 617 (618).

(2) Liquidation proceedings of banking company — Debtor filing affidavit claiming dues from company — Affidavit is not set off and is not liable to Court-fee. AIR 1959 Ker 11 (11): 1958 Ker LT 749.

(3) A defendant can claim as set-off a sum for which he has already obtained a decree against the plaintiff. AIR 1939 Bom 386 (388).

(4) A decree can be passed in favour of a defendant pleading a set-off as he is in the position of a plaintiff as regards a set-off pleaded by him in respect of the balance claimed by him. AIR 1942 Cal 559 (561): ILR (1942) 2 Cal 485 (DB) •• AIR 1942 Mad 580 (581): ILR (1942) Mad 836 (DB) •• AIR 1934 All 543 (545): 56 All 912 (DB).

(5) The defendant is not to be deprived of his claim for a set-off, by reason of fail-

(d) A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite pecuniary demands may be set-off.

(e) A sues B for compensation on account of trespass. B holds a promissory note for Rs. 1,000 from A and claims to set-off that amount against any sum that A may recover in the suit. B may do so, for, as soon as A recovers, both sums are definite pecuniary demands.

(f) A and B sue C for Rs. 1,000. C cannot set-off a debt due to him by A alone.

(g) A sues B and C for Rs. 1,000. B cannot set off a debt due to him alone by A.

(h) A owes the partnership firm of B and C Rs. 1,000. B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set-off the debt of Rs. 1,000.

[1882 and 1877. S. 111; 1859. S. 121; R. S. C., O. 19, R. 3; See O. 20, R. 19.]

HIGH COURT AMENDMENTS

Mysore

In R. 6, convert the full stop at the end of sub-rule (1) into a comma and add the following thereafter :—

"and the provisions of Rules 14 to 18 of Order VII of this Code shall, mutatis mutandis, apply to a defendant claiming set-off as if he were a plaintiff" [30-3-1967].

Orissa

Same as that of Patna.

Patna

Add the following words to sub-rule (1) :

"and the provisions of O. 7, Rr. 14 to 18 shall, mutatis mutandis, apply to a defendant claiming set-off as if he were a plaintiff."

Order 8, Rule 6 — Note 1 (contd.)

ure of plaintiff to substantiate his claim. (1951) 88 Cal L Jour 90 (98).

(6) Even where the suit is withdrawn, the defendant is entitled to have his claim of set-off adjudicated upon and he could be given a decree on basis of the set-off. AIR 1941 Nag 258 (260).

(7) No Court can entertain a plea of set-off if the nature of the set-off is such that if a separate suit were brought in respect of it, the Court could not have jurisdiction to try such suit. AIR 1956 Pat 199 (200) °° AIR 1954 Pat 439 (441): 33 Pat 52 (DB).

(8) It is not necessary that Court should have territorial jurisdiction over subject-matter of claim of set-off, if a separate suit is brought in respect of it. AIR 1932 Bom 617 (618).

(9) The right of set-off being a ground of defence must be pleaded as part of written statement. AIR 1951 Mad 783 (786): ILR (1952) Mad 60.

(10) Defendant not specifically pleading a set-off in his written statement — Court may decline to allow same to be set up subsequently. AIR 1927 Lah 431 (432) °° AIR 1915 Mad 242 (243) (DB) °° AIR 1965 All 266 (267). (Suit for recovery of rent — Tenant pleading that landlord owed price of goods purchased from him — Neither set-off nor Counter claim pleaded — No interference in second appeal.) °° AIR 1959 Madh Pra 222 (223, 224): 1959 MPLJ 327 (DB). (Defendant failing to plead set-off in trial Court—It cannot be pleaded in appeal.) (Amendment of pleading to introduce claim of set-off — Delay in making amendment cannot be allowed.)

[See AIR 1967 Pat 386 (388) (DB).]

[See however AIR 1952 Pat 73 (75): 30 Pat 1161 (DB).]

(11) Where no issues are framed on the plea and no application is made by defendant therefor, it is not open to him to raise it in appeal. (1886) 13 Cal 124 (135): 13 Ind App 48 (PC).

(12) A defendant who has failed to claim a set-off before decree in a suit cannot claim it in execution proceedings. AIR 1924 Oudh 434 (435): 27 Oudh Cas 248.

(13) Defendant stating in written statement that he will file a separate suit in respect of his claim — He is not precluded from proving a set-off afterwards on getting written statement amended. AIR 1925 Mad 228 (229) (DB).

(14) Withdrawal of claim to set-off without leave of Court — A subsequent suit for amount of claim is barred under O. 23, R. 1. AIR 1946 Mad 470 (471, 472): ILR (1947) Mad 18 (DB).

(15) Court has no option to refuse to adjudicate a plea of set-off falling under this rule. AIR 1920 Mad 142 (143) °° AIR 1963 Pat 145 (146).

(16) Where a plaintiff in a suit deducted a sum of money due from him to defendant with a view to bring the suit within jurisdiction of Small Cause Court, it was held

Order 8, Rule 6 — Note 1 (contd.)
that the procedure was illegal and that plaintiff could not enforce a set-off on defendant. (1894) 21 Cal 419 (426, 427) (SB) °° AIR 1925 Sind 319 (320) (DB).

(17) Claim in suit for wrongful deductions from plaintiff's bill for supply of goods by defendant for alleged loss incurred by him in other supplies — Both supplies arising out of one contract for supply of goods — Not a case of set-off but of adjustment—R. 6 does not apply. AIR 1963 Orissa 174 (179): ILR (1963) Cut 372 (DB) °° AIR 1967 Pat 358 (360). (Tenant-defendant clearly pleading that the amount which he had paid to his landlord-plaintiff was specifically towards rent of the house and therefore no dues were outstanding — It is clearly a plea of adjustment and not of set-off.) °° AIR 1966 Raj 177 (178): 1965 Raj LW 465. (Adjustment and set-off — Difference indicated.) °° AIR 1964 Madh Pra 231 (232): 1964 MPLJ 527. (Plea of adjustment — No court-fee is payable.)

(18) Right to claim set-off is not affected by provisions of Companies Act. AIR 1960 Assam 191 (198): (1961) 31 Com Cas 91 (DB).

2. Suit must be for recovery of money. — (1) The first essential condition for claiming a set-off is that the suit must be one for recovery of money. AIR 1956 Punj 190 (192).

(2) No matter what the title may be, no matter whether such title arises ex delicto or ex contractu, so long as the relief sought is to recover money, it is a suit for money, and a set-off can be pleaded therein. (1888) 10 All 587 (598, 599) (DB).

(3) A suit on a negotiable instrument is a suit for money. AIR 1931 Nag 12 (13).

(4) A suit for dissolution of a partnership or for an account is not a suit for money. (1886) 13 Cal 124 (135): 13 Ind App 48 (PC) °° (1888) 10 All 587 (593) (DB). (But if there is also prayer for payment of such balance as may be found due, it would be one for payment of money.)

(5) A suit on a mortgage for payment of money and in default thereof for the sale of mortgaged property is a suit for the recovery of money. AIR 1933 Rang 13 (14).

(6) A suit to enofrce a mortgage under which the right to a personal decree is barred is not a suit for money. (1904) 8 Cal WN 174 (177) (DB).

(7) A suit for redemption pure and simple is not a suit for recovery of money. AIR 1952 Pat 73 (75, 76): 30 Pat 1161 (DB).

(8) A suit for ejectment of tenant on ground that he had not paid rent for certain months without adding any claim for recovery of a sum of money as arrears is not a suit for money. AIR 1956 Punj 190 (192).

3. "Any ascertained sum of money."— (1) An "ascertained sum of money" means a sum of money of which the amount is fixed and known; it does not necessarily mean a sum admitted by the other side or decreed by Court; the words are used in contradistinction to unliquidated damages. AIR 1953 Hyd 186 (187): ILR (1952) Hyd 1041 (DB) °° AIR 1943 Oudh 17 (20): 18 Luck 327 (DB) °° AIR 1940 Nag 177 (177): ILR (1941) Nag 753 °° AIR 1959 Ker 352 (353): 1958 Ker LT 922.

(2) Mere fact that an arithmetical calculation is necessary to arrive at the total sum cannot render such total an unascertained sum of money. (1904) 2 Low Bur Rule 186 (187, 189) (FB).

(3) Suit by a landlord against tenant for rent — Claim for set-off of commission of three per cent, on collections made by him on behalf of landlord, is one for an ascertained sum of money. AIR 1916 Pat 84 (84).

(4) Claim for unascertained damages cannot be pleaded by way of set off — Valuation put by defendant on damages does not make it a claim for ascertained sum. (1951) 88 Cal L Jour 90 (96).

[See also AIR 1964 Mad 108 (110): (1965) 2 Lab LJ 50 (DB).]

(5) Rule does not apply where the amount can be ascertained only on taking accounts or by determining quantum of share due to defendant. AIR 1940 Nag 177 (178): ILR (1941) Nag 753 °° AIR 1931 Cal 23 (24): 57 Cal 855 °° AIR 1917 Pat 533 (535): 2 Pat L Jour 451 (DB). (Quantum of share in fees claimed by way of set off not determined.)

4. Equitable set-off.— (1) The rule does not take away from parties any right to set off which they would have had independently of the Code. AIR 1954 Trav-Co 243 (245): ILR (1953) Trav-Co 1161: 1954 Cri L Jour 642 (FB) °° AIR 1956 Pat 199 (200).

(2) In cases of mutual debits and credits, and in cases where cross-demands arise out of the same transaction, or, are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant driven to a cross suit. Courts of Equity in England have allowed a plea of set-off even though the amount may be unascertained. This set-off is known as an equitable set-off and such a right is recognized in this country also apart from the provisions of this rule. AIR 1956 Pat 199 (200) °° AIR 1953 Hyd 186 (187): ILR (1952) Hyd 1041 (DB) °° AIR 1914 PC 153 (154, 155): 17 Oudh Cas 33 °° (1963) 4 Guj LR 926 (928): ILR (1963) Guj 822.

(3) In case of legal set-off Court is bound to entertain and adjudicate upon the plea when raised. AIR 1956 Pat 199 (200) °° AIR 1953 Hyd 186 (187): ILR (1952) Hyd 1041 (DB).

(4) Euqitable set-off cannot be claimed as a matter of right. AIR 1956 Pat 199 (200) °° AIR 1953 Hyd 186 (187): ILR (1952) Hyd 1041 (DB).

Order 8, Rule 6 — Note 4 (contd.)

(5) Court has a discretion to adjudicate upon a plea of equitable set-off in same suit or to order it to be dealt with in a separate suit. AIR 1956 Pat 199 (200) °° AIR 1953 Hyd 186 (187): ILR (1952) Hyd 1041 (DB) °° 1961 MPLJ 272 (273): 1961 Jab LJ 79.

(6) Where a Court thinks that the investigation into the claim of equitable set-off will cause great delay, it may refuse to allow it or may order the enquiry to proceed on such terms as it thinks fit. AIR 1951 Hyd 57 (59): ILR (1951) Hyd 632 (DB) °° (1913) 21 Ind Cas 716 (718, 719) (DB) (Cal).

(7) In a legal set-off, amount claimed is an ascertained sum of money which is legally recoverable, while in an equitable set off, it is not necessary that amount claimed should be ascertained. AIR 1953 Hyd 186 (187): ILR (1952) Hyd 1041 (DB) °° AIR 1952 Pat 73 (75): 30 Pat 1161 (DB).

(8) Claim by way of equitable set-off can be urged when claim of defendant is to an ascertained amount also. AIR 1955 Pat 320 (329): 34 Pat 487 (DB) °° 40 Cal WN 751 (752). (AIR 1915 Cal 649, Foll.)

[But see AIR 1936 Nag 290 (290): ILR (1937) Nag 481.]

(9) It is essential for a valid claim to an equitable set-off that the cross-demands should have arisen out of the same transaction. A plea of equitable set-off will not be available where it relates to a different transaction. **AIR 1952 SC 201 (204): 1952 SCR 782.** (('44) 79 Cal L Jour 229, Affirmed.) °° AIR 1942 Cal 559 (560): ILR (1942) 2 Cal 485 (DB) °° AIR 1959 Cal 746 (748): (1960) 30 Com Cas 473 (DB).

(10) Suit for price of goods supplied in part — Defendant can claim set-off in respect of damages for breach of contract caused by failure to supply full stock promised. (1910) 37 Cal 334 (338) °° (1893) 15 All 9 (11) (DB).

[See also AIR 1958 All 574 (575).]

(11) Suit for recovery of principal and interest due on a mortgage bond — Defendant can plead an equitable set-off in respect of loss occasioned by plaintiff's failure to make repairs while in possession of mortgaged properties. (1892) 15 Mad 290 (291) (DB).

(12) Where plaintiff sues a limited company for recovery of dividend payable to him as a share-holder, the company is not entitled to set off damages for breach of a contract by him to deliver cotton. AIR 1923 Bom 24 (25, 26): 47 Bom 182 (DB).

(13) Where a patnidar obtains a decree against his zamindar for possession of lands and mesne profits, amounts due to zamindar on account of rent, revenue and cess for a period subsequent to date of delivery of possession cannot be deducted from mesne profits by way of equitable set-off. **AIR 1952 SC 201 (204): 1952 SCR 782.**

(14) Appellant having fixed deposit with Bank in joint names of himself and his wife — Appellant obtaining loan from Bank — Bank treating fixed deposit receipt as security — Bank going in liquidation — Claim by liquidator against appellant under Section 45-B, Banking Companies Act — Appellant can claim set-off against fixed deposit. AIR 1963 All 90 (93, 94): 1962 All LJ 957 (DB).

(15) Suit by owner of plot for compensation on account of defective construction dismissed by High Court — No appeal from that dismissal — Claim for equitable set-off cannot be reagitated in companion suit in absence of such plea in written statement. **AIR 1966 SC 1034 (1036): (1961) 3 SCR 663 (DB).**

(16) The plea of adjustment to which O. 8, R. 6, Civil P. C. will not be applicable can be raised only where prior to the date of suit an adjustment had already been effected. AIR 1969 Orissa 171 (173).

5. "Legally recoverable by him from the plaintiff."— (1) In case of a legal set-off amount claimed must be 'legally recoverable' from plaintiff. AIR 1942 Cal 559 (560): ILR (1942) 2 Cal 485 (DB).

(2) The words 'legally recoverable' have no reference to the ability of debtor to pay the demand in full; a sum is legally recoverable, though in the result, the creditor must be satisfied with dividend. (1906) 30 Bom 173 (193, 194) (DB).

(3) A sum cannot be said to be 'legally recoverable'—

(a) where the plaintiff is not bound by law to pay it. (1892) 15 Mad 29 (34) (DB) °° (1879) 4 Cal 576 (581) (DB).

(b) where he is not liable to the defendant in respect of that debt. AIR 1941 Cal 308 (310) (DB) °° AIR 1926 Oudh 301 (302, 303) (DB).

(4) A barred debt is not legally recoverable and, therefore, in order to enable a defendant to claim a set-off sum due to him must not have been barred by the law of limitation on date of suit. AIR 1956 Trav-Co 239 (240) (DB) °° AIR 1952 Pat 73 (76): 30 Pat 1161 (DB).

(5) A claim which is barred by limitation according to the law of the place where the suit is instituted, but is subsisting according to the lex loci contractus is a legally recoverable claim. (1913) 35 All 238 (239, 240) (DB).

(6) Where A transfers to C a debt due to him by B, C takes it subject to the liabilities and equities to which A is subject as against B, under the provisions of S. 132 of the Transfer of Property Act, 1882. If B therefore has a legally recoverable claim against A in respect of another debt, he can enforce the same as against C also, by way of set-off. AIR 1941 Nag 63 (65): ILR (1942) Nag 248 (DB) °° (1912) 16 Ind Cas 686 (687) (DB) (Mad).

Order 8, Rule 6 — Note 5 (contd.)

[See however AIR 1917 Mad 928 (930): 40 Mad 683 (DB).]

(7) Where there is a fiduciary relationship as of trustee and cestui que trust or where there is accountability as between plaintiff and defendant, even barred debts can be pleaded by way of equitable set-off. AIR 1916 Mad 720 (725, 726): 39 Mad 365 (DB). (Trustee and cestui que trust.) °° (1905) 32 Cal 576 (580) (DB). (Between mortgagor and mortgagee.) °° AIR 1926 Pat 77 (79) (DB). (Do.)

[But see AIR 1917 Mad 258 (259): 39 Mad 939 (DB). (Case of lessor and lessee.)]

(8) A plea of set-off is a weapon of defence up to the amount of the plaintiff's claim but it is one of attack so far as the amount is in excess of the claim and therefore, limitation in regard to its recovery must be determined with reference to the date of the written statement. AIR 1934 All 427 (428, 430): 56 All 821 (DB) °° AIR 1942 Cal 559 (561): ILR (1942) 2 Cal 485 (DB) °° AIR 1956 Trav-Co 239 (240) (DB) °° AIR 1964 Andh Pra 88 (90).

[But see 7 All 284 (287, 288) (DB).]

(9) Winding up of company — Claim by creditor in respect of amount due to him from company — Duty of creditor to deduct from his claim any sum due by him to company which is legally recoverable — Relevant date for determining whether claim for set off is barred by limitation — Creditor's claim allowed by official Liquidator without any deduction — Application by auction purchaser of Company's assets — Plea of set off can be allowed. AIR 1964 Andh Pra 88 (89).

6. Separate debt not to be set off against joint debt.— (1) Illustrations (f) and (g) to this rule adopt the general principle of law that a joint debt and a separate debt cannot be set off against each other. AIR 1949 Nag 193 (194): ILR (1948) Nag 780 °° AIR 1941 Mad 654 (655).

(2) Where the debt sought to be set off is due jointly to the defendant and another who is not a party to the suit, it cannot be pleaded by way of set off. AIR 1954 Cal 303 (305).

(3) A sued B and C whose liability was joint and several. Either of them can claim a set off in regard to a debt due to him by A. AIR 1941 Mad 654 (655) °° (1951) 55 Cal WN 302 (304).

(4) Principle that a joint debt and a several debt cannot be set off against each other does not apply to insolvency or liquidation proceedings but only to suits. AIR 1940 Mad 266 (268).

(5) Suit for money against father and son — Sum due by plaintiff to the son, who was acting on behalf of the joint family which included the father, could be set off. AIR 1942 Mad 429 (435): ILR (1942) Mad 464 (DB).

(6) Sum due to firm by one of the partners can be set off against sum due to the partner from the firm AIR 1941 Nag 63 (65): ILR (1942) Nag 248 (DB).

7. "Not exceeding the pecuniary limits of the jurisdiction of the Court."— (1) The value of the claim of set off must be within the pecuniary jurisdiction of Court. AIR 1932 Bom 617 (617).

(2) The valuation of the set-off for purposes of jurisdiction is the entire sum pleaded and not the difference between the plaintiff's claim and the defendant's claim. AIR 1925 Rang 22 (25): 2 Rang 349 (DB) °° (1893) 20 Cal 527 (532) (SB).

(3) Where plaintiff admits in plaint any portion of defendant's claim, that portion must be deducted in determining jurisdiction of Court to try set-off. AIR 1925 Rang 65 (66): 2 Rang 462.

(4) Where amount of set-off exceeds pecuniary jurisdiction of Court defendant can reduce his claim and bring it within jurisdiction of Court. When he so reduces his claim he will be barred by Order 2, Rule 2 from claiming the balance afterwards by a separate suit. AIR 1942 Mad 580 (581): ILR (1942) Mad 836 (DB).

8. Both parties must fill the same character.— (1) In order to entitle a defendant to plead a set-off it is necessary that parties should fill the same character as they fill in the plaintiff's suit. AIR 1949 Nag 193 (194): ILR (1948) Nag 780 °° ILR (1953) Mys 591 (603) °° AIR 1963 Punj 479 (480): 65 Punj LR 875.

(2) Amount due to defendant in capacity of a manager cannot be set off against a personal claim against him. (1883) 5 All 299 (301) (DB).

9. Effect of not claiming set-off.— (1) A defendant is not bound to put forward a claim for set-off — His omission to do so does not preclude him from bringing a separate suit in respect of it. AIR 1953 Him Pra 11 (15) °° AIR 1941 Mad 847 (850) (DB) °° AIR 1939 Pat 264 (265) °° 1960 Jab LJ 1076.

[See however AIR 1920 Mad 531 (532, 533) (DB).]

(2) A set-off must be in respect of the entire amount due. Defendant cannot claim a set-off in respect of a portion only, and subsequently sue for the balance. AIR 1953 Him Pra 11 (15) °° AIR 1942 Mad 580 (581): ILR (1942) Mad 836 (DB).

(3) Defendant pleading set-off is under no greater disability than is imposed by Order 2, Rule 2 on a plaintiff. AIR 1957 Andh Pra 896 (897).

10. Counter-claim.— (1) A set-off is a statutory defence to a plaintiff's action; a counter-claim is substantially a cross action. AIR 1956 J and K 38 (39) °° AIR 1955 Pat 323 (329): 34 Pat 487 (DB) °° AIR 1950 All 201 (202): ILR (1950) All 1207 (DB) °° AIR 1941 Nag 258 (260).

(2) Whther in the particular facts of a case the claim of the defendant is to be treated as a set-off or a counter-claim is

Order 8, Rule 6 — Note 10 (contd.)

first to be determined and judged by reference to the pleadings in suit and then also by reference to the nature and character of the plea and not by the plaintiff's refusal to prosecute the suit. (1951) 88 Cal L Jour 90 (93).

(3) When the defendant in a suit claims an amount from the plaintiff therein below and upto the plaint-claim it is a claim for set-off stricto sensu; but, when the claim is for an amount larger than the plaint claim, the claim for the excess over the plaint claim is a counter claim, which is really in the nature of another suit by the defendant against the plaintiff. AIR 1968 Ker 310 (314, 315): 1968 Ker LJ 635 (DB) °° AIR 1967 Mad 300 (301): 1966 Mad LJ 200. (Plea for value of improvement by alienee in suit for partition is neither set-off nor counter claim.) °° (1963) 2 Andh WR 447 (449): (1964) 1 Andh LT 223 (DB).

[See also (1966) 1966-18 STC 163 (176) (Guj) (DB). (A set-off is a ground of defence, a shield and not a sword, which if established affords an answer to the plaintiff's claim wholly or pro tanto; a counter-claim as such affords no defence to a plaintiff's claim but is a weapon of offence which enables a defendant to enforce a claim against the plaintiff effectually as in an independent action.)]

(4) Defendant pleading that particular item has been omitted in account — Plea is not counter claim or set-off. AIR 1960 Andh Pra 520 (524).

(5) The counter-claim need not be an action of the same nature as the original action or even analogous thereto. AIR 1956 J and K 38 (39) °° AIR 1955 Pat 320 (329): 34 Pat 487 (DB) °° AIR 1932 Bom 617 (618).

(6) Suit for recovery of possession — Defendant can set up a counter-claim for specific performance of an agreement to sell. AIR 1956 J and K 38 (39). (AIR 1924 Rang 346: 2 Rang 276, Foll.)

(7) Though there is no provision in the Code for making a counter-claim, a Court has got the power to treat the counter-claim in the plaint as a cross suit and hear the two together if the counter-claim is properly stamped. AIR 1956 J and K 38 (39) °° AIR 1955 Pat 320 (329): 34 Pat 487 (DB) °° **AIR 1964 SC 11 (16, 17, 18, 19, 20, 21, 22, 23): (1964) 2 SCR 567.**

(8) A counter-claim may be set up only in respect of claims as to which the party could bring an independent action in the Court in which the counter-claim is brought. AIR 1956 J and K 38 (39) °° AIR 1954 Pat 439 (441): 33 Pat 52 (DB) °° AIR 1950 All 201 (202): ILR (1950) All 1207 (DB) °° AIR 1949 Mad 630 (631) °° AIR 1965 Andh Pra 18 (19, 20): (1964) 1 Andh WR 194.

(9) Court-fee paid on counter-claim — Court holding that counter-claim cannot be claimed as of right — Court-fee not exhausted and can be used in second suit instituted on counter-claim. AIR 1961 Tripura 22 (22, 23).

(10) Small cause suit — Counter claim by defendant — Suit dismissed for default but counter claim decreed ex parte — Restoration of suit — Ex parte decree will be left untouched. AIR 1960 Madh Pra 393 (394): 1960 MPLJ 1080.

11. Solicitor's lien for costs.— (1) A solicitor has, at Common Law, and apart from any order of the Court or statute, a lien over property recovered or preserved or the proceeds of any judgments obtained for the clients by his exertions. AIR 1955 Bom 126 (131): ILR (1954) Bom 1432 (DB) °° AIR 1927 Bom 542 (545): 51 Bom 855 (DB) °° AIR 1959 Bom 162 (165).

(2) The solicitor's lien is a particular lien; it is, therefore, not available for the general balance of account between the solicitor and the client. (1909) 33 Mad 255 (256) (DB).

(3) Although a defendant has the right to compromise with a plaintiff without the knowledge of the plaintiff's attorney, such compromise must be made with the honest intention of ending the litigation, and not with any design to deprive the attorney of his costs, and he cannot make a payment to the plaintiff under that compromise, if he has notice of the lien for the costs of the plaintiff's attorney. AIR 1955 Bom 126 (131, 132): ILR (1954) Bom 1432 (DB) °° AIR 1935 Cal 168 (172, 173): 61 Cal 1005 (DB).

(4) Under sub-rule (2) of this rule, a set-off cannot be made so as to affect the lien of the pleader in respect of his costs. (1906) 30 Bom 173 (195) (DB).

(5) Costs ordered to be paid by a petitioning creditor to a debtor when an adjudication in bankruptcy is set aside, cannot be set off to the prejudice of the solicitor's lien against the debts due to the petitioning creditor. AIR 1930 Bom 516 (517): 55 Bom 377.

(6) A solicitor's lien upon a judgment obtained by his client is only a claim or right to ask for the intervention of the Court for his protection when, having obtained judgment for his client he finds there is a probability of the client depriving him of his costs and that the lien is subject to all the equities between the client and the other parties interested in the property, so that it ought not to intercept the right claimed by the judgment-debtor to set off a prior decree which he had obtained against the attorney's client. AIR 1917 Cal 241 (242, 243): 43 Cal 932 °° AIR 1942 Bom 102 (104).

(7) Suit by plaintiff — Pending it, plaintiff declared evacuee — Custodian continuing suit — Solicitors engaged by plaintiff engaged also by Custodian — Costs incurred by Solicitors — Their remedy for recovery of costs is by pay order for costs

R. 7. Defence or set-off founded on separate grounds.—Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

[R. S. C., O. 20, R. 7; See O. 7, R. 8.]

HIGH COURT AMENDMENT

Rule 7A

Mysore

After Rule 7 and before Rule 8, add the following as Rule 7-A:—

7-A. Where the defendant seeks the permission of the Court under Rule 8 of Order I of this Code to defend the suit on behalf of or for the benefit of himself and other persons having the same interest as the defendant in the subject-matter of the suit he shall file an application supported by an affidavit setting out the particulars detailed in sub-rule (2) of Rule 4 of Order VII of this Code. Notice of such an application shall be given to all parties to the suit, and if the permission sought is granted the plaint may be amended by inserting a statement that the defendant is with the leave of the Court sued as the representative of all persons interested in subject-matter of the suit [30-3-1967].

R. 8. New ground of defence.—Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

[R. S. C., O. 24, Rr. 1 and 2; See R. 9.]

Order 8, Rule 6 — Note 11 (contd.)

incurred since the time Custodian has engaged the solicitors. AIR 1959 Bom 162 (168).

12. Advocate's or pleader's lien for costs. — (1) Like a solicitor, an advocate or a pleader has also a lien on the papers entrusted to his custody and can refuse to part with the papers until his fee is paid. AIR 1955 Orissa 102 (104): ILR (1955) Cut 225: 1955 Cri L Jour 1085 (SB).

(2) In the absence of an express agreement no advocate or pleader is entitled to retain the moneys of his client and claim a lien to hold it until his own accounts are settled. AIR 1955 Orissa 102 (105, 106): ILR (1955) Cut 225: 1955 Cri L Jour 1085 (SB).

13. Appeal.— (1) An appeal does not lie against an order on a preliminary issue disposing of the claim to a legal set-off, advanced by the defendant. AIR 1917 Lah 261 (265): 1917 Pun Re No. 62 (DB).

(2) An objection cannot be taken up in appeal, for the first time, that a plea of equitable set-off cannot be entertained by the Court. AIR 1931 Cal 358 (359) (DB).

(3) Where a claim of set-off is disposed of without demanding court-fees from the defendant and the lower Appellate Court decides that no coure-fee is necessary, such an omission is only a mere irregularity within the meaning of Section 99 of the Code and is not a ground for reversing the decision in second appeal. (1913) 19 Ind Cas 918 (919) (FB) (Cal).

14. Court-fee.— (1) Plea of set-off — Application by Liquidator under S. 45-B. Banking Companies Act — Debtor filing reply claiming set-off against his fixed deposit — Court-fee on plea of set-off held was payable under Sch. II, Art. 1 (5) and not under Sch. I, Art. 1. AIR 1963 All 90 (DB).

(2) Suit for declaration of title, possession and mesne profits — Claim by defendant for compensation for improvements as a condition of decree for possession — Not a set-off or counter-claim — No Court-fee payable on such claim. AIR 1961 Mad 527 (528).

Order 8, Rule 7

1. Scope.— (1) Inconsistent defences on contradictory facts are not generally permitted — In an ejectment suit the defendant challenging plaintiff's title to premises cannot at the same time challenge that tenancy has not been terminated according to law. AIR 1965 Pat 156 (158) (DB).

Order 8, Rule 8

1. Court can take notice of subsequent events.— (1) A Court can take cognizance of events which happen during pendency of litigation as a defence to action. AIR 1928 Bom 427 (430): 52 Bom 883 (DB) °° AIR 1967 Cal 603 (607) °° (1966) 1 Andh WR 352: (1966) 1 Andh LT 424 °° AIR 1964 Cal 335 (339) (DB) °° AIR 1963 Raj 198 (201): 1963 Raj LW 304.

[But see (1911) 10 Ind Cas 49 (50) (Cal).]

(2) Though a Court of appeal will not ordinarily take notice of any facts which may have arisen subsequent to judgment of lower Court, it will do so in exceptional cases where, by so doing, it can shorten litigation and best attain the ends of justice. (1907) 6 Cal L Jour 74 (78) (DB) °° AIR 1967 Cal 603 (607).

R. 9. Subsequent pleadings.—No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

[1882 and 1877, S. 112; 1859, S. 122; See O. 6, R. 7.]

HIGH COURT AMENDMENT

Bombay: Dadra and Nagar Haveli[a]

For Rule 9, substitute the following:

9. Subsequent pleadings.—No pleading subsequent to the written statement of the defendant other than by way of defence to a set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Order 8, Rule 8 — Note 1 (contd.)

(3) There can be no limitation against a plea in defence. AIR 1929 All 77 (78).

(4) Where the plaintiff after instituting his suit for restitution of conjugal rights and before the wife filed her written statement, married again it would be open to the wife to take the plea that by reason of the provisions of Section 2 of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, the plaintiff would not be entitled to a decree for restitution of conjugal rights. AIR 1957 Orissa 199 (201).

Order 8, Rule 9

1. Subsequent pleadings.— (1) Leave of the Court is essential before any party can present a further pleading after the written statement has been filed. AIR 1925 Bom 390 (392, 396) (DB) °° AIR 1915 Mad 984 (988) (DB) °° 1967 Ker LT 257: 1967 Ker LJ 685 °° AIR 1961 Him Pra 46 (48).

[See **AIR 1957 SC 444 (457): 1967 SCR 370.** (Replication cannot be filed as a matter of right.)]

(2) Even in case of a minor defendant he is not entitled, on attaining majority, to put in an additional written statement without leave of the Court. AIR 1935 Mad 117 (117) (DB) °° AIR 1937 Pat 625 (626) °° AIR 1962 Pat 159 (160).

(3) Amendment of written statement without leave of Court — Inconsistency with previous written statement — Court has to ignore the amendment. AIR 1961 Him Pra 46 (48).

(4) The defendant called upon to file a written statement to an amended plaint is not required to confine and restrict the new written statement to the amended portion of the plaint or to any particular pleas or to refrain from raising new pleas. AIR 1960 Punj 575 (581).

[But see AIR 1961 Him Pra 46 (48).]

(5) If the party, wants to file an additional written statement, he has to file a petition stating the reason why he failed to say these things in the original written statement, and what excuse there is for allowing him to file an additional written statement at that stage. Then the other side has to be given an opportunity to oppose the petition and contend that such additional written statement should not be entertained at that stage. Then the Court has to give its decision as to whether the additional written statement is to be admitted or not. A Court should not direct suo motu the amendment of the pleadings like the filing of additional written statements by the respondents in an appeal, however necessary they may be in the interests of justice. AIR 1958 Mad 383 (383): ILR (1958) Mad 584.

(6) Additional written statement by way of amendment of previous statement — One defendant raising new ground inconsistent with that raised in joint written statement — Amendment can be allowed if it does not work injustice to other side and it is necessary for the purpose of determining the real question of controversy between the parties. AIR 1966 Orissa 6 (8): 32 Cut LT 930.

(7) Suit for recovery of possession of property from lessee and declaration of title — Defendant originally pleading that suit was not maintainable without impleading co-sharers — Subsequently defendant filing petition under Order 8, Rule 9, for permission to file additional statement on ground that he had purchased suit property from one of co-sharers subsequent to plaint — **Held,** additional statement should be permitted to be filed. AIR 1965 Mad 9 (10): 77 Mad LW 476.

(8) Additional written statement — Plea put forward unsubstantial and belated — Defendant not having personal knowledge of matter pleaded or stating how he came by any new materials throwing fresh light on question — Dismissal of application for filing statement held rightly ordered. AIR 1953 Mad 492 (504) (DB).

(9) Party has no right to file rejoinder after filing of written statement and findings given on certain issues — Proper procedure

R. 10. Procedure when party fails to present written statement called for by Court.—Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

[1882, S. 113; 1877, Ss. 113, 370; 1859, S. 106.]

HIGH COURT AMENDMENTS

Allahabad

Rules 11 and 12

Add the following Rules:—

Order 8, Rule 9 — Note 1 (contd.)

for plaintiff is to apply for amendment of plaint. AIR 1952 Mad 825 (826) (DB).

(10) If the pleadings of either party are too vague, the Court may require such party to file a further and fuller statement under this rule. (1890) 17 Cal 840 (848) (DB).

(11) Where the defendant does not make a counter-claim or plead a set-off, the plaintiff cannot be called upon to put in a written statement in answer to the defendant's allegations. AIR 1929 Bom 413 (413).

(12) An additional written statement filed long after the fixed date cannot be removed from the record unless the opposite party takes immediate steps for its removal. (1885) 9 Bom 373 (381, 382).

(13) Plaint amended by addition of a new defendant. Court should permit original defendant to file additional written statement. AIR 1949 Orissa 77 (79): ILR (1949) 1 Cut 105 (DB).

(14) It is open to the court in granting leave to the plaintiff to file a replication to do so with or without conditions. 1967 Ker LT 257: 1967 Ker LJ 685.

(15) Where one of the terms for permission to file additional statement is that certain amount should be paid within a fixed time, it is open to the Court to enlarge this period under Section 148 even though the period originally fixed or granted might have expired. The fact that there was a default clause that if the payment be not made the application will stand dismissed does not take away from the fullness of the court's power to enlarge the time under Section 148. AIR 1959 Cal 35 (36) (DB) °° AIR 1959 Cal 35 (36): 62 Cal WN 588 (DB).

(16) Order 8, Rule 9 invests the Court with the widest possible discretion and enables it to accept a written statement filed subsequently after the settlement of the issues upon such terms as the Court thinks fit. In exercising that discretion its hands are not tied by any so called ex parte order that has been passed by it. AIR 1961 Pat 152 (155): 1961 BLJR 478 °° 1968 Kash LJ 72.

(17) In view of the express provisions of this Rule if cannot be stated that a plea not mentioned in the plaint cannot be heard by the Court and that a replication is not warranted in law and cannot be treated as part of the pleadings and made the foundations of a judgment. 1967 Ker LT 257: 1967 Ker LJ 685.

(18) A rejoinder made with the permission of the Court has to be included in the term "pleading" and the issues in such a case have to be struck on the basis of the original amended plaint, the written statement of the defendants and the rejoinder. 1968 Kash LJ 72.

(19) Claim of owner of vehicle that vehicle has been transferred prior to the accident and he has no subsisting liability — Plea of insurance company that it has no legal liability in respect of claims for damages because of the transfer — Held, the company could always urge that it has no legal liability because of transfer — Additional statement was not necessary to this effect since it was a pure question of law relating to a pleading of fact already on record. AIR 1967 Mad 464 (464): (1967) 1 Mad LJ 195.

(20) The appellate Court has power to allow a defendant to raise additional pleas and this it can do not only by directing the filing of an additional written statement but also by an amendment of the written statement. (1964) 2 Andh LT 421.

Order 8, Rule 10

1. Scope.— (1) The power given to the Court by this rule to pronounce judgment refers to a written statement which has been demanded by the Court under Rule 9 and not one under Rule 1. AIR 1928 Rang 261 (262): 6 Rang 466 (DB) °° AIR 1945 Mad 299 (299, 300): ILR (1945) Mad 866 (DB) °° AIR 1918 Mad 1163 (1164) (DB). (Per Sheshagiri Aiyer, J., Ayling, J., contra.)

[But see AIR 1925 Oudh 567 (568) (DB) °° (1912) 15 Oudh Cas 78 (80).]

(2) This rule applies only to a specific requirement by the Court to the filing of a written statement. 1954-2 Mad L Jour (Andh) 251 (254).

(3) A general direction in the summons that such a written statement may be filed does not come within the purview of the rule. AIR 1945 All 352 (353): ILR (1945) All 499 (DB) °° AIR 1925 Oudh 567 (568).

(4) A conditional order, as for instance, an order directing a statement, if any, to be filed will not entail the penalty imposed by this rule. AIR 1927 Mad 1007 (1008) (DB).

(5) Where a party files a written statement expressing his inability to supply the particulars asked for by the Court, it is not a failure to present a written statement within the meaning of this rule. (1906) 16 Mad L Jour 30 (31, 32).

"11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing file in Court a proceeding stating his address for service, written in English in block letters, and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act suo motu or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24 and 25 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule."

Bombay: Dadra and Nagar Haveli

Add the following Rules after R. 10 :—

Rules 11 to 30

The following shall be added as Rules 11 to 30:—

11. (1) (a) **Parties to file addresses.**—Every party, whether original, added or substituted, who appears in any suit or other proceeding, shall file in the Court on or before the date fixed in the summons or notice served on him as the date for his appearance or within such further time as may be allowed by the Court a memorandum in writing stating the address at which he may be served.

(b) **Registered address.**—This address shall be called the "registered address" and it shall, subject to Rule 24 of Order VII read with Rule 12 of this Order, hold good in all proceedings in the suit and in appeals and also for a further period of six years from the date of the final decision for all purposes including those of execution.

(c) **Consequences of default in filing registered address.**—If, after being required to file the registered address within a specified time, he fails to do so, he shall be liable to have his defences, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act suo motu or on the application of any party for an order to such effect, and the Court may make such order as it thinks fit.

(2) **When default may be condoned.**—Where the Court has struck out the defences under sub-rule (1) and has adjourned the hearing of the suit or the proceeding and where the defendant or the opposite party at or before such hearing appears and assigns sufficient cause for his failure to file the registered address and also files the registered

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Order 8, Rule 10 — Note 1 (contd.)

(6) The Court cannot strike out a defence for failure of the defendant to present a further written statement called for by it. 1892 Pun Re No. 59, Page 216 (DB).

[See AIR 1937 Nag 268 (269): ILR (1937) Nag 519.]

(7) A judgment pronounced under this rule must satisfy the requirements of 'judgment' as defined in Section 2, sub-s. (9) and therefore, the Court should go into the case and pronounce a decision upon the facts so far as they are before it. (1912) 15 Oudh Cas 78 (80): 15 Ind Cas 212.

(8) A plaintiff is not entitled to obtain a decree before the date on which the summons is returnable, even though the summons directs that the written statement should be filed on or before a day before such returnable date. (1908) 32 Bom 534 (539) (DB).

(9) Where a defendant is orderd to file a written statement within a certain time and he fails to do so, it is not justifiable to pass an order that the suit should proceed ex parte against him. Such failure means only that he admits the allegations in the plaint, and he is entitled to appear and submit any argument open to him on the plaint. AIR 1938 Bom 470 (471) (DB).

(10) Defendant's previous non-appearance but appearance on day of next adjourned hearing — Even if he fails to assign good cause for his previous non-appearance the petition filed under O. 9, Rule 7 should not be dismissed — He should be allowed to participate in proceeding and action under Order 8, Rule 10 should be taken, if necessary. 1960 Ker LT 1141 °° AIR 1961 Pat 152 (154, 155): 1961 BLJR 478.

(11) The court has ample powers under Order 8, Rule 10 to pronounce judgment against the defendant when he fails to present the written statement or pass any other order that it thinks fit in relation to the suit but it cannot pass an order which is an expression of resentment on the part of the Court. AIR 1964 J and K 58 (59): 1964 Kash LJ 68.

2. **Appeal.**— (1) An order pronouncing judgment against a party under this rule is appealable as an order under Order 43 Rule 1 (b). AIR 1925 Oudh 567 (567) (DB) °° AIR 1969 Goa 53 (54).

(2) Order refusing to pronounce a judgment under this rule is not appealable. AIR 1931 Lah 77 (77).

address, he may, upon terms as the Court directs as to costs or otherwise, be heard in answer to the suit or the proceeding as if the defences had not been struck out.

(3) **When decree passed on default can be set aside.**—Where the Court has struck out the defences under sub-rule (1) and has consequently passed a decree or order, the defendant or the opposite party, as the case may be, may apply to the Court by which the decree or order was passed for an order to set aside the decree or order, and, if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the address, the Court shall make an order setting aside the decree or order as against him upon such terms as to costs or otherwise as it thinks fit and shall appoint a date for proceeding with the suit or proceeding:

Provided that where the decree or order is of such a nature that it cannot be set aside as against such defendant or opposite party only, it may be set aside as against all or any of the other defendants or the opposite parties.

12. Applicability of Rr. 20 and 22 to 26 of O. VII.—Rules 20, 22, 23, 24, 25 and 26 of Order VII shall apply so far as they may be applicable, to registered addresses filed under the last preceding rule.

Counterclaim.

13. Defendant may set up counterclaim against the claims of the plaintiff in addition to set-off.—A defendant in a suit, in addition to his right of pleading a set-off under Order VIII, Rule 6 of the Code of Civil Procedure, 1908, may set up by way of counterclaim against the claims of the plaintiff any right or claim in respect of a cause of action accruing to the defendant either before or after the filing of the suit, but before the defendant has delivered his defence and before the time limited for delivering his defence has expired, whether such counterclaim sounds in damages or not, and such counterclaim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit both on the original and on the counterclaim, and the plaintiff (if so advised) shall be at liberty to file a written statement in answer to the counterclaim of the defendant within four weeks after service upon him or his pleader of a copy of the defendant's counterclaim; and the Court or a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such counterclaim cannot be disposed of in the pending suit or ought not to be allowed, refuse permission to the defendant to avail himself thereof, and require him to file a separate suit in respect thereof.

14. Defendant setting up a counterclaim to specifically state so in the written statement.—Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall in his written statement state specifically that he does so by way of counterclaim.

15. Where the counterclaim involves in addition to the plaintiff other persons also, the defendant to add further title to the title of the written statement and deliver copies of his written statement to such persons as are already parties to the suit.—Where a defendant by a written statement sets up any counterclaim, which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his written statement a further title similar to the title in a plaint, setting forth the names of all the persons who, if such counterclaim were to be enforced by a cross-suit, would be defendants to such cross-suit, and shall deliver copies of his written statement to such of them as are already parties to the suit within the period within which he is required to deliver it to the plaintiff.

16. Service of summons when counterclaim is against persons who are not already parties to the suit.—Where any such person as is mentioned in the last preceding rule, is not already a party to the suit, he shall be summoned to appear by being served with a copy of the written statement and such service shall be regulated by the

same rules as are contained in the Code of Civil Procedure, 1908, with respect to the service of a writ of summons.

17. Appearance of persons other than defendants to the suit, when served with counterclaim.—Any person not a defendant to the suit, who is served with a written statement and counterclaim as aforesaid, must appear therein as if he had been served with a writ of summons to appear in the suit.

18. Reply to counterclaim.—Any person named in a written statement as a party to a counterclaim thereby made, may deliver a reply within the time, within which he might deliver a written statement if it were a plaint.

19. Objection to counterclaim being allowed to be set up in the suit.—Where a defendant sets up a counterclaim, if the plaintiff or any other person named in the manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim but in an independent suit, he may, at any time before reply, apply to the Court or a Judge for an order that such counterclaim may be excluded and the Court or Judge may, on the hearing of such application, make such order as shall be just.

20. Counterclaim may be proceeded with, even if suit be stayed, discontinued or dismissed.—If in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.

21. On default of reply to counterclaim, the counterclaim may be set down for judgment.—If the defendant to the counterclaim makes default in putting in reply to the counterclaim, the defendant in the suit, who is the plaintiff to the counterclaim may in such cases get the suit set down for judgment on the counterclaim, and such judgment shall be given as the Court shall consider him to be entitled to.

22. Judgment when set-off or counterclaim is established.—Where in any suit a set-off or counterclaim is established as a defence against the plaintiff's claim, the Court or a Judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled upon the merits of the case.

Third Party Procedure

23. (1) Third party notice.—Where in a suit a defendant claims as against any person not already a party to the suit (hereinafter called 'the third party')—

(a) that he is entitled to contribution or indemnity, or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff, or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third party or between any or either of them,

he may by leave of the Court or a Judge, issue a notice (hereinafter called the third party notice) to that effect, sealed with the seal of the Court. Such notice shall be filed with the Registrar or the Clerk of the Court or such other officer appointed by the Court in this behalf, and a copy thereof served on such person according to the rules relating to the service of writs of summonses.

(2) **Form and service of the notice.**—The notice shall state the nature and grounds of the claim or the nature and extent of any relief or remedy claimed or the nature of the question or issue sought to be determined and shall, unless otherwise ordered by

the Court or a Judge, be served on the third party within the time limited for filing the written statement of defence and therewith shall be served a copy of the plaint.

(3) Effect of service of notice.—The third party shall, as from the time of the service upon him of the notice, be a party to the suit with the same rights in respect of his defence against any claim made against him and otherwise as if he had been duly sued in the ordinary way by the defendant.

24. Appearance of third party and consequences of default in appearance.—If a person not a party to the suit who is served as mentioned in rule 23 (hereinafter called 'the third party') desires to dispute the plaintiff's claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance or file a vakalatnama in the suit within eight days, if residing or carrying on business or personally working for gain within the local limits of the jurisdiction of the Court; or within fifteen days, if not residing or carrying on business or personally working for gain within such limits, from the service of the notice. In default of his so doing he shall be deemed to admit the validity of the decree obtained against such defendant whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice.

Provided always that a person so served and failing to appear within the said period of eight or fifteen days, as the case may be, may apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or Judge shall think fit.

25. Decree when third party makes default in appearance.—Where a third party makes default in entering an appearance or filing a Vakalatnama in this suit,—

(1) in case the suit is tried and results in favour of the plaintiff, the Court or the Judge that tries the suit may, at or after the trial, pass such decree as the nature of the case may require for the defendant giving the notice against the third party:

Provided that execution thereof be not issued without leave of the Court or a Judge until after satisfaction by such defendant of the decree against him; and

(2) if the suit is finally decided in the plaintiff's favour otherwise than by trial, the Court or a Judge may, on application, pass such decree as the nature of the case may require for the defendant giving the notice against the third party at any time after satisfaction by the defendant of the amount decreed in favour of the plaintiff against the defendant.

26. Appearance of the third party and application for direction.—If a third party enters an appearance or files a Vakalatnama, the defendant giving notice may, after serving notice of the intended application upon the plaintiff, the third party and any other defendant, apply to the Court or a Judge for directions, and the Court or Judge may—

(a) where the liability of the third party to the defendant giving the notice is established on the hearing of the application, pass such decree as the nature of the case may require in favour of the defendant giving the notice against the third party, or

(b) if satisfied that there is a question or issue proper to be tried as between the plaintiff and the defendant and the third party or between any or either of them as to the liability of the defendant to the plaintiff or as to the liability of the third party to contribute or indemnify as claimed, in whole or in part, or as to any other relief or remedy claimed in the notice by the defendant or that a question or issue stated in the notice should be determined not only as between the plaintiff and the defendant but as between the plaintiff, the defendant and the third party or any or either of them, order such

question or issue to be tried in such manner, before, at or after the trial of the suit, as the Court or Judge may direct, or

(c) dismiss the application.

27. **Directions to be given.**—The Court or a Judge upon the hearing of the application mentioned in Rule 26 may, if it shall appear desirable to do so, give the third party liberty to defend the suit either alone or jointly with the original defendant upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, pleadings or documents to be delivered or amendments to be made, and give such directions as to the Court or Judge shall appear proper for having the question and the rights and liabilities most conveniently determined and enforced, and as to the mode and extent in or to which the third party shall be bound or made liable by the decree in the suit.

28. **Costs.**—The Court or a Judge may decide all questions of costs as between a third party and the other parties to the suit and may order any one or more to pay the costs of any other, or others, or give such direction as to costs as the justice of the case may require.

29. **Party served with a third party notice may apply for a third party notice against some other person.**—(1) Where a person served with a third party notice by defendant makes, as against any person not already a party to the suit, such claim as is defined in Rule 23, he may by leave of the Court or a Judge issue a third party notice to that effect and the preceding rules as to third party procedure shall apply mutatis mutandis to every notice so issued, and the expressions "third party notice" and "third party" in these rules shall apply to and include other notices so issued and every person served with such notice respectively.

(2) Where a person served with a notice under this rule by a third party in turn makes such a claim as is defined in Rule 23 against another person not a party to the suit, the procedure prescribed by the preceding rules shall be followed as regards such further person and any other further person or persons so served and so on successively.

30. **Defendant claiming against co-defendant.**—Where a defendant claims against another defendant—

(a) that he is entitled to contribution or indemnity, or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff, or

(c) that any question or issue relating to or connected with the subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant making the claim and should properly be determined not only as between the plaintiff and the defendant making the claim but as between the plaintiff and the defendant and another defendant or between any or either of them,

the defendant making the claim may without leave of the Court or a Judge issue and serve on such other defendant a notice making such claim or specifying such question or issue, and the same procedure shall be adopted for the determination of such questions between the defendants as would be followed in respect of such other defendant, as if such last mentioned defendant were a third party; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in suit. (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17.

Rules 11 and 12 (Gujarat)

The following be added as Rr. 11 and 12:—

11. **Parties to file addresses.**—Every party, whether original, added or substituted, who appears in any suit or other proceeding shall, on or before the date

fixed in the summons or notice served on him as the date of hearing, file in Court a memorandum in writing stating his address for service, and if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act suo motu or on the application of any party for an order to such effect, and the Court may make such order as it thinks fit. The address so given shall hold good throughout the interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution:

"Provided that this rule shall not apply to a defendant who has not filed a written statement but who is examined by the Court under Sec. 7 of the Dekkhan Agriculturists' Relief Act, 1879, or otherwise, or in any case where the Court permits the address for service to be given by a party on a date later than that specified in this rule.

"12. **Applicability of Rr. 20 and 22, 24 and 25 of O. 7 to addresses for service.**—Rules 20, 22, 24 and 25 of Order VII shall apply, so far as may be, to addresses for service filed under the last preceding rule." (1-11-1966.)

Rules 11 to 13 (Madhya Pradesh)

Add the following Rules 11 to 13:—

"11. **Registered address.**—Every defendant in a suit or opposite party in any proceedings, shall, on the first day of his appearance in Court, file a memorandum giving an address for service on him of any subsequent process. The address shall be within the local limits of the Civil District in which the suit or petition is fixed or, if an address within the local limits of such Civil District cannot conveniently be given, within the local limits of the Civil District in which the party ordinarily resides.

This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

12. **Consequences of non-filing address.**—(1) If the defendant or the opposite party fails to file a registered address as required by Rule 11, he shall be liable, at the discretion of the Court, to have his defence struck out and to be placed in the position as if he had made no defence.

An order under this rule may be passed by the Court suo motu or on the application of any party.

(2) Where the Court has struck out the defence under sub-rule (1) and has adjourned the hearing of the suit or the proceedings and where the defendant or the opposite party at or before such hearing appears and assigns sufficient cause for his failure to file the registered address he may upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit or the proceedings as if the defence had not been struck out.

(3) Where the Court has struck out the defence under sub-rule (1) and has consequently passed a decree or order, the defendant or the opposite party, as the case may be, may apply to the Court by which the decree or order was passed for an order to set aside the decree or order; and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the address, the Court shall make an order setting aside the decree or order as against him upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or proceeding:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant or opposite party only it may be set aside as against all or any of the other defendants or opposite parties.

13. Rules 20, 22 and 23 of Order 7 shall apply, so far as may be, to addresses for service filed under Rule 11." (16-9-1960.)

Orissa

Omit Rules 11 and 12 of Order 8 of the First Schedule of the Code of Civil Procedure (Patna amendment). (7-5-1954.)

Rules 11 and 12 (Patna)

Add the following Rules:—

"11. Every party, whether original, added or substituted, who appears in any suit or other proceedings shall, at the time of entering appearance to the summons, notice or other process served on him, file in Court a statement stating his address for service and if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act suo motu or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20 and 22 of O. 7 shall apply, so far as may be, to addresses for service filed under the preceding rule."

Rules 11 and 12 (Punjab and Haryana; Chandigarh)

Add the following Rules:—

"11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons, notice or other process served on him as the date of hearing, file in Court a proceeding stating his address for service, and, if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act suo motu or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24 and 25 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule." (24-11-1927); Act 31 of 1966, Ss. 29 and 32 (1-11-1966.)

Note—Rule 11 (Punjab).—This rule applies to defendants who are corporations as well as to other defendants. The rule is mandatory so far as the filing of the proceeding stating the addresses for service is concerned; but the matter is left to the discretion of the Court and it is not bound to strike off the defence of the defaulting party in every case.

Rules 11 and 12 (Rajasthan)

Add the following Rules:—

"11. (1) Every party whether original, added or substituted who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a memorandum stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act suo motu or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

(2) Where the Court has struck out the defence under sub-rule (1) and has adjourned the hearing of the suit or the proceeding and where the defendants or the opposite party at or before such hearing, appears and assigns good cause for his failure to file the registered address, he may upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit or the proceeding as if the defence had not been struck out.

(3) Where the Court has struck out the defence under sub-rule (1) and has consequently passed a decree or order, the defendant or the opposite party, as the case may be, may apply to the Court by which the decree or order was passed for an order to set aside the decree or order, and if he files a registered address and

satisfies the Court that he was prevented by any sufficient cause from filing the address, the Court shall make an order setting aside the decree or order as against him upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or proceeding:

Provided that where the decree or order is of such a nature that it cannot be set aside as against such defendant or opposite party only it may be set aside as against all or any of the other defendants or opposite parties.

12. Rules 19 (2), 20, 22, 23, 24 and 25 of Order VII shall apply, so far as may be, to addresses for service filed under the preceding rule." (24-7-1954.)

HIGH COURT AMENDMENTS

Order VIII-A

Andhra Pradesh

Same as that of Madras.

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras (9-6-1959): Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 (1) and Schedule.

Madras: Pondicherry

After Order VIII insert the following as Order VIII-A, namely:—

"ORDER VIII-A

THIRD PARTY PROCEDURE

R. 1. Third party notice.—Where a defendant claims to be entitled to contribution from or indemnity against any person not already a party to the suit (hereinafter called a third party), he may, by leave of the Court issue a notice (hereinafter called a third party notice) to that effect, sealed with the seal of the Court. The notice shall state the nature and grounds of the claim. Such notice shall be filed into Court with a copy of the plaint and shall be served on the third party according to the rules relating to the service of summons.

Order 8-A (Madras) Rule 1 — Note 1

(1) The object of the third party procedure is two-fold: First to prevent the same question from being tried twice with possibly different results and secondly to prevent multiplicity of action and to enable the Court to settle disputes between all the parties in one action. (1955) 68 Mad LW 371 (374) °° (1969) 1 Mad LJ 168: 82 Mad LW 134 °° (1968) 2 Mad LJ 12: 81 Mad LW 32.

(2) The procedure applies only to cases of contribution or indemnity. (1955) 68 Mad LW 371 (374) °° AIR 1967 Andh Pra 145 (146): (1966) 2 Andh WR 214 °° (1967) 2 Mad LJ 446: 80 Mad LW 362. (Insurer bound by policy of motor insurance.) °° (1969) 2 Mad LJ 16: 82 Mad LW 198. (Suit for arrears of rent.)

(3) The person who may apply under this order is only the defendant. (1955) 68 Mad LW 371 (375).

(4) The application for leave under the rule is to be made ex parte to the Judge on affidavit stating the nature and grounds of the claim. (1955) 68 Mad LW 371 (375).

(5) There is no restriction in regard to the point of time when a defendant may ask for the issue of a third party notice except that he should make his application at a stage of the proceedings when there is still a trial of action between the plaintiff and himself. (1955) 68 Mad LW 371 (375).

(6) The Court even at the time when application for leave is filed has a discretion not to allow notice to be served where the result will be not to embarrass the plaintiff or where the questions at issue cannot be completely disposed of, although these are matters which are usually considered on the application for directions and not on the application for leave to issue notice. At the latter stage usually leave is granted where the defendant makes out a prima facie case that he is entitled to contribution or indemnity. (1955) 68 Mad LW 371 (375).

(7) The service of notice required under the rule is effective service whether it is personal or postal or substituted. (1955) 68 Mad LW 371 (375).

(8) Generally speaking, there will be no privity of contract between the plaintiff and the third party in a claim falling under O. 8-A, which the defendant sets up against a third party. A Subordinate Judge therefore wrongly refuses to exercise the jurisdiction vested in him under that Rule where he dismisses the application on the ground that there is no such privity. AIR 1957 Mad 679 (679) °° (1968) 2 Mad LJ 12: 81 Mad LW 32. (Indemnity referred to in O. 8-A need not necessarily spring from contract.)

R. 2. Effect of notice.—The third party shall, as from the time of the service upon him of the notice, be deemed to be a party to the action with the same rights in respect of his defence against any claim made against him and otherwise as if he had been duly sued in the ordinary way by the defendant.

R. 3. Default by third party.—If the third party desires to dispute the plaintiff's claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party may enter appearance in the suit on or before the date fixed for his appearance in the notice. If he does not enter appearance he shall be deemed to admit the validity of the decree that may be obtained against such defendant, whether by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice:

Provided always that a person so served and failing to appear may apply to the Court for leave to appear, and such leave may be given upon such terms, if any, as the Court shall think fit.

Order 8A, Rule 1 (Mad) — Note 1 (contd.)

°° AIR 1961 Mad 367 (368): (1961) 2 Mad LJ 335.

(9) If the Court is satisfied that there is no question to be tried, as to the liability of the third party to make the contribution or pay the indemnity claimed, it should be at liberty to hold that there is no such question and to dismiss the application for directions. AIR 1957 Andh Pra 939 (940).

(10) Person already impleaded as one of the defendants in the suit — Plaintiff, however, dropping him out pending disposal — He can again be brought in as a third party under O. 8-A. (1967) 2 Mad LJ 446: 80 Mad LW 362.

(11) There is no limitation that the rule is applicable only to a claim of indemnity arising out of the same transaction or a transaction entered into simultaneously with the transaction sought to be enforced, in the suit. (1969) 1 Mad LJ 168: 82 Mad LW 134.

(12) Application of O. 8-A, R. 1 is not restricted to suits other than those laid on negotiable instruments. AIR 1962 Mad 202 (204): (1962) 1 Mad LJ 246 °° (1969) 1 Mad LJ 168: 82 Mad LW 134.

(13) Court issuing notice to third party before considering application under R. 1 — Procedure not wrong. AIR 1967 Andh Pra 145 (146): (1966) 2 Andh WR 214.

(14) Application under R. 1 — Order refusing leave has necessarily the effect of an order under R. 1. AIR 1967 Andh Pra 145 (146): (1966) 2 Andh WR 214.

(15) Application under R. 1 — No enquiry possible on facts except hearing parties — Order does not suffer from infirmity on the ground that application is dismissed without enquiry. AIR 1967 Andh Pra 145 (146): (1966) 2 Andh WR 214.

(16) If suit is maintainable Court must consider whether the defendant is entitled to be indemnified by the third party's estate. AIR 1962 Ker 326 (327).

(17) Defendant bringing his case within four corners of R. 1 — Court will have to issue notice unless there are justifiable grounds to refuse to grant leave. AIR 1967 Andh Pra 145 (147): (1966) 2 Andh WR 214.

(18) Court should not refuse to issue third party notice merely because a difficulty may arise. (1967) 2 Mad LJ 446: 80 Mad LW 362 °° AIR 1967 Andh Pra 145 (147): 1966) 2 Andh WR 214.

(19) Suit on promissory note by endorsee against maker alone — Original payee (endorser) not impleaded — Plea by maker that payments made to endorser were not given credit to — Application to implead endorser under third party procedure. Held on facts third party procedure not applicable to case. AIR 1962 Mad 202 (205): (1962) 1 Mad LJ 246.

(20) It applies only to cases, where there is a contract of indemnity and if a decree is passed against the defendant, he is entitled to be indemnified by the third party. (1962) 2 Ker LR 23.

(21) Because the petitioner could file an independent suit, it would not disentitle him to implead the third party under O. 8-A. 81 Mad LW 32: (1968) 2 Mad LJ 12.

(22) Payments made by one person, a debtor to another (the husband of the creditor), (due to misrepresentation). The claim is not on any indemnity express or implied and the provisions of O. 8-A will not apply. AIR 1962 Mad 243 (244): (1962) 1 Mad LJ 49. (AIR 1926 All 605, Distinguished.)

(23) Suit by assignee of mortgagee — Defendant mortgagor seeking to implead original mortgagee as party-defendant alleging discharge of debt before assignment — Held O. 8-A, R. 1 applies. AIR 1965 Mad 495 (496): (1965) 2 Mad LJ 160.

Order 8-A, Rule 2 (Mad) — Note 1

(1) Third party can raise all grounds to the action available against the party defendant who seeks to bring him on record — Jurisdiction of the Court is one such point. AIR 1961 Mad 367 (368): (1961) 2 Mad LJ 335.

Order 8-A, Rule 3 (Mad) — Note 1

(1) Rule 3 of O. 8-A (Madras) does not limit the scope of O. 8-A so as to make it applicable only to cases where suit claim is admitted. **(1969) 1 Mad LJ 168: 82 Mad LW 134.**

R. 4. Procedure on default.—Where the third party does not enter appearance in the suit and the suit is decreed by consent or otherwise in favour of the plaintiff, the Court may pass such decree as the nature of the case may require, against the third party and in favour of the defendant on whose behalf notice was issued:

Provided that execution thereof shall not be issued without leave of the Court until after satisfaction by such defendant of the decree against him.

R. 5. Third party directions.—If the third party enters appearance the defendant on whose behalf notice was issued may apply to the Court for directions; and the Court may, if satisfied that there is a question to be tried as to the liability of the third party to make the contribution or pay the indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the Court may direct; and if not so satisfied, may pass such decree or order as the nature of the case may require.

R. 6. Leave to defend.—The Court may upon the hearing of the application mentioned in Rule 5, give the third party liberty to defend the suit upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, documents to be delivered or amendments to be made, and give such directions as appear proper for the most convenient determination of the question or questions in issue, and as to the mode and extent in or to which the third party shall be bound or made liable by the decree in the suit.

R. 7. Costs.—The Court may decide all questions of costs, as between the third party and the other parties to the suit, and may order any one or more to pay the costs of any other, or others or give such direction as to costs as the justice of the case may require.

R. 8. Questions between co-defendants.—Where a defendant claims to be entitled to contribution from or indemnity against any other defendant to the suit, a notice may be issued and the same procedure shall be adopted for the determination of such questions between the defendants as would be issued and taken, if such last-mentioned defendant were third party; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the suit.

R. 9. Further parties.—Where any person served with a third party notice by a defendant under these rules claims to be entitled to contribution from or indemnity

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Order 8-A (Madras) Rule 5 — Note 1

(1) It is not correct to say that once the defendant obtains the leave of Court under O. 8-A to issue notice to a third party the Court has no option but to add the third party. AIR 1957 Andh Pra 939 (940).

(2) At the stage of asking for directions under this rule, the Court exercises its discretion in the matter and it is then that the defendant has to show a prima facie case within R. 1 that he is entitled to bring the third party on record. At that stage it will be open to the plaintiff to prefer his objections and the third party to show either by evidence or by arguments at the Bar the special circumstances which require that the directions should not be given and the application should be dismissed. (1955) 68 Mad LW 371 (375, 376).

(3) Directions for contribution or indemnity by the third party can be asked for at or after the trial of the suit, or even after disposal of appeal. (1967) 2 Mad LJ 446: 80 Mad LW 362.

(4) Application to implead a third party under R. 1 — Leave sought refused under R. 1 — It cannot be an order passed under R. 5 as Rule 5 relates to a subsequent stage. AIR 1967 Andh Pra 145 (146): (1966) 2 Andh WR 214.

(5) Suit for ejectment by purchaser of property — Defendant applying for addition of vendor as co-defendant alleging agreement of sale between vendor and defendants with notice to purchase — Order 8-A would not apply, since the alleged right of the petitioner under the agreement of sale could not be a valid defence to an action in ejectment. AIR 1967 Mad 344 (345): (1967) 1 Mad LJ 275.

Order 8-A (Madras) Rule 8 — Note 1

(1) The third party procedure can be availed of as against a person already on record. AIR 1953 Mad 927 (927).

[See also (1967) 2 Mad LJ 446: 80 Mad LW 362.]

(2) In a claim against a co-defendant under O. 8-A, R. 8 (Mad), where the co-defendant admitted his liability to the defendant, the decree cannot be challenged on ground of absence of proper notice. AIR 1962 Mad 429 (430): (1962) 2 Mad LJ 184.

against any person not already a party to the suit, he may, by leave of the Court, issue a third party notice to that effect, and the preceding rules as to the third party procedure shall apply mutatis mutandis to every notice so issued and the expressions "third party notice" and "third party" in these rules shall apply to and include every notice so issued and every person served with such notice respectively." (21-8-1951): Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-68].

Mysore

After Order VIII insert the following as Order VIII-A, namely:—

ORDER VIII-A

THIRD PARTY PROCEDURE

R. 1. (1) Where in respect of the claim made against him in the suit, a defendant claims to be entitled to contribution from or indemnity against any person not already a party to the suit (hereinafter called the third party) he may by leave of Court, issue a notice (hereinafter called the third party notice) to that effect, sealed with the seal of the Court.

(2) An application for leave to issue such notice shall be filed along with the written statement of the said defendant and be accompanied by a draft of the notice sought to be issued. The notice shall state the nature and grounds of the claim and when the draft of the same is approved by Court with or without corrections, it shall be served on the third party together with a copy of the plaint and a copy of the said defendant's written statement in the manner prescribed for the service of summons.

R. 2. (1) If on being served with such notice the third party does not enter appearance on or before the date fixed therein for his appearance, he shall be deemed to admit the validity of the decree that may be passed against the defendant, on whose behalf the notice was issued, whether upon contest or consent or otherwise, and to admit his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice.

Provided that a person so served and failing to appear may, at any time before the disposal of the suit, apply to Court for leave to appear and the Court may grant such leave upon such terms, if any, as it may think fit to impose.

(2) Where the third party does not enter appearance in the suit and the suit is decreed upon contest or consent or otherwise against the defendant on whose behalf the notice was issued, the Court may in the said decree make such directions as to contribution or indemnity, as the case may be, against the third party and in favour of the said defendant as the circumstances of the case may require.

Provided that the execution thereof shall not issue against the third party without the leave of the Court until after satisfaction by such defendant of the decree against him.

R. 3. If the third party desires to dispute either the claim made against him in the third party notice or the plaintiff's claim in the suit or both, he shall enter appearance in the suit on or before the date fixed therefor in the notice.

R. 4. When the third party enters appearance under Rule 3 or upon leave being granted under the proviso to sub-rule (1) of Rule 2 he shall apply to Court for directions as to further proceedings to be taken on the notice setting out his case or pleas in respect of the same. Notice thereof shall be given both to the defendant on whose behalf the third party notice was issued as well as to the plaintiff, fixing an early date for its hearing.

R. 5. (1) On hearing of such application—

(a) if the Court is of the opinion either that the claim made in the third party notice is prima facie not warranted or that it is not so intimately connected with the plaintiff's claim in the suit as to render its being conveniently tried along with the plaintiff's claim in the suit, or that its trial in the suit will unduly prolong or hamper the trial of the suit, the Court may dismiss the proceedings on the third party notice.

(b) if the Court is satisfied that there is a question to be tried as to the liability of the third party to make the contribution or pay the indemnity claimed, in whole or in part, and that it is just and convenient to try the same in the suit itself, the Court may order the question of such liability as between the third party and the defendant giving notice, to be tried in such manner as it may direct and may by the said order also give liberty to the third party to defend the suit itself upon such terms as may be just.

(2) When the Court proceeds under Cl. (b) of sub-rule (1) it shall also give such directions as may be necessary for the delivery of pleadings, production of documents or the taking of further appropriate proceedings in the suit.

(3) If upon trial a decree comes to be passed either on contest or consent or otherwise against the defendant on whose behalf notice was given, the Court shall in such decree make such direction as to contribution or indemnity, as the case may be, against the third party and in favour of the said defendant as the circumstances of the case may require, and also as to whether execution in respect of such direction against the third party shall or shall not be conditional upon the defendant satisfying the decree against him.

(4) The Court, while making such decrees, may decide all questions of costs as between the third party and other parties and may order any one or more to pay the costs of any other or others and give such directions as to costs as the justice of the case may require.

R. 6. (1) Where the Court dismisses the proceedings on a third party notice under clause (a) of sub-rule (1) of Rule 5, the claim made in the third party notice shall be deemed to have been left undecided, and the defendant on whose behalf notice was issued will be at liberty to take such other independent proceeding in respect thereof as may be open to him, as if no such notice had been issued by him.

(2) Where the Court decides to proceed under clause (b) of sub-rule (1) of Rule 5, the third party shall, as from the date on which the third party notice was served on him be a party to the suit and shall have—

(a) the same rights as respects the claims made against him by or the decree passed against him in favour of the defendant on whose behalf the notice was issued, as if he had been sued in the ordinary way by the said defendant; and

(b) where he is given the liberty to defend the suit itself, the same rights as respects his defence in the suit and the decree passed therein as if he had been sued in the ordinary way by the plaintiff in the suit.

(3) On the making of an order under clause (b) of sub-rule (1) of Rule 5, the cause-title of the suit shall be amended by inserting the name of the third party in the array of defendants, with the addition in brackets after his name the words "Third Party on the notice of the defendant served on." [30-3-1967.]

ORDER IX

APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE

R. 1. Parties to appear on day fixed in summons for defendant to appear and answer.—On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

[1882 and 1877, S. 96; 1859, S. 109.]

ORDER 9 (GENERAL) — SYNOPSIS

1. Applicability of O. 9 to execution proceedings.
2. Applicability of O. 9 to applications under O. 9 itself.
3. Applicability of O. 9 to miscellaneous proceedings — See also Notes under S. 141 and O. 9, R. 9.
4. Failure of party to appear at adjourned hearing — See Notes under O. 17, R. 2.

Order 9 (General)

1. Applicability of Order 9 to execution proceedings.— (1) Order 9 does not apply to execution proceedings. AIR 1955 Nag 305 (306): ILR (1956) Nag 390 (DB) °° 1957 Jab LJ 257 (258) (DB) °° AIR 1948 Mad 337 (338) °° (1941) 22 Pat LT 965 (967).

[But see AIR 1945 Pat 132 (132, 133) (DB) °° AIR 1924 Mad 715 (715) °° AIR 1969 Pat 79 (82) °° AIR 1962 Raj 107 (108): 1961 Raj LW 218. (AIR 1963 SC 23, Rel. on; AIR 1954 Raj 15, Dist.)]

(2) When an execution application is dismissed for default the party can file a fresh application. (1941) 22 Pat L Tim 965 (967) °° AIR 1923 All 460 (460): 45 All 148 (DB).

(3) When an execution application is dismissed for default the party can invoke the inherent powers of the court for a re-hearing. AIR 1958 Andh Pra 341 (341, 342) °° AIR 1957 Mad 353 (354) °° 1957 Jab LJ 257 (258) (DB) °° AIR 1955 Nag 297 (298): ILR (1955) Nag 962 (DB) °° 1955 Ker LT 870 (873) °° AIR 1954 All 98 (99) °° AIR 1962 Raj 107 (108): 1961 Raj LW 218.

[But see (1941) 22 Pat L Tim 965 (966).]

(4) Prior to insertion of Rules 104 and 105 in O. 21 (Andhra Amendment) there was no provision in O. 9 for restoration of execution application dismissed for default; but after the insertion, a specific statutory provision has been made in O. 21, R. 105 (1). Consequently in these matters the question of exercise of inherent powers by the Court does not arise. AIR 1963 Andh Pra 127 (128): (1962) 2 Andh WR 21.

2. Applicability of Order 9 to applications under Order 9 itself. — (1) Where an application under Rr. 4 or 9 or R. 13 of Order 9 is itself dismissed for default,

(a) it has been held in some cases that a fresh application to restore that application can lie. AIR 1948 Mad 480 (480) °° AIR 1966 Andh Pra 263 (264, 265): (1964) 2 Andh WR 315 °° AIR 1961 Manipur 35 (36).

(b) On the other hand, the other cases have held that a second application to restore a prior application dismissed for default does not lie. AIR 1923 Bom 386 (386) (DB) °° AIR 1929 Cal 17 (18) (DB) °° AIR 1922 Pat 121 (121): 4 Pat L Jour 287 (DB).

(c) The following cases held that the application for restoration can itself be treated as a second application for restoring the suit provided there is no bar by limitation. AIR 1924 All 503 (504): 46 All 319 (DB) °° AIR 1927 Cal 534 (536): 54 Cal 405 (DB) °° AIR 1914 Mad 438 (438).

(d) In a proper case the Court can also restore a prior application dismissed for default under its inherent powers. AIR 1929 All 624 (624) (DB) °° AIR 1927 Cal 534 (536): 54 Cal 405 °° AIR 1968 Pat 112 (113).

(e) Sole plaintiff dying — Suit dismissed for failure of either party to appear on hearing date — Two separate cases filed by two different persons for substitution claiming to be legal representatives of deceased — Court proceeding to take evidence — Case demands suo motu exercise of inherent powers of restoration of suit. AIR 1968 Pat 110 (111, 112): 1968 BLJR 155 (DB).

(2) An application for the restoration of a suit which application itself has been dismissed for default can be restored under the inherent power of the Court but not under O. 9, R. 9 read with Section 141. AIR 1932 Nag 101 (102): 28 Nag LR 83 (FB). (OVERRULING AIR 1923 Nag 293: 19 Nag LR 119: 7 Nag LR 32 must also be deemed as overruled by this decision.) °° AIR 1954 Assam 1 (6): ILR (1953) 5 Assam 538 (FB) °° AIR 1958 Pat 107 (107, 108) °° 1956 Madh B LJ 959 (961) °° AIR 1959 Pat 121 (126): 1958 BLJR 783 (FB). (Section 141 does not make Order 9 applicable to proceeding started under Rr. 4, 9 and 13.) °° AIR 1966 Orissa 24 (26): 31 Cut LT 769.

[But see (1923) 72 Ind Cas 547 (548) (Nag).]

(3) Where a suit is dismissed for default and an application for restoration of the suit is also dismissed for default and an application is made for restoration of the latter application, the Court cannot enter into the merits of the application to restore the suit. AIR 1944 Nag 317 (317): ILR (1944) Nag 558.

(4) Suit dismissed in absence of both parties — Application for restoration — Notice to defendant not necessary — Principle will apply in case of restoration of application for restoration. (1963) 65 Pun LR 259 (261, 262): 1963 Cur LJ 140 (DB).

3. Applicability of O. 9 to miscellaneous proceedings. — See also Notes under S. 141 and O. 9, R. 9—(1) Reference under S. 146 (1) of Criminal P. C. to Civil Court is governed by that section only — O. 9, C. P. Code will not apply to such proceedings. AIR 1965 All 368 (369, 370): 1965 (2) Cri LJ 177: 1964 All LJ 635 (DB).

(2) An attaching creditor of the plaint claim in the suit cannot maintain an application under O. 9, R. 9. The attachment does not obtain for him any assignment, creation or devolution of interest within the meaning of O. 22, R. 10 (1). 1959 Ker LT 284: 1959 Ker LJ 166.

(3) Application for fixation of fair rent under Kerala Act 1 of 1964 — Dismissal for default — Provisions of O. 9 are applicable. AIR 1967 Kerala 287 (288): 1967 Ker LT 317 (FB).

(4) Order dismissing maintenance petition for default — O. 9 C. P. Code applicable to maintenance proceedings under S. 488, Cr. P. Code also. (1965) 31 Cut LT 789 (793, 794): ILR (1965) Cal 566.

R. 2. Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.—Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed:

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

[1882 and 1877, S. 97; 1861, S. 5.]

HIGH COURT AMENDMENTS

Allahabad

After the words, "for such service" insert the words "or that the plaintiff has failed to comply with the rules for filing the copy of the plaint for service on the defendant."

Orissa

In Rule 2, for the words "court-fee or postal charges" substitute the words and comma "court-fee, postal or other charges" [7-5-1954].

Order 9, Rule 1 — Note 3 (contd.)

(5) Order rejecting plaint for non-payment of deficit court-fee within time granted by Court — Non-compliance due to mistake of pleader in entering wrong date in his diary — Application under S. 151 for restoration of suit held maintainable. AIR 1964 Orissa 134 (136): ILR (1964) Cut 18. (Order 9 does not apply.)

(6) Order is applicable to election disputes under Representation of the People Act (1951). AIR 1965 Pat 378 (381, 382): 1966 BLJR 588 (DB). (Election petition can be dismissed for default under R. 8.) °° AIR 1968 Punj 152 (158, 159): ILR (1967) 2 Punj 430.

4. Failure of party to appear at adjourned hearing. See Notes under O. 17, R. 2.

ORDER 9, RULE 2 — SYNOPSIS

1. Scope.
2. "Defendant."
3. Failure to pay court-fee or postal charges when entails dismissal.
4. Appeal.

1. Scope. — (1) The Court cannot dismiss the suit under this rule for failure on the part of the plaintiff to furnish the correct address of the defendant, or his failure to file the summons and the copy of the plaint in Court in reasonable time. AIR 1931 Lah 655 (655) °° ILR (1952) 2 Raj 382 (383).

(2) The failure contemplated is not merely an omission to pay the requisite charges but also to pay the same within the time fixed. (1911) 7 Nag LR 114 (116).

(3) Where a suit is dismissed for default and an application for its restoration is dismissed for failure to pay the process fees, the order dismissing the application falls under R. 9 and not under this rule. AIR 1936 All 737 (738) (DB).

(4) This rule applies to an application under O. 34, R. 5 by virtue of S. 141 and such an application can be dismissed for non-payment of process fees. AIR 1937 Sind 273 (278): 31 Sind LR 180.

2. "Defendant." — (1) The word 'defendant' does not include the guardian ad litem of a minor defendant and the mere fact that no process fee is paid for issuing notice to such a guardian is no ground for dismissing the suit under this rule, especially where there are major defendants in the suit. (1912) 11 Ind Cas 317 (318): 1912 Pun Re No. 35 °° AIR 1920 Pat 820 (821) (DB).

(2) Where the summons has been served upon a wrong person instead of on the real defendant, and he appears and denies his liability, the proper order to pass is to dismiss the suit with costs. (1880) 4 Bom 619 (623).

3. Failure to pay court-fee or postal charges, when entails dismissal.— (1) Unless the Court fixes a time for the deposit of the process fee under O. 48, R. 1 (2) and gives the party reasonable time and opportunity to comply with its orders, it cannot dismiss the suit. AIR 1924 Nag 298 (299) °° AIR 1920 Cal 244 (244, 245) (DB).

(2) Where there is failure on the part of the plaintiff to pay process fee for a newly added defendant the failure will not entail the dismissal of the whole suit. The dismissal should be only as against the particular defendant. (1880) 2 All 318 (319) (DB) °° AIR 1950 Nag 188 (189) °° AIR 1921 Pat 422 (422) (DB).

[But see (1868) 5 Bom HCR 118 (121).]

(3) According to the proviso, if notwithstanding the plaintiff's default in paying the process fees the defendant appears, the Court cannot dismiss the suit. AIR 1919 Pat 372 (373) (DB) °° (1891) 15 Bom 160 (162, 163).

(4) Where the plaintiff is prepared to pay the process fee but it is the Court which refuses to take it because according to its view the process fee is being deposited later, this rule does not strictly apply. AIR 1936 All 737 (739) (DB).

R. 3. Where neither party appears, suit to be dismissed.—Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

[1882, S. 98; 1877, Ss. 98, 99; 1859, S. 110.]

Order 9, Rule 2 — Note 3 (contd.)

(5) There is no provision in Civil P. C. with regard to the fixing of a date before calling upon the plaintiff to file process-fees and processes. In absence of any such provision, it could be open to the Court either to fix a date for the appearance of the defendant and then demand process-fees, etc., or to require the plaintiff to file the process-fees, etc., and thereafter fix a date for the appearance of the defendant or for hearing. AIR 1968 Pat 110 (111): 1968 BLJR 155. (AIR 1939 Pat 160, OVERRULED.)

(6) Where there are several defendants, the plaintiff must deposit sufficient process fees for service on all the defendants. It is not open to him to contend that the Court should serve at least the defendants for whose service the money paid will be sufficient. AIR 1941 Pat 402 (403).

4. Appeal. — (1) The order of dismissal is not a decree within Section 2 (2) and no appeal lies therefrom. AIR 1916 All 326 (326): 38 All 357 (DB) °° (1883) 9 Cal 627 (628) (DB).

ORDER 9, RULE 3 — SYNOPSIS

1. "Where neither party appears."
2. "When the suit is called on for hearing."
3. "The Court may make an order that the suit be dismissed."
4. Appeal and review.

1. "Where neither party appears." — (1) If the plaintiff or his agent or his pleader duly instructed is present, the fact that no evidence is adduced will not enable the Court to order a dismissal under this rule. AIR 1954 Punj 174 (175) °° AIR 1918 All 333 (335): 40 All 590 (DB) °° AIR 1922 Pat 504 (507).

(2) If both the parties are absent, the mere presence of the pleaders without instructions is not an appearance and a dismissal under this rule is justified. AIR 1934 Pat 18 (19) °° AIR 1952 Kutch 31 (32) °° AIR 1938 Cal 547 (548) (DB).

(3) Where the plaintiff and some of the defendants do not appear but the other defendants appear and the suit is dismissed, the dismissal, in so far as it is against the absent defendants, is under this rule, while as against the defendant or defendants who appear, it is under R. 8. AIR 1920 Bom 54 (55): 44 Bom 767 (DB) °° AIR 1926 All 169 (170): 48 All 97 (DB).

(4) Application of both parties for adjournment rejected — Parties asked to get ready — Plaintiff present but not ready when called for hearing — Suit dismissed — Held mere physical presence in Court is not appearance under O. 9 — Appearance means taking part in suit — Application for restoration bound to succeed. ILR (1964) Cut 149.

2. "When the suit is called on for hearing." — (1) The hearing referred to is obviously the first hearing after the issue of the summons to the defendant, and not necessarily a hearing of evidence. AIR 1957 Cal 170 (171) °° AIR 1919 Sind 89 (91): 13 Sind LR 149 (DB) °° AIR 1922 Pat 252 (254): 6 Pat L Jour 650 (DB) °° AIR 1953 Vindh Pra 10 (11).

(2) Read with O. 17, R. 2, this rule may be applied to cases where the parties are absent at the adjourned hearings. AIR 1949 Sind 26 (37) (DB).

(3) It is not proper to dismiss a suit on a date on which the parties had no previous notice or at a place not notified or on a day fixed for considering only an application for amendment of the issues. AIR 1956 Hyd 139 (140): ILR (1956) Hyd 551 (DB) °° AIR 1952 Him Pra & B. 24 (25) °° (1913) 18 Ind Cas 280 (281) (Lah) °° ('04) 1904 Pun Re No. 37, p. 121 (122) °° AIR 1921 Pat 96 (97): 6 Pat L Jour 331 (DB).

(4) Where on the date fixed in the summons for the appearance of the defendant he has the opportunity of putting in the written statement, the mere fact that he does not actually file the same cannot detract from that day being the date of hearing. ILR (1955) Patiala 388 (396) °° AIR 1952 Pepsu 174 (177): ILR (1952) Patiala 345.

(5) After a preliminary decree has been passed, the suit cannot be dismissed for default of appearance. AIR 1924 PC 198 (200): 4 Pat 61: 51 Ind App 321 °° AIR 1932 Mad 519 (522) (DB) °° AIR 1933 Oudh 229 (230): 8 Luck 496 (DB).

(6) Even though a party may have appeared at any time on the date fixed, the consequence of his non-appearance or default will follow if he happens not to appear at the time when the suit is called on for hearing. AIR 1958 Pat 86 (87).

(7) Where the suit which was in the special list under Chapter X-R. 35 of the Original Side Rules of the High Court was struck out because neither party appeared before the Judge who made the order of dismissal, R. 3 of O. 9 cannot strictly apply as the suit was not called on for hearing. AIR 1965 Cal 547 (549).

3. "The Court may make an order that the suit be dismissed." — (1) A discretion is given to the Court in the matter of dismissing the suit. AIR 1936 Pat 437 (438).

(2) The Court has no power to strike a case off its file but can only make on order dismissing the suit. (1887) 10 Mad 270 (271) (DB).

R. 4. Plaintiff may bring fresh suit or Court may restore suit to file.—Where a suit is dismissed under Rule 2 or Rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

[1882, S.99; 1877, Ss. 98, 99; 1859, S. 110.]

HIGH COURT AMENDMENTS

Delhi and Himachal Pradesh

Same as that of Punjab—see Act 26 of 1966, Ss. 7 and 17.

Gujarat

Rule 4 shall be numbered Rule 4 (1) and the following sub-rule (2) shall be added to it, namely :—

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908[a], shall apply to applications under this rule." [17-8-1961.]

[a] Now see Limitation Act, 1963, S. 5.

Punjab, Haryana and Chandigarh

Same as that of Gujarat [14-2-1956]; See Act 31 of 1966, Ss. 29 and 32.

Order 9, Rule 3 — Note 3 (contd.)

(3) Where the parties state that the case it settled and at their request the case is struck off, it is not a dismissal for default under this rule. AIR 1917 Mad 495 (496, 497) (DB).

(4) It is clear from Order 9 that after summonses are served on the defendants, the suit can be dismissed but the plaint cannot be rejected. AIR 1963 Guj 79 (80): (1963) 4 Guj LR 437.

4. Appeal and review. — (1) A dismissal under this rule is not a decree within Section 2 (2) and, therefore, no appeal lies. AIR 1952 Him Pra & B. 24 (25, 26) °° AIR 1949 Sind 26 (28): ILR (1948) Kar 87 (DB).

(2) An order under this rule is not open to review. (1898) 2 Cal WN 318 (319) (DB) °° (1899) 26 Cal 598 (600, 601) (DB). (Obiter.)

(3) An order of dismissal based on an erroneous application of this rule is open to revision. AIR 1952 Kutch 31 (32).

ORDER 9, RULE 4 — SYNOPSIS

1. Scope.
2. "Sufficient cause."
3. Applicability of the rule to insolvency proceedings.
4. Applicability of the rule to miscellaneous applications.
5. Notice to defendant.
6. Appeal.
7. Revision.

1. Scope. — (1) Where a suit is dismissed under R. 2 or R. 3, or under O. 17, R. 2 read with these rules, a fresh suit is not barred. AIR 1948 Cal 366 (368) (DB) °° AIR 1925 Nag 31 (31) °° AIR 1929 All 131 (131): 50 All 837 °° 1966 All WR (HC) 733 (734) °° AIR 1964 All 300 (301). (Transferee pendent lite from plaintiff also entitled to bring fresh suit.)

[But see AIR 1928 Nag 220 (221).]

(2) A fresh suit may be brought notwithstanding the fact that no application for restoration has been made under this rule or even after an application under this rule has proved unsuccessful. AIR 1951 Him Pra 87 (88) °° AIR 1926 All 678 (678) °° AIR 1937 Pat 9 (11): 15 Pat 716 (DB).

(3) The effect of a restoration of the suit under this rule is to bring the suit back as regards parties, to the same position in which it was at the time of dismissal. AIR 1952 All 749 (750) °° AIR 1952 Pepsu 22 (22): ILR (1952) Patiala 27 °° AIR 1924 Cal 814 (815) (DB).

(4) As a matter of general rule, the intention would be to restore the suit and all incidental matters. AIR 1952 All 749 (750) °° AIR 1952 Pepsu 22 (22): ILR (1952) Patiala 27 °° AIR 1934 Mad 49 (51): 57 Mad 308.

[See also AIR 1968 Mys 283 (286): (1967) 1 Mys LJ 414. (Revival of ancillary orders depends upon terms on which order of dismissal is passed and also the terms on which Court restored the suit in question. AIR 1965 All 546, DISSENT. FROM; AIR 1934 Mad 49 and AIR 1956 Pat 271, Foll.)]

(5) Where a suit brought by a shebait in the name of an idol is dismissed for default under O. 9, R. 3 an application for restoration under this rule can be made by another shebait who is the shebait at the time

Order 9, Rule 4 — Note 1 (contd.)
of the application. AIR 1938 Cal 547 (548) (DB).

(6) An application under this rule for restoration of a plaint rejected under O. 7, R. 11 is misconceived. AIR 1952 Assam 149 (150): ILR (1952) 4 Assam 262.

(7) Where the defendant although he is physically present does not respond when the case is called and the plaintiff is also absent the dismissal of the suit is one under R. 3 and not under R. 8. AIR 1956 Pat 127 (128).

(8) The fact of the defendant's appearance in the suit itself by the filing of a written statement is not sufficient to take the dismissal outside the scope of R. 3 when he does not respond when the case is called. ILR (1948) 1 Cal 141 (143).

(9) Suit for dissolution of partnership and rendition of accounts — Court cannot dismiss the suit for default of appearance after passing a preliminary decree — Application by plaintiff to restore the suit so dismissed — Refusal of application is not justified. (1963) 65 Punj LR 1001 (1002) (DB).

(10) Suit dismissed under O. 9, R. 3 — Application to set aside dismissal of suit under O. 9, R. 4 — Application signed and filed by advocate — Vakalatnama filed by advocate subsequently — It is sufficient compliance with O. 3, R. 4 — Application is competent. AIR 1962 J and K 83 (84, 85): 1962 Kash LJ 42. (AIR 1937 Mad 239, Not foll.; AIR 1957 Andh Pra 172 (FB) and ILR 17 Cal 580 (PC), Rel. on.)

2. "Sufficient cause." — (1) An order under this rule without giving the applicant an opportunity to show sufficient cause is ultra vires. Madh BLJ 1955 HCR 1110 (1111) °° 1889 Bom PJ 216 (216) (DB).

(2) Where the plaintiff is prevented from attending Court due to unavoidable causes, there was sufficient cause for non-appearance. AIR 1931 Pat 87 (88).

(3) A bona fide mistake which is not unreasonable is a sufficient cause to order restoration. AIR 1935 Lah 163 (164) °° (1936) 165 Ind Cas 563 (564) (Lah).

(4) If sufficient cause is shown for non-appearance, the Court is bound to restore the suit; it has no choice in the matter. AIR 1953 Vindh Pra 10 (11) °° AIR 1933 Nag 39 (40): 28 Nag LR 295.

(5) In a Small Cause suit, the plaintiff filed the forms of summons for the settlement of issues, instead of the forms of summons for the final disposal of the suit as required by the proviso to O. 5, R. 5. After several adjournments for filing correct forms, the suit was fixed for disposal. No step, however, was taken and the suit was dismissed for default. AIR 1957 Pat 152 (154, 155).

(6) Suit dismissed under O. 9, R. 2 — Application for restoration filed beyond limitation—Court cannot grant relief under S. 151 — S. 5 of the Limitation Act had no application to O. 9, R. 4. (1966) 32 Cut LT 501 (502, 503): ILR (1965) Cut 562.

[But see AIR 1962 J and K 8 (9). (In Jammu and Kashmir, (J. and K.) Limitation Act, S. 5 applies.)]

3. Applicability of the rule to insolvency proceedings. — (1) Where an insolvency petition was dismissed on the analogy of R. 2 for non-payment of process-fee, a fresh application for insolvency is not barred, by virtue of the provisions of this rule. AIR 1928 Pat 116 (117) (DB) °° AIR 1919 Cal 108 (108) (DB).

(2) The dismissal for default of a creditor's application in insolvency proceedings to annul a transfer by the debtor as being fraudulent does not bar a fresh application for the same purpose. AIR 1951 Nag 268 (269): ILR (1950) Nag 331.

4. Applicability of the rule to miscellaneous applications. — (1) Where an application for a final decree in a mortgage suit has been dismissed for non-payment of batta, the applicant can file a fresh application for the same. AIR 1933 Mad 55 (56): 56 Mad 310 (DB).

(2) When an application for amendment of a decree is dismissed for non-payment of batta, a fresh application for amendment can be made. AIR 1933 Pat 208 (208): 12 Pat 179 (DB).

(3) Where an application for adjudication as an insolvent is dismissed on account of the default of both the parties an application can be made to restore the previous application. AIR 1933 Nag 39 (40): 28 Nag LR 295.

(4) When an application under O. 33 R. 1 is dismissed for default of both parties on the hearing date fixed under O. 33, R. 7, a second application is maintainable. AIR 1967 Pat 320 (323).

(5) Dismissal of revision for default of appearance — Restoration — Availability of right to file another revision petition in such a case no argument for not entertaining application for restoration in view of O. 9, R. 4. AIR 1967 J. and K. 93 (94): 1967 Kash LJ 220.

5. Notice to defendant. — (1) Notice to defendant is not necessary for restoration under this rule. AIR 1956 All 714 (714) (DB) °° AIR 1956 Pat 127 (128) °° AIR 1953 Vindh Pra 10 (11) °° AIR 1966 Orissa 232 (233, 234): 32 Cut LT 467. (Defendant can contest even without notice.) °° (1963) 65 Pun LR 259 (261, 262).

[See also AIR 1963 Him Pra 30 (32). Court restoring suit without issuing notice to defendants who were present on the day the order of dismissal of suit was made — Court held acted illegally and in any case indiscreetly in restoring suit.)

(2) Where the suit is restored and a date is fixed for the hearing of the case, the defendant is, as of right, entitled to a notice of such date, except in the case where he had been ex parte even before the suit itself was dismissed for the default of the

R. 5. Dismissal of suit where plaintiff, after summons returned unserved, fails for three months to apply for fresh summons.—[a][(1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that—

(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served; or

(b) such defendant is avoiding service of process; or

(c) there is any other sufficient cause for extending the time,

in which case the Court may extend the time for making such application for such period as it thinks fit.]

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

[a] Substituted by the Code of Civil Procedure (Amendment) Act XXIV of 1920, Section 2 for the original sub-rule (1).

[1882, S. 99A.]

Order 9, Rule 4 — Note 5 (contd.)

plaintiff. AIR 1945 Nag 185 (185): ILR (1945) Nag 312 °° ILR (1958) 8 Raj 95 (98) °° AIR 1933 All 522 (522, 523): 55 All 684 °° AIR 1952 All 749 (750).

6. Appeal. — (1) No appeal lies from any order passed under this rule. ILR (1948) 1 Cal 141 (144) °° AIR 1918 All 176 (177) (DB) °° AIR 1960 Pat 504 (504): 1960 BLJR 325. (AIR 1922 Pat 121 and AIR 1959 Pat 121 (FB). Disting.)

[See also AIR 1965 Cal 547 (549). (Suit in special list under Ch. 10, R. 35, Calcutta High Court Original Side Rules, struck out for want of prosecution — Application to set aside order dismissed — Appeal against dismissal order not maintainable, whether order is under S. 151 or O. 9, R. 4.)]

7. Revision. — (1) An order rejecting an application under this rule is not open to revision under S. 115, Civil Procedure Code, but the High Court can interfere under its inherent powers. AIR 1930 Lah 440 (441).

[But see (1936) 165 Ind Cas 563 (564) (Lah).]

ORDER 9, RULE 5 — SYNOPSIS

1. Applicability and scope.
2. "Returned unserved".
3. "Period of three months".
4. Fresh summons, when granted.
5. Waiver of summons.
6. Appeal.

1. Applicability and scope. — (1) Where there is no rule on the Original Side of the High Court of Calcutta which has expressly or impliedly excluded the operation of O. 9, R. 5 of the Code, O. 9, R. 5 applies to Ordinary Original Civil jurisdiction of the High Court. AIR 1954 Cal 369 (372): ILR (1956) 1 Cal 187.

(2) When Rule 5 speaks of the Court making an order dismissing the suit, 'the Court' contemplated can only be a Judge and cannot be the Master. The Master cannot dismiss a suit. Where, however, the rule speaks of 'the Court' which may be satisfied that one or another of the specified reasons made it impossible for the plaintiff to serve the summons within the usual time, the expression means or at least includes the Master. (1957) 61 Cal WN 212 (215) (DB).

(3) Court has no inherent jurisdiction to restore suit dismissed under O. 9, R. 5. 1962 All WR (HC) 205: 1962 All LJ 268.

(4) Suit dismissed against one of several defendants for non-service of summons on him → Court may subsequently add such defendant as party to suit under O. 1, R. 10 (2) — No question arises of inconsistent decrees, earlier order dismissing suit not being a decree — Order of dismissal does not operate as res judicata — Plaintiff's right to institute fresh suit against such defendant reserved by O. 9, R. 5 (2) — Fresh suit need not necessarily be by presentation of plaint. AIR 1966 Cal 60 (61, 62).

2. "Returned unserved." — (1) Where it cannot be said that the summons has been issued to the defendant in the manner prescribed by law, the Court has no jurisdiction to dismiss the suit under the penal provisions of this rule. AIR 1949 East Punj 49 (51).

(2) Where a summons is returned as "served" but the Court fixes a date for proof of service and on such date the proof is not forthcoming, steps can be taken under this rule for issue of fresh summons. AIR 1942 Pat 56 (58) (DB).

[But see (1940) 22 Pat L Tim 950 (951).]

3. "Period of three months." — (1) A dismissal of a suit under this rule before the expiry of the period of three months is premature and irregular. AIR 1954 Mad 73 (73) °° AIR 1933 Pat 557 (558) °° AIR 1931 Mad 795 (797).

HIGH COURT AMENDMENTS

Bombay: Dadra and Nagar Havelia

For R. 5 substitute the following :—

5. Dismissal of suit where plaintiff after summons returned unserved fails for two months to apply for fresh summons.—(1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of two months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons, the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff satisfies the Court that—

(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time,

in which case the Court may extend the time for making such application for such period as it thinks fit.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Kerala : Laccadive, Minicoy and Amindivi Islands

In Rule 5—

(i) for the existing marginal note the following shall be substituted, namely :—

"Dismissal of suit where plaintiff fails to apply for steps".

Order 9, Rule 5 (contd.)

4. Fresh summons, when granted. — (1) The plaintiff must apply for fresh summons within 3 months from the date of the return of non-service on the defendant. AIR 1954 Cal 369 (373): ILR (1956) 1 Cal 187 °° AIR 1931 Lah 655 (655).

(2) If the plaintiff wants an extension of time he has to apply to the Court within three months and satisfy the Court as to any of the circumstances mentioned in subcls. (a), (b) and (c). AIR 1954 Cal 369 (373): ILR (1956) 1 Cal 187 °° (1878) 3 Cal 312 (313).

(3) Where the plaintiff has not made an application for the issue of a fresh summons within three months, nor has he made an application within that period for an extension of time, an application for such extension, far less, an application for the issue of a fresh summons can no longer be entertained. In the situation which arises, the Court will be bound to make an order that the suit be dismissed. (1957) 61 Cal WN 212 (216) (DB).

5. Waiver of summons.— (1) Where the defendants could not know, and it would not be possible that they would know, without making an appearance and searching the records of the case and apprising themselves of the facts, that the order for fresh summons was neither applied for nor obtained within three months of the date of the return of the unsuccessful service, the defendants could not, by entering appearance, be said to have disabled themselves from saying that the suit be dismissed under O. 9, R. 5. AIR 1954 Cal 369 (373): ILR (1956) 1 Cal 187.

6. Appeal. — (1) This rule does not apply to appeals as O. 41 contains specific rules covering corresponding cases that arise in appeal. AIR 1927 Bom 68 (69, 70): 50 Bom 815 (DB).

(2) Where an application for the issue of fresh summons was dismissed on the ground that it was presented after the expiry of three months from the date of the return of the original summons and in the appeal preferred against the order no notice of the appeal was served on the respondent named, it was held that by reason of the expiry of three months from the date on which the writ of summons was returned unserved and the failure of the appellant to make any application for the issue of fresh summons within that period, a valuable right had accrued in favour of the defendant and the appellant could not have an order destructive of that right in the absence of the respondent. (1957) 61 Cal WN 212 (216) (DB).

(3) There is no provision in the Code which confers on the defendant a right to have the suit dismissed against him on the ground of delay in serving the writ of summons unless the case comes within the four corners of O. 9, R. 5. A case in which the writ of summons was never returned as served but was lost does not come within Order 9, Rule 5. If in such a case the Court directs the issue of a duplicate writ of summons no right of the defendant is adjudicated. The order being one which merely regulated the procedure in the suit without determining any right or liability affecting the merits of the case an appeal against it would not lie. AIR 1961 Cal 386 (389): ILR (1961) 2 Cal 430 (DB).

(ii) in sub-rule (1) for the words "three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers" the words "one month from the next hearing of the suit or from the notice regarding the non-service of summons given by the Court to the plaintiff or his counsel" shall be substituted [9-6-1959]; see also Reg. 8 of 1965, S. 3.

Orissa

For R. 5 substitute the following :—

"5. Dismissal of suit where plaintiff, after summons returned unserved, fails to file necessary requisites for fresh summons :—

(1) Where after summons has been issued to the defendant, or to one of similar defendants and returned unserved, the plaintiff fails to file necessary requisites for the issue of a fresh summons, within the period fixed by the Court, it shall make an order that the suit be dismissed as against such defendant, and

(2) in such a case, the plaintiff may (subject to the law of limitation) bring a fresh suit [3-5-1968].

R. 6. Procedure when only plaintiff appears.—(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing then—

When summons duly served.

(a) if it is proved that the summons was duly served, the Court may proceed ex parte;

When summons not duly served.

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

When summons served, but not in due time.

(c) if it is proved that the summons was served on the defendant but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the

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ORDER 9, RULE 6 — SYNOPSIS

1. Scope.
2. Ex parte decree.
3. Second summons.
4. Sufficient time.

1. Scope. — (1) This rule contemplates the hearing of the suit on the day fixed in the summons, whereas O. 17, R. 2 contemplates the hearing of the suit on some later date to which the hearing may be adjourned. AIR 1957 All 344 (346) (DB) •• AIR 1922 Pat 485 (487, 488): 1 Pat 188 (DB) •• AIR 1937 All 347 (348) (DB).

(2) If the defendant had already appeared in answer to the summons but fails to appear at the adjourned hearing, the case falls under O. 17, R. 2. AIR 1951 Assam 13 (14): ILR (1950) 2 Assam 527 (DB) •• AIR 1945 Sind 98 (102): ILR (1945) Kar 1 •• (1872) 2 All 67 (70, 71): 5 Ind App 283 (PC).

(3) The words 'hearing' in R. 6 of O. 9, has been used not in its broad or general sense but in its technical sense to mean a hearing at which the Judge either takes evidence or hears arguments or considers questions relating to the determination of the suit which would enable him finally to come to an adjudication upon it. AIR 1960 Punj 34 (35): 61 Pun LR 737 (DB).

(4) When an appearance under O. 9 is in question the word "hearing" means the first day of the hearing. AIR 1927 Mad 799 (800) •• AIR 1937 All 347 (348) (DB).

(5) Ex parte merely means in the absence of the other party. AIR 1955 SC 425 (431): (1955) 2 SCR 1. (AIR 1945 Sind 98: ILR (1945) Kar 1, OVERRULED.)

(6) When a party has been ordered to appear in person under O. 3, R. 1 and does not appear, then by virtue of O. 9, R. 12, provisions of Rule 6 or Rule 8 apply to him and the suit can be dismissed in default of his appearance, if plaintiff, and proceeded ex parte, if defendant. ILR (1955) Patiala 459 (462).

(7) The provisions of O. 9, R. 6, do not apply to a decree passed in a summary suit. Order 37 is a self-contained order which deals with the right of the defendant to appear in a summary suit in which a decree has to be passed if leave to defend is not given to him. AIR 1958 Bom 10 (12): ILR (1957) Bom 520 (DB).

(8) Order 9, Rule 6 (1) (a) enables the Court to proceed ex parte where the defendant is absent even after due service. That

suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

[1882, S. 100; 1877, Ss. 100, 101; 1859, Ss. 111, 112, 113.]

HIGH COURT AMENDMENTS

Orissa

Same as that of Patna.

Patna

In Rule 6 (1) (c) delete the words "and shall direct notice of such day to be given to the defendant" and substitute a full stop for the comma after the words "fixed by the Court" [6-5-1946].

Rajasthan

In Rule 6, the words "the Court may proceed ex parte" shall be substituted by the words "the Court may make an order that the suit be heard ex parte" [30-6-1956].

Order 9, Rule 6 — Note 1 (contd.)

provision contemplates two sets of cases: (1) The day on which the defendant fails to appear is one of which the defendant has no intimation that the suit will be taken up for final hearing, and (2) where the stage of first hearing is passed and the hearing which is fixed is for the disposal of the suit. The effect of proceeding ex parte in the two sets of cases would mean a great difference in the result. **AIR 1964 SC 993 (1003, 1004, 1005): (1964) 5 SCR 946.**

(9) Physical presence of party engaging a lawyer, after lawyer lets him down, is not appearance within Rr. 6, 8 — Appearance of party engaging a lawyer means appearance with his pleader. AIR 1966 Cal 307 (310): 69 Cal WN 828.

(10) Rule applies where parties against whom orders are passed are alive at the time of passing them. AIR 1967 Ker 135 (138): 1967 Ker LT 777.

(11) Proceedings under Payment of Wages Act (1936) — Provisions of Or. 5, 9 and 27 read with Ss. 15 and 18 of the Act clearly supply the necessary guidance for the Authority when it chooses to proceed ex parte. AIR 1963 Punj 122 (123, 124): (1963-64) 25 FJR 414. (Notice of application under Section 15 served only three days prior to date of hearing — Appearance of clerk of employer — Prayer for adjournment — Refusal — Ex parte proceedings not justified.)

(12) Summons served but defendant not appearing — Court is right in ordering case to proceed ex parte under R. 6 (1) (a) — Examination of plaintiff's witness concluded and case adjourned for delivery of judgment — Remedy of defendant is under O. 9, R. 13 and not under R. 7. (1968) 34 Cut LT 1180.

(13) The plaintiff has to prove a prima facie case even though the defendant is ex parte. It is also the duty of the Court, even when it hears a case ex parte, to consider the interest of the absent party and not to pass a decree except on proof by the plaintiff that he is entitled to that decree. 1968 Ker LT 462.

2. Ex parte decree. — (1) Before proceeding ex parte the Court must be satisfied that there is due service of summons on the defendant. AIR 1949 Mad 396 (397) °° (1900) 23 All 99 (100) (DB) °° AIR 1964 J and K 67 (72): 1964 Kash LJ 24 (FB) °° AIR 1961 Pat 152: 1961 BLJR 478.

(2) Where the Court thinks fit to direct fresh notices to the defendants but no fresh notices went, an order directing ex parte proceedings is unjustified. AIR 1962 Punj 443 (445): 64 Punj LR 590 (DB).

(3) All that Rule 6 (1) (a) does is to remove a bar and no more. It merely authorises the Court to do that which it could not have done without this authority, namely, to proceed in the absence of one of the parties. **AIR 1955 SC 425 (431): (1955) 2 SCR 1.** (AIR 1945 Sind 98: ILR (1945) Kar 1; AIR 1952 Raj 12: ILR (1951) 1 Raj 311 and AIR 1949 Oudh 59: ILR (1950) All 6 (FB), **OVERRULED.**)

(4) Where the defendant appears by a pleader and the pleader applies for adjournment and on the refusal of the same, reports "no instruction," then there is no appearance of the defendant as such in the case and further proceedings against the defendant are ex parte. AIR 1956 Nag 179 (182, 183): ILR (1956) Nag 132 (DB). (AIR 1948 Nag 310: ILR (1948) Nag 462, **Overruled.**)

(5) The plaintiff is bound to prove his case to the satisfaction of the Court and his burden is not lightened because the defendant is absent. AIR 1956 Cal 87 (88) (DB) °° AIR 1942 Bom 344 (344) (DB).

(6) It is not the duty of the judge to tell the plaintiff how much evidence he should produce, in order to succeed in his suit. ILR (1951) 1 Raj 173 (176) (DB).

[But see AIR 1948 Nag 168 (170): ILR (1947) Nag 982.]

R. 7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.—Where the Court has adjourned the hearing of the suit ex parte and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

[1882, S. 101; 1877, Ss. 100, 101; 1859, S. 111.]

HIGH COURT AMENDMENT

Rajasthan

The following shall be substituted for Rule 7, namely,—

"7. Where the Court has adjourned the hearing of the suit after making an order that it be heard ex parte and the defendant at or before such hearing appears and assigns good cause for his previous non-appearance, the Court may upon such terms as it directs as to costs or otherwise set aside the order for the hearing of the suit ex parte and hear the defendant in answer to the suit as if he had appeared on the day fixed for his appearance" [30-6-1956].

Order 9, Rule 6 — Note 2 (contd.)

(7) The Court while ordering that the suit should proceed ex parte cannot also strike off the defence. AIR 1952 Raj 12 (15): ILR (1951) 1 Raj 311 (DB). (Overruled on another point in **AIR 1955 SC 425: 1955-2 SCR 1.**)

(3) Second summons — Clause (b).— (1) If it is not proved that there was due service the Court is bound to order fresh summons for the defendant. If the non-service or failure to effect due service is due to plaintiff's default the Court is bound to order him to pay the costs of the postponement under sub-rule (2). (1894) 18 Bom 59 (60) (DB) °° AIR 1931 Pat 420 (420, 421).

4. Sufficient time — Clause (c).— (1) When on the date fixed for the appearance of the defendant if sufficient time had not elapsed after the summons was served on him, the court must postpone the date of the hearing and must direct notice of such adjourned hearing to be given to the defendant. AIR 1954 Trav-Co 513 (514): ILR (1954) Trav-Co 1269 (FB) °° AIR 1953 Trav-Co 126 (127, 128).

(2) If the rule-making authority has chosen to fix "sufficient" time in terms of days, non-compliance with the rule, without more would constitute "sufficient cause" within the meaning of Order 9, Rule 13, so as to entitle the defendant to have the ex parte decree against him set aside. AIR 1954 Trav-Co 513 (514): ILR (1954) Trav-Co 1269 (FB).

(3) Provisions of Order 9, Rule 6 (1) (c) and provision for sufficient time to be provided for appearance of defendant are mandatory. Where, therefore, no notice of the adjourned date is given to the defendant there is no proper service of summons and there would be sufficient cause for non-appearance within Order 9, Rule 13 for setting aside ex parte decree passed against defendant. 1961 Ker LT 876. ((1959) KLT 1157, Rel. on.)

ORDER 9, RULE 7 — SYNOPSIS

1. Scope.
1A. "Adjourned the hearing."
2. "Assigns good cause."
3. "Such terms as the court directs as to costs or otherwise."
4. Appeal.
5. Revision.

1. Scope.— (1) The underlying principle of this rule is that until a suit is actually called and so long as an ex parte decree is not passed, the defendant is entitled to come in and defend the suit. AIR 1954 Punj 207 (208) °° AIR 1948 Nag 362 (364): ILR (1948) Nag 252.

(2) In its essence the adjudication under Order 9, Rule 7 is directed to ensure the orderly conduct of the proceedings by penalising improper dilatoriness calculated merely to prolong the litigation. **AIR 1964 SC 993 (1002): (1964) 5 SCR 946.**

(3) The adjudication which the Court makes under Order 9, R. 7 does not put an end to the litigation nor does it involve the determination of any issue in controversy in the suit. A decision or direction in an interlocutory proceeding of the type provided for by Order 9, Rule 7 is not of the kind which can operate as res judicata so as to bar the hearing on the merits of an application under Order 9, Rule 13. **AIR 1964 SC 993 (1002, 1003): (1964) 5 SCR 946.** (21 Mad 324 and 10 CPLR 45, Approved) °° ('98) 21 Mad 324 (325) (DB).

(4) Where after declaring the defendant ex parte, the Court allows him to participate in the proceedings, it must be held that the Court has impliedly set aside the ex parte order. 1950 All WR 158 (161) (DB).

(5) The rule applies to the trial of an election petition under the Representation of the People Act, 1951, before the Election Tribunal, by virtue of Section 90 (2) of the Representation of the People Act. **AIR**

Order 9, Rule 7 — Note 1 (contd.)
1955 SC 425 (429): (1955) 2 SCR 1. (AIR 1951 Mad 813, must be held to be no longer good law.)

(6) The inherent power of the Court cannot override the express or implied provisions of law. Order 9, Rule 7 and Order 9, R. 13 between them exhaust the whole gamut of situations that might arise during the course of the trial owing to non-appearance of defendant, and provide for every contingency which is likely to happen in the trial vis-a-vis the non-appearance of the defendant at the hearing of the suit. There is therefore no scope or justification for the invocation of the inherent powers of the Court under Section 151. **AIR 1964 SC 993 (1004): (1964) 5 SCR 946.**

1A. "Adjourned the hearing."— (1) If the entirety of the "hearing" of a suit has been completed and the court being competent to pronounce judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment there is no 'adjournment' of hearing and Order 9, Rule 7 could have no application the matter would stand at the stage of Order 9, Rule 6 to be followed up by passing of an ex parte decree making Rule 13 the only provision in O. 9 applicable. **AIR 1964 SC 993 (1003): (1964) 5 SCR 946 °° (1968) 34 Cut LT 1180.**

2. "Assigns good cause."— (1) If the defendant wants to set aside the order placing him ex parte and be relegated to the stage at which the suit was, when he absented himself, then he has to assign good cause for his previous absence. But if he merely wants to take part in the proceedings at the stage at which it is when he appears it is not necessary to get the previous order placing him ex parte set aside. **AIR 1955 SC 425 (431, 432, 433): (1955) 2 SCR 1.** (AIR 1945 Sind 98: ILR (1945) Kar 1; AIR 1952 Raj 12: ILR (1951) 1 Raj 311 and AIR 1949 Oudh 59: ILR (1950) All 6 (FB), **Overruled.**) °° AIR 1957 Punj 63 (63) °° AIR 1965 Punj 58 (60, 61): 66 Pun LR 1076 (DB). (Election petition — Adjourned hearing — Counsel for respondent withdrawing from proceedings — Tribunal deciding to proceed ex parte — Subsequent application before judgment, by respondent to adduce evidence — Previous order to proceed ex parte, no bar to allow subsequent application. **AIR 1955 SC 425,** Foll.) °° AIR 1961 Ker 287 (288, 289): 1961 Ker LT 161. (If the defendant desires to cross-examine the witness examined before he entered appearance, he can claim an opportunity to do so after the decree is set aside under Order 9, Rule 7. But if he fails to avail himself of this right, the evidence recorded before he entered appearance is binding on him.) °° 1960 Ker LT 1141 (1141): 1960 Ker LJ 1187

[But see AIR 1949 Oudh 59 (63): ILR (1950) All 6 (FB) °° AIR 1952 Raj 12 (15): ILR (1951) 1 Raj 311 (DB).]

(2) There is no material difference between the facts to be established for satisfying the two tests of "good cause" for non-appearance in Order 9, Rule 7 and "sufficient cause" under Order 9, Rule 13. **AIR 1964 SC 993 (999): (1964) 5 SCR 946.**

[But see AIR 1948 Nag 362 (364): 1949 Nag LJ 83.]

[Note: Must be treated as impliedly overruled by **AIR 1964 SC 993.**]

(3) Application for setting aside ex parte order stating that Counsel's clerk was unable to be present but containing no reasons for the absence of appellant and his Counsel — No sufficient cause for setting aside ex parte order. (1968) 70 Pun LR (D) 395.

(4) If the Court sets aside the ex parte proceedings under this rule, the defendant is put in the same position as if he had actually appeared on the first day of hearing. **AIR 1955 SC 425 (432): (1955) 2 SCR 1.** (He can file written statement.) °° AIR 1953 Punj 247 (247) °° 65 Punj LR 705 (706, 707): 1963 CIS (IJ) 17. (Application for ejectment under Punjab Urban Rent Restriction Act — Ex parte proceedings set aside under Order 9, Rule 7 — Deposit of rent — Good tender — Deposit by the tenant on the day on which the ex parte order was set aside must be treated as if the deposit was made on the day fixed for his appearance.) °° AIR 1961 Pat 152 (155): 1961 BLJR 478. (Order 9, Rule 7 invests the court with the widest possible discretion and enables it to accept a written statement.)

(5) When a suit which is proceeding ex parte is dismissed for default and subsequently restored, all previous proceedings and order are revived including the order that the suit was to proceed ex parte against the defendant. AIR 1952 All 749 (750).

[See however AIR 1954 Bilaspur 7 (1) (7).]

(6) The conclusion arrived at by the Court, that the cause shown is not good and sufficient cause, cannot be challenged in a petition under Article 226 of the Constitution. AIR 1954 Raj 129 (130): ILR (1953) 3 Raj 768 (DB).

3. "Such terms as the Court directs as to costs or otherwise."— (1) The Court cannot impose a condition, the non-fulfilment of which would result not only in a refusal to set aside the ex parte order but in depriving the defendant of other rights. AIR 1949 Oudh 59 (63): ILR (1950) All 6 (FB).

(2) The amount that is ordered by the Court as costs under this rule cannot be challenged in revision. AIR 1952 Raj 12 (15): ILR (1951) 1 Raj 311 (DB).

4. Appeal.— (1) No appeal lies from an order refusing an application under this rule. AIR 1953 Trav-Co 99 (100): ILR (1953) Trav-Co 347 (DB).

(2) Where an application under Order 9, Rule 7 has been dismissed, it is open to the defendant to take a ground under Section 105 in the appeal which would finally come to the High Court from the decree

R. 8. Procedure where defendant only appears.—Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

[1882, S. 102; 1877, Ss. 102, 103; 1859, S. 114.]

Order 9, Rule 7 — Note 4 (contd.)
passed in the suit, and therefore a revision from an order dismissing an application under Order 9, Rule 7 does not lie. AIR 1957 Raj 68 (71): ILR (1957) 7 Raj 501 (DB).

5. Revision.— (1) Revision against interlocutory order under Order 9, Rule 7 refusing leave to defend suit filed after ex parte decree passed — Other remedies open to defendant — Revision application held not maintainable at later stage. AIR 1965 Mys 300 (301, 302): (1965) 1 Mys LJ 297.

ORDER 9, RULE 8 — SYNOPSIS

1. Scope.
2. "When the suit is called on for hearing."
3. More plaintiffs than one.
4. More defendants than one.
5. "Shall make an order that the suit be dismissed."
6. Unless the defendant admits.
7. Effect of dismissal under this rule.
8. Revision.

1. Scope.— (1) The defendant is not entitled to call evidence to disprove charges of fraud, etc., made against him in the plaint. ('12) 40 Cal 119 (122).

(2) The expression "does not appear" in Order 9 substantially means the same thing as "fails to appear" in Order 17. AIR 1956 Nag 179 (182): ILR (1956) Nag 132 (DB).

(3) The Court has no power to dismiss a suit for default under this rule where the plaintiff dies. (1913) 35 All 331 (337): 40 Ind App 151: 16 Oudh Cas 194 (PC) °° AIR 1935 Nag 189 (190): 31 Nag LR 374 °° AIR 1963 Orissa 88 (90).

(4) The suit cannot be dismissed for default of the plaintiff, where because of his unsoundness of mind, he is not a position to give obedience to the order of the Court and refuses to appear in the Court. ILR (1955) Patiala 459 (462).

(5) This rule is applicable to the Original Side of the Calcutta High Court. AIR 1950 Cal 217 (223).

(6) The rule has no application to proceedings under Section 144 of the Code. AIR 1953 Nag 153 (154): ILR (1953) Nag 649.

(7) The absence of witnesses of the plaintiff can be no ground for dismissing a suit under Order 9, Rule 8. AIR 1957 Raj 11 (14): ILR (1956) 6 Raj 926 (DB)

(8) Recovery of rent from tenant — Proceedings started under Section 7-B of U. P. (Temporary) Control of Rent and Eviction Act — Two stages of proceedings — In second stage proceedings are disposed of as a suit — Provisions of C. P. Code apply to the suit — Plaintiff absent on day of hearing — Suit rightly dismissed under O. 9, R. 8 — Fresh suit on same cause is barred under Order 9, Rule 9. AIR 1964 All 36 (37).

(9) Part-heard case adjourned for cross-examination of plaintiff — Plaintiff and his counsel absent — Defendant asking some time for inspecting document — Court adjourning the suit to some other date on terms — Order is valid — Case governed by Order 17, Rule 2 and not Order 9, Rule 8 — Court not bound to dismiss the suit. (1967) 1 Andh WR 291 (293).

(10) What Order 9, Rule 8, primarily contemplates is a dismissal for default, whether of the whole suit or, where a portion of the claim has been admitted, of the rest of the suit. If there has been an appearance on the part of the plaintiff, the decree passed is not a decree made on default and even when a part of the claim is dismissed, it must be a dismissal on the merits, although it may be a dismissal for want of evidence. AIR 1959 Cal 389 (392, 393, 394): 63 Cal WN 300 (DB).

(11) Suit for accounts of dissolved partnership — Withdrawal of suit — Dismissal of suit as withdrawn — It stood on same footing as dismissal under Order 9, Rule 8. AIR 1969 Ker 78 (78): 1968 Ker LT 578.

(12) The expression 'the date of dismissal' used in the third column of both the Articles 163 (Limitation Act 1908) and 122 (Limitation Act 1963) must be construed as meaning the date of dismissal of the suit for default of appearance under Order 9, Rule 8 of Civil P. C. When the order of the Civil Judge under Order 17, Rule 5 is substituted by an order under Order 9, Rule 8 read with Order 17, Rule 3, the limitation for an application under Order 9, Rule 9 for restoration of the suit would commence not from the date when the Civil Court dismissed the suit under Order 17, Rule 3 but from the date when the substitution order was made. 1968 MPLJ 183 (186): 1968 Jab LJ 361.

(13) Setting aside dismissal of suit for default is not a matter of grace. 1960 Andh LT 904 (906) (DB).

(14) Rules apply only to cases where orders have been passed as against either plaintiff or defendant, who was alive, on date when orders were passed. AIR 1967 Ker 135 (139): 1967 Ker LT 777.

Order 9, Rule 8 — Note 1 (contd.)

(15) Suit adjourned not at instance of plaintiff — Plaintiff absent on date of hearing — Court can proceed under Order 17, Rule 2 and not under Order 17, Rule 3. AIR 1962 Ker 17 (19): 1961 Ker LT 178.

(16) Petition under Section 10, Hindu Marriage Act (1955) — Dismissal for default of petitioner's appearance — Order amounts to a decree and is appealable as such. AIR 1966 Mys 1 (2): (1965) 1 Mys LJ 329 (DB).

(17) Dismissal for default of proceedings under — Section 10 of the Hindu Marriage Act (1955) — Absence of petition not leading to any advantage or disability — Application of Rules 8 and 9 of Order 9, Civil P. C, — Not repugnant to Section 23 of Hindu Marriage Act (1955). AIR 1966 Mys 1 (2): (1965) 1 Mys LJ 329 (DB).

(18) An application under Section 10 Hindu Marriage Act (1955) dismissed in default to appear has to be read as an order under Order 9, Rule 8. AIR 1966 Mys 1 (4): (1965) 1 Mys LJ 329 (DB).

(19) Dismissal of revision for default of appearance — Restoration — Order 9, Rule 8 is applicable. AIR 1967 J and K 93 (94): 1967 Kash LJ 220.

(20) Court suo motu adjourning hearing and passing order on adjourned date, for production of evidence on the following day without any request from parties — Counsel for plaintiff reporting no instructions next day — Dismissal of suit by Court can only fall under Order 9, Rule 8 and not under Order 17, Rule 3 (All). AIR 1962 All 407 (410): 1962 All LJ 495 (DB).

(21) Dismissal of a suit on merit and dismissal for default stand on different footing. Suit dismissed due to absence of plaintiff on adjourned date would be deemed to be one under Order 9, Rule 8. 1966 All WR (HC) 399: 1966 All LJ 1078 (1080).

2. "When the suit is called on for hearing."— (1) The hearing of the suit may be either on the day named in the summons or on a subsequent day to which the hearing may be adjourned. AIR 1954 Trav-Co 150 (151) °° (1868) 4 Mad HCR 56 (59) (DB).

(2) The date fixed for the settlement of issues is as much a day fixed for the hearing as any other date fixed. AIR 1918 Pat 62 (62) (DB) °° AIR 1922 Mad 416 (416) (DB) °° 1967 BLJR 960.

[See also **AIR 1955 SC 425 (431): (1955) 2 SCR 1.**]

(3) The sheristadar of a Court has no authority to adjourn a case to a future date in the absence of the presiding Judge of the Court. An order of dismissal for default on the adjourned date in such circumstances is therefore, illegal. AIR 1950 Assam 47 (48) (DB) °° Madh BLJ 1955 HCR 9 (10).

(4) A Court will not be justified in dismissing a suit under this rule at an adjourned hearing where the evidence on record is sufficient to decree the claim of the plaintiff, or where the evidence has been completely recorded and nothing remains to be done except to hear arguments, or where the suit was adjourned for pronouncing judgment. (1905) 7 Bom LR 261 (262) (DB) °° (1909) 5 Low Bur Rul 75 (76) °° (1881) 3 All 292 (294) (DB) °° (1911) 11 Ind Cas 842 (842, 843) (Lah.)

(5) Where the date fixed for hearing a case happens to be a holiday, the Court is in no way justified in taking up the case on the following day and in passing any order to the prejudice of any of the absent parties without duly serving upon him a fresh notice of the hearing. AIR 1957 Punj 80 (80): ILR (1957) Punj 746.

(6) It is not proper for the Court to dismiss the suit on a day not fixed for the hearing of the suit. AIR 1954 Assam 92 (93) (DB) °° Madh B LJ 1955 HCR 9 (10) °° (1911) 33 All 560 (562) (SB).

(7) Where the pleader of the plaintiff appears and applies for adjournment and the adjournment is refused, the Court should not assume that the pleader has no instructions to proceed with the suit and should not dismiss the suit under this rule. AIR 1952 Kutch 31 (32).

(8) After a decree has once been made a suit cannot be dismissed for default. AIR 1924 PC 198 (200): 4 Pat 61: 51 Ind App 321 °° AIR 1957 Trav-Co 197 (199): ILR (1955) Trav-Co 714 (DB).

(9) No order for dismissal for default should be passed till the end of the day when the Court was rising because there could be no default until the Court rose for the day. AIR 1956 Bhopal 26 (26) °° AIR 1941 Oudh 91 (93): 16 Luck 294.

(10) What the rule requires is appearance of the parties when the suit is called on for hearing and not appearance in the suit itself or even physical presence of a party in the Court room if he chooses to be silent and does not respondent to the call. AIR 1956 Pat 127 (128).

(11) Mere physical presence of party engaging a lawyer, after the lawyer lets him down is not appearance within the rule. AIR 1966 Cal 307 (310): 69 Cal WN 828.

(12) Dismissal for non-appearance — What constitutes — Adjournment refused — Plaintiff physically present not taking part in proceedings — Dismissal is for non-appearance — Order is one passed under Order 9, Rule 8 — Application under O. 9, R. 9 can be filed. 1961 Ker LT 653 (654): (1961) 2 Ker LR 206.

(13) Matters of routine nature not included within the meaning of "hearing" — Transfer of case — Object of requiring appearance of parties not for hearing case but for passing further orders — Next friend of minor-plaintiff, a judicial officer applying for adjournment on ground of uncle's death — Order of dismissal for default held unsustainable — Discretionary power under Order 9, Rule 8 not soundly exercised.

Order 9, Rule 8 — Note 2 (contd.)
1962 MPLJ 590 (593, 594): 1962 Jab LJ 599 (DB).

(14) Suit fixed for plaintiff's evidence — Plaintiff's counsel only present but not taking part in any way — Suit dismissed for want of proof — Dismissal is one for default of appearance — Application for restoration maintainable. AIR 1961 Raj 88 (91): 1961 Raj LW 538.

(15) Adjourment by Court for production of evidence generally — Suit dismissed for default — Provisions of Order 17, Rule 3 are not attracted — Court is bound to dispose of the matter either under Order 9 or else grant an adjournment. 1961 Ker LT 653 (654).

3. More plaintiffs than one.— (1) This rule is meant to provide for a case where a single plaintiff does not appear or where there are several plaintiffs and all of them do not appear. AIR 1921 Cal 176 (177): 4 Cal 57 (DB).

4. More defendants than one.— (1) Under the rule there can be a partial or total dismissal for default. AIR 1925 All 425 (426).

(2) So far as the defendant or defendants who appear are concerned, the order of dismissal will be one under this rule and will bar a fresh suit against them. With regard to the defendants who are absent, the dismissal will be under Rule 3 and a fresh suit is not barred. AIR 1926 All 169 (170): 48 All 97 (DB).

(3) Even if the defendant appears and applies for time the dismissal would fall only under this rule and not under R. 3. AIR 1928 Pat 335 (336): 7 Pat 333 (DB).

5. "Shall make an order that the suit be dismissed."— (1) The dismissal is not a decree but only an order which is not appealable. AIR 1941 Nag 61 (63): ILR (1942) Nag 189.

(2) Dismissal under the rule does not affect the merits of the case by determining the rights and liabilities of the parties and is not a "judgment" within the meaning of Clause 15 of the Letters Patent (Bom.) AIR 1950 Bom 355 (356) (DB).

(3) The Court has no option under this rule but to dismiss the suit. ILR (1955) Patiala 459 (462) °° AIR 1939 Nag 213 (214): ILR (1939) Nag 574 (DB).

(4) The Court cannot under this rule inquire into the merits of the case or receive evidence or record any statement from the defendant. AIR 1950 Bom 355 (356) (DB) °° AIR 1921 Pat 325 (326) °° (1913) 20 Ind Cas 1 (1) (DB) (Cal) °° AIR 1920 All 193 (193).

(5) Though the plaintiff may have adduced evidence in a case, if on the last day on which the suit comes up for disposal, he does not appear for conducting the case though he might have appeared to apply for time, which not having been granted, he ceased to appear thereafter, it is not competent for the Court to pass a decree on the merits. AIR 1954 Trav-Co 150 (151).

(6) Dismissal for default under this rule is wrong regarding a portion of the claim when in respect of such portion a final decision had been passed thereon on the merits. AIR 1923 PC 114 (116): 4 Lah 284: 50 Ind App 162.

(7) Private party failing to appear at hearing of proceedings under Section 18 of Land Acquisition Act of 1894 — Reference must be dismissed for want of appearance and evidence in support of the claim. AIR 1967 Guj 118 (121, 122): 8 Guj LR 311.

6. Unless the defendant admits.—(1) This rule provides for a decree being passed in favour of the absent plaintiff only when there is an admission of the claim by the defendant in whole or in part and not merely because the defendant is ex parte. AIR 1955 Mys 2 (2).

(2) When the defendant admits the claim of the plaintiff either in whole or in part, the Court must pass a decree for the amount admitted. AIR 1957 Pat 162 (163) °° AIR 1948 Oudh 225 (226) °° AIR 1925 Pat 712 (713).

(3) The word 'claim' may refer to the right claimed irrespective of the amount stated in the relief column. AIR 1917 Mad 732 (734) (DB).

7. Effect of dismissal under this rule.— (1) A dismissal under this rule precludes a fresh suit on the same cause of action. But two other remedies are open to the plaintiff to apply under Rule 9 for restoration of the suit, or to apply for a review of the order. AIR 1950 Assam 47 (48) (DB) °° AIR 1928 Rang 177 (178): 6 Rang 254.

(2) It was held that where a suit is dismissed under O. 9, R. 8 there could be no such grounds for review as those mentioned in O. 47, R. 1. AIR 1925 Bom 521 (522): 49 Bom 839 (DB).

[See however AIR 1923 Bom 395 (395) (DB).]

(3) The dismissal of a suit under this rule is not a judgment under Cl. 15 of the Letters Patent (Bom). AIR 1950 Bom 355 (356) (DB).

(4) On adjourned date plaintiff's counsel applying for adjournment — Application rejected and suit dismissed for default — O. 17 R. 2 held did not apply but O. 17 Rule 3 applied. ILR (1960) 1 All 546 (561) (DB).

(5) The dismissal of suit for default under O. 9, R. 8 only bars another suit based upon the same cause of action, but does not bar a new suit. The cause of action for a suit for partition is a continuing cause of action emanating from the jointness of the family which continues and hence even if the suit is dismissed for default another partition suit can be instituted. (1967) 2 Mys LJ 506 (508): 12 Law Rep 438.

(6) Suit fixed for evidence — Permission to withdraw disallowed — Second Suit on

R. 9. **Decree against plaintiff by default bars fresh suit.**—(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

[1882, S. 103; 1877, Ss. 103, 108, 109, 588; 1859, S. 119; See O. 22, R. 9.]

Order 9, Rule 8 — Note 7 (contd.)

almost same cause of action — First suit allowed to be dismissed for default — Second suit was a gross abuse of process of court and not maintainable. AIR 1952 Punj 190 (191) (DB).

(7) Where the Tribunal dismissed the mortgagee's application under Section 10 of the Displaced Persons (Debts Adjustment) Act in default which was passed in exercise of the powers conferred by Order 9, Rule 8 it follows as a consequence that the provisions of Rule 9 of Order 9 of the Code apply and it is not within the power of the mortgagee to present or in the power of the Tribunal to entertain a second application unless the order of dismissal is first set aside. AIR 1960 Punj 171 (172): 61 Pun LR 910 (DB) °° AIR 1962 Punj 239 (243): ILR (1962) 1 Punj 190 (FB).

(8) Though it is true that the dismissal of a suit for default automatically terminates the applicability and force of the interlocutory orders then pending, this does not mean that the rights and obligations created by such situations of advantage obtained as a result of such orders, also become null and void, and are consequently not enforceable between the parties to the litigation. AIR 1964 Mad 205 (208): (1964) 1 Mad LJ 103.

(9) Valuation of plaint disputed by defendant — Suit adjourned for hearing him — Plaintiff not appearing on date of hearing — Dismissal is under Order 7, Rule 11 and not of entire suit on merits under Order 9, Rule 8. AIR 1964 Manipur 7 (8).

(10) Application for ejectment of tenant on ground of non-payment of rent under Delhi Rent Control Act (59 of 1958), Section 15 — Defence that rent agreed was excessive and standard rent be fixed — Dismissal of application for default — Still, defence cannot be left without adjudication. (1965) 67 Pun LR 1197 (1199).

(11) Order dismissing application under Section 10 of Displaced Persons (Debts Adjustment) Act (1951) for default is a 'final order' and hence appealable. 1962 Jab LJ 599 (602) (DB).

(12) An application under Order 33 R. 1 if dismissed in the absence of the applicant it can be deemed to be under Order 9, Rule 8 and a second application would be barred. AIR 1967 Pat 320 (323).

8. Revision.— (1) Where the Court refuses to act under this rule in a case to which the rule applies or acts under this rule illegally or with material irregularity, a revision will lie. AIR 1919 Pat 372 (373) (DB) °° ILR (1955) Patiala 459 (463) °° AIR 1952 Kutch 31 (32).

(2) Order 9, Rule 8, Civil P. C. applies to election petition — Election Tribunal does not become functus officio after dismissal of petition for default — High Court will not interfere with order setting aside dismissal for default. 1964 All LJ 155 (159) (DB) °° AIR 1965 Pat 378 (381, 382): 1966 BLJR 588.

[But see AIR 1960 J and K 25 (27) (FB).]

(3) Election petition — High Court has power to dismiss election petition for non-appearance of petitioner. AIR 1969 Raj 75 (81). (AIR 1960 J and K 25 (FB) and AIR 1964 All 181, Dissented.; AIR 1968 Punj 152 (FB), Followed.)

(4) Dismissal of suit under O. 9, R. 8 — Question is one of law — Wrong admission on the point by counsel — Not binding on his client — Party can again raise it in revision. AIR 1964 Manipur 7 (8).

ORDER 9, RULE 9 — SYNOPSIS

1. Scope.
1A. Applicability.
1B. Non-applicability.
1C. Second application.
2. Bar of fresh suit.
3. "Suit," meaning of.
4. Minor plaintiff.
5. Suit by shebait of idol.
6. "Sufficient cause."
7. Restoration of suit in favour of one of several plaintiffs — Whether can operate in favour of all.
8. Conditional order of restoration.
9. Notice — Sub-rule (2).
10. Appeal.
11. Revision.
12. Limitation.

1. Scope.— (1) The remedy provided for by this rule is not open to a plaintiff whose suit has been dismissed for any reason, other than default of appearance under Rule 8. AIR 1956 Bhopal 54 (54) °° 1958-1 Andh

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta, see Act 27 of 1962, Ss. 13 and 15 [1-12-1963].

Calcutta: Andaman and Nicobar Islands

Renumber sub-rule (2) as sub-rule (3) and insert after the words "notice of the application" the words "with a copy thereof (or concise statements as the case may be)".

Insert the following as sub-rule (2):

"The plaintiff shall, for service on the opposite parties, present along with his application under this rule either—

(i) as many copies thereof on plain paper as there are opposite parties, or

(ii) if the Court by reason of the length of the application or the number of opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements."

Delhi and Himachal Pradesh

Same as that of Punjab—see Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Order 9, Rule 9 — Note 1 (contd.)

WR 166 (167) ** ILR (1951) 1 Cal 642 (643) (DB).

[See however AIR 1946 Pat 184 (185).]

(2) No application lies under this rule where the dismissal is under Order 17, R. 3 or Order 11, Rule 21, or where the dismissal is due to a failure on the part of the plaintiff to adduce evidence, or where the plaint is rejected under Order 7, Rule 11. (1956) 22 Cut L Tim 395 (396, 397) ** AIR 1935 All 210 (212) ** AIR 1949 Mad 121 (121) (DB).

(3) Where the suit is dismissed for plaintiff's failure to appear on a day not fixed for the hearing of the case but for some other purpose neither Rule 8 nor this Rule applies. AIR 1946 All 506 (507) (DB).

(4) This rule and Rule 8 are applicable to the Original Side of the Calcutta High Court. AIR 1950 Cal 217 (223) ** AIR 1925 Oudh 105 (106).

(5) The effect of restoration under O. 9, R. 9 is to bring the suit, as regards parties to the exact position in which it was at the time of dismissal. AIR 1956 Pat 271 (273) (DB) ** AIR 1924 Cal 814 (815) (DB).

(6) A plaintiff, whose suit is decreed in part and dismissed in part, can agitate under Order 9, Rule 9 for setting aside that portion of the judgment or order dismissing the suit, irrespective of the remedy that he may have in appeal. AIR 1951 Mys 52 (53): ILR (1951) Mys 385 (DB) ** AIR 1957 Pat 162 (163).

(7) In the expression "Plaintiff shall be precluded" ocurring in sub-section (1) the word 'plaintiff' includes his assigns and legal representatives. **AIR 1965 SC 295 (301): (1964) 6 SCR 192.** (Observations in AIR 1929 Pat 685, Not approved.)

(8) Order 9, Rule 9 deprives only the plaintiff from bringing a fresh suit. Secondly, the cause of action must be the same. Thirdly, it applies only where a suit is dismissed under Order 9, Rule 8. Fourthly, Order 9, Rule 9 precludes a plaintiff only from bringing a fresh suit. It does not create a bar against a party figuring as a defendant from raising any plea in this regard. ILR (1964) 2 All 191 (339) (DB).

(9) Setting aside dismissal of suit for default is not a matter of grace. 1960 Andh LT 904 (906) (DB).

(10) The proper procedure for making an application for restoration of a suit dismissed for default of appearance is by way of Notice of Motion and not by issue of a Chamber summons under Calcutta High Court (Org. Side) Rules and Orders Chapter 6, Rules 3, 5. (1959) 63 Cal WN 877 (883) (DB).

(11) There can be no oral application under Order 9, Rule 9. The Court sometimes restores suits which have been dismissed for default on the oral application of Counsel, but that is not a power exercised under Order 9, Rule 9. It is sometimes done in the exercise of the inherent jurisdiction of the Court before the end of the day or by consent. AIR 1961 Cal 474 (476, 477): 65 Cal WN 249 (DB).

(12) Small cause suit — Counter claim by defendant — Suit dismissed for default but counter claim decreed ex parte — Restoration of suit without setting aside ex parte decree will result in reopening of plaintiff's claim only and will leave untouched ex parte decree. AIR 1960 Madh Pra 393 (394): 1960 MPLJ 1080.

(13) The causes of action in the two suits may be considered to be the same if in substance they are identical. The meaning

Gujarat

Add the following as sub-rule (3):—

"(3) The provisions of Section 5 of the Indian Limitation Act, 1908[a], shall apply to applications under this rule" [21-12-1927].

[a] Now see S. 5 of the Limitation Act 1963 (36 of 1963).] [17-8-1961].

Kerala : Laccadive, Minicoy and Amindivi Islands

Same as that of Gujarat [9-6-1959]; For Laccadive, etc., see Act 37 of 1956, S. 60 and Reg. 8 of 1965 [w. e. f. 1-10-1967].

Madras and Pondicherry

Same as that of Gujarat [29-3-1949]; see Act 26 of 1968, S. 3 and Sch., Pt. II.

Orissa

Same as that of Gujarat [20-9-1957].

Punjab, Haryana and Chandigarh

(i) Add the following proviso to sub-rule (1):

"Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default." [Chief Court 12-5-1909].

(ii) Add as sub-rule (3) the following, namely :—

"(3) The provisions of Section 5 of the Indian Limitation Act, 1908[a], shall apply to applications under sub-rule (1)" [14-2-1956]; Act 31 of 1966, Sections 29 and 32.

[a] Now see S. 5 of the Limitation Act 1963 (36 of 1963).

Order 9, Rule 9 — Note 1 (contd.)

of the term 'cause of action' as used in Order 9, Rule 9, of the Code is exactly the same as used in Order 2, Rule 2 of the Code, and the above principles are applicable to that term under both the rules. AIR 1960 Pat 387 (389, 390, 391, 392): 1960 BLJR 389 (DB). (**AIR 1949 PC 78,** Rel. on.)

(14) Provisions of Order 9 apply to suits and proceedings in nature of suits and not to execution proceedings — Application under Section 47 dismissed for default — Fresh application not barred. AIR 1961 Raj 59 (62): 1961 Raj LW 506. (AIR 1920 Oudh 177 and AIR 1937 Oudh 377, **Dissented.**)

(15) It is the duty of the Court to adjudicate a case on merits and dismissal should normally follow upon a trial and not before. Provisions under Order 9, Rule 9 are in the nature of an exception. AIR 1963 Raj 106 (109).

(16) Effect of Section 20 (1) of the Code of Civil Procedure (Amendment) Act (2 of 1951) was to repeal Order 9, Rule 9 (3), Mysore C. P. Code from date referred to in Section 20 (1) so that provisions of Section 5, Limitation Act no longer became applicable to applications under Order 9, Rule 9, Civil P. C. AIR 1960 Mys 184 (185): 38 Mys LJ 156.

(17) Election petition cannot be dismissed on the ground of non-appearance of petitioner. Order under Order 9, Rule 8 on the subject-matter would be untenable in law. If however the petition is restored under Order 9, Rule 9 although the order would be without jurisdiction still High Court will not disturb it under Article 226 of Constitution. AIR 1960 J and K 25 (27) (FB).

(18) There appears to be no distinction in principle between an order restoring a suit under Order 9, Rule 9 and an order setting aside an abatement under Order 22, Rule 9 which too has the effect of restoring a suit. If the one order is a judgment, the other must also be. AIR 1961 Punj 424 (425): ILR (1960) 2 Punj 386 (DB).

(19) If an ex parte decree is set aside, the suit is restored and the parties are put back to the position which they occupied on the date on which the ex parte decree was passed. All ancillary orders also must be deemed to have been revived. ILR (1968) 1 All 209.

1A. Applicability. — (1) Proceedings in revision being proceedings in "Court of civil jurisdiction" O. 9 can be invoked both for dismissal of a revision and also for its restoration. AIR 1967 J. & K. 93 (94): 1967 Kash LJ 220. (AIR 1943 Mad 260 (1) and AIR 1945 Mad 103, **Dissented.**)

(2) Where an election petition under J. & K. Representation of the People Act (4 of 1957) was dismissed for default but it was found that the petitioner was prevented from appearing for want of time, the petition can be restored under O. 9, R. 9. AIR 1968 J. & K. 90 (91): 1968 Kash LJ 96.

(3) Suit adjourned not at instance of plaintiff — Plaintiff absent on date of hearing — Court purporting to decide suit on merits — Appeal and application under O. 9, R. 9 by plaintiff — Trial Court can decide application under O. 9, R. 9 after

Order 9, Rule 9 — Note 1A (contd.)

disposal of appeal. AIR 1962 Ker 17 (19): 1961 Ker LT 178.

(4) Where the Court, of its own accord, adjourned the case for evidence to another date and on the adjourned date the plaintiff applied for time to adduce evidence but his application was dismissed and the case was disposed of by writing a judgment which in form purported to be on merits but without considering the real question arising in the suit, the disposal was really as one for default and not under O. 17, R. 3 and therefore, an application for restoration was maintainable. 1960 Ker LT 648 (649) °° AIR 1962 Ker 17 (19): 1961 Ker LT 178.

(5) Adjournment refused — Plaintiff physically present not taking part in proceedings — Dismissal is for non-appearance — Order is one passed under O. 9, R. 8 — Application under O. 9, R. 9 can be filed. 1961 Ker LT 653 (654).

(6) Bombay Tenancy and Agricultural Lands Act (67 of 1948) S. 76 (2) — Rules under, R. 33 — Revision petition dismissed for default — Application for restoration of petition — O. 9, R. 9 Civil P. C. applies. ILR (1960) Mys 6.

(7) Plaintiff appearing at adjourned hearing but applying for time — Application rejected and suit dismissed — Application under O. 9, R. 9 maintainable. AIR 1964 Orissa 246 (247, 248): 32 Cut LT 107.

(8) Plaintiff's non-appearance on date fixed for issues on examination of parties under O. 10, Rr. 1 and 2 — Suit dismissed under O. 10, R. 4 (2) — Application for restoration under O. 9, R. 9, is competent. AIR 1968 Orissa 225 (226): 34 Cut LT 1389.

(9) If an application under O. 33, R. 1 is dismissed in the default of the applicant alone it will be deemed to be dismissed under O. 9, R. 8 and a second application under O. 33, R. 1 would be barred under O. 9, R. 9 but an application for restoration under R. 9 would lie. AIR 1967 Pat 320 (322). (AIR 1926 Mad 875 and AIR 1947 Nag 14 and AIR 1950 Nag 82, **Dissented.**)

(10) There being no provision to the contrary in the Displaced Persons (Debts Adjustment) Act 1951, provisions of O. 9, R. 9 would apply to dismissal in default of an application under Sec. 10 of the Act (1951). AIR 1962 Punj 239 (243): ILR (1962) 1 Punj 190 (FB) °° (1957) 59 Punj LR 433 (434).

(11) Writ proceedings are civil proceedings even though provisions of Civil P. C. (1908) do not directly apply yet the same not being in conflict with Rajasthan High Court Rules provision of O. 9. R. 9 could be applied to writ proceedings. AIR 1969 Raj 41 (48): 1969 Raj LW 130 (DB).

1-B. Non-applicability. — (1) There cannot be adjournment of the suit for hearing to a later part of the same day. That would be postponment for a short time. Where, therefore, the suit taken up after a short postponment of half an hour is dismissed as no one appeared on the side of the plaintiff dismissal of the suit is not for default and the order is either under Order XVII Rule 3, C. P. C. or amounts to a decree and in either case it is appealable and cannot be set aside on a restoration application being made under Order IX Rule 9 C. P. C. 1965 All LJ 575 (576) °° 1968 All WR (HC) 658: 1969 All LJ 264.

(2) Section 36 of Bombay Agricultural Debtor's Relief Act specifically bars application of provisions of Order 9, Rule 9. (1961) 2 Guj LR 601.

(3) Dismissal for failure to pay court-fee within time allowed — Order amounts to a decree — Suit cannot be restored under inherent powers or under Order 9, Rule 9. AIR 1962 Guj 59 (61): (1962) 3 Guj LR 71.

(4) Rule applies only where parties against whom orders are passed are alive at the time of passing them — Ex parte decree against defendant not alive at the time of passing decree — Rule 9 does not apply. AIR 1967 Ker 135 (138): 1967 Ker LT 777.

(5) The provision of Order 9, Rule 9 of the Code of Civil Procedure has no application to a contentious suit for probate of will dismissed for default of the applicant and, therefore, a Court has no jurisdiction to set aside the order dismissing the probate suit for default. AIR 1963 Pat 83 (84, 85): 1962 BLJR 854 (DB).

(6) When on an application for an adjournment being rejected plaintiff opened his case, examined one witness and retired from the case followed by recording of defence evidence and the suit was dismissed it is a dismissal on merits under O. 17, R. 3 and an application under Order 9, Rule 9 is not maintainable. AIR 1967 Pat 366 (367). (AIR 1933 Cal 73, **Dissented.**)

(7) Suit dismissed for non-payment of deficit court-fees — Petition under Order 9, Rule 9 and Section 151 for its restoration dismissed — Rule does not apply to such a case. AIR 1968 Pat 48 (48).

(8) Provisions of Order 9, Rule 9 have no application to applications under Order 9, Rule 13. AIR 1966 Tripura 2 (3). (AIR 1958 Pat 107, Foll.)

(9) Where an application made under Section 4 of the Provincial Insolvency Act was dismissed for default of appearance of applicant who was however not aware of the date of hearing, Order 9, Rule 9 is not attracted. Such application can be restored under Section 151, Civil P. C. AIR 1964 Bom 40 (41): 65 Bom LR 432.

(10) Where a suit is dismissed for failure of plaintiff to deposit guardian's fee for minor defendant, in presence of other defendants. restoration can only be under Section 151. It cannot be restored under Order 9, Rule 9. AIR 1962 J. & K. 21 (22).

Order 9, Rule 9 — Note 1B (contd.)

(11) A revision petition dismissed for default can be restored if there be sufficient ground for the non-appearance of the petitioner at the hearing. The power is not under Order 9, Rule 9 but is implied in Rules of the High Court of Madhya Pradesh, Part I, Chapter 4, Rule 12. AIR 1962 Madh Pra 308 (309): 1962 MPLJ 317.

1-C. Second application. — (1) A second application lies under O. 9, R. 9 itself to set aside the dismissal for default of an earlier application made under R. 9 to restore a suit which was dismissed under Order 9, Rule 8. AIR 1966 Andh Pra 263 (266): (1964) 2 Andh WR 315 °° 1961 Ker LT 31 (32).

[See also AIR 1963 J. and K. 12 (14): 1962 Kash LJ 167 (DB). (AIR 1959 Pat 121 (FB), **Dissented.**) °° AIR 1963 J. and K. 10 (10, 11): 1962 Kash LJ 115. (As there is no provision in the C. P. Code dealing with an application to restore to file an application under Order 9, Rule 9, dismissed for default, a Court is entitled to take recourse to the wide provisions of Section 151 and allow that application with a view to subserving the ends of justice. AIR 1954 Assam 1 (FB) and AIR 1962 Madh Pra 64, Relied on; AIR 1959 Pat 121 (FB), Not foll.)]

[But see AIR 1968 Bom 250 (253): 69 Bom LR 629 (DB). (AIR 1959 Pat 121 (FB) and AIR 1966 Andh Pra 263 and AIR 1917 Cal 548, Not followed.]

[Also see AIR 1962 Madh Pra 64 (65): 1961 MPLJ 1145 (DB). (Dismissal for default of an application for restoration under Order 9, Rule 9 can be set aside under Section 151, Civil P. C.)]

2. Bar of fresh suit. — (1) Where a suit is dismissed for default, it cannot operate as res judicata. But the plaintiff is, under the specific provisions of this rule, barred from bringing a fresh suit on the same cause of action. AIR 1952 Punj 123 (124) °° AIR 1949 Mad 882 (884) °° AIR 1952 Punj 261 (263) °° 1959 Andh LT 214 (216) (DB).

(2) Where the cause of action in the subsequent suit is different from that in the first suit, this rule will not apply. (1967) 2 SCWR 823 (SC) °° AIR 1956 Pat 143 (145, 146) °° AIR 1957 Andh Pra 537 (538) °° AIR 1955 Cal 169 (171) °° AIR 1952 All 427 (427).

(3) A suit for partition dismissed for default under this rule does not bar a subsequent suit for partition. (1906) 28 All 627 (629) (DB) °° AIR 1935 Mad 458 (459) (DB).

(4) A suit for redemption dismissed for default of appearance does not bar a subsequent suit for redemption. (1909) 2 Ind Cas 630 (631, 632) (All) °° AIR 1928 Bom 67 (67): 52 Bom 111 (DB) °° AIR 1950 FC 1 (6, 7): 1949 FCR 484. (AIR 1945 Mad 225: ILR (1945) Mad 803, **Reversed.**)

(5) The rule does not apply unless the plaintiff in the prior suit is the plaintiff in the subsequent suit. AIR 1949 Mad 882 (885) °° AIR 1942 Cal 99 (104): ILR (1941) 2 Cal 477 (DB).

(6) The bar of a fresh suit under this rule applies only where the suit has been dismissed for default under Rule 8 and not otherwise. AIR 1935 Cal 764 (766).

(7) The bar under this rule does not apply to a fresh suit instituted during the pendency and before the dismissal of the first suit for default under Rule 8. But such a suit will be barred on the principle that no one shall be twice vexed with the same cause of action. AIR 1947 Lah 102 (103) (DB) °° AIR 1952 Punj 190 (191) (DB).

(8) Order 9, Rule 9, of Civil P. C. precludes a second suit in respect of "the same cause of action" where the first suit is dismissed for default of appearance of the plaintiff. In considering whether the cause of action in the subsequent suit is the same or not, as the cause of action in the previous suit, the test to be applied is "are the causes of action in the two suits in substance and not technically identical." Thus, the term "cause of action" is to be construed with reference rather to the substance than to the form of action. AIR 1965 SC 295 (302): (1964) 6 SCR 192. (AIR 1949 PC 78 and 12 Beng LR 304 (315) (PC), Foll.)

(9) A filed a suit for recovery of property from B, the second defendant. X was the pro forma first defendant. During pendency of suit A transferred his interest to X whereupon X applied for his transposition as additional plaintiff to continue the suit. B opposed the application contending that X must work out his right by separate suit and that since A had assigned his rights the suit must be dismissed. The Court upheld the objection and dismissed the application and the suit for default. X subsequently filed a suit for recovery of the property from B who now contended that the suit was barred by Order 9, Rule 9.

Held, that by his action opposing the transposition in the previous suit, B was now precluded from contending that the suit was barred. He could not approbate and reprobate. AIR 1959 Ker 133 (135): 1958 Ker LT 925 (DB).

(10) Declaratory suit as to possession of land attached under Sec. 146 (1) Cr. P. C. — Dismissal for non-appearance — Subsequent suit for same relief is not barred under Order 9, Rule 9 read with Sec. 12 C. P. C. AIR 1969 J. & K. 48 (49): 1968 Kash LJ 116.

(11) The bar of fresh suit imposed upon the plaintiff under Order 9, Rule 9, also attaches to the persons claiming through the plaintiff, i.e., his heirs and legal representatives. AIR 1961 Pat 92 (93): 1960 BLJR 724 (DB). (Obiter in AIR 1929 Pat 685, **Dissented from.**)

Order 9, Rule 9 — Note 2 (contd.)

(12) Mortgage in favour of more than one person — Suit by one making others as defendants — Suit dismissed for default of plaintiff — Second suit by other mortgagees — No bar under O. 9, R. 9. AIR 1963 Punj 401 (402): 1963 Cur LJ 58. (AIR 1956 Punj 129 (FB), Rel. on.)

(13) Where on a day to which a hearing is adjourned (i.e. where the adjournment was not granted to any party to the suit) if the parties or any of them fail to appear and the Court disposes of the case under Order 17, Rule 2, the only remedy to the party is under Order 9, Rule 9. AIR 1960 Raj 245 (247): 1960 Raj LW 217 (DB).

(14) Second suit based on same cause of action and between same parties, as the previous suit, is barred — If there is a split of the same cause of action, the second suit is barred — If cause of action is distinct, a second suit is not barred — If cause of action of second suit not existed when first suit is instituted, second suit is not barred. AIR 1968 Raj 51 (54): 1967 Raj LW 63 (DB).

(15) Valuation of plaint disputed by defendant — Suit adjourned for hearing him — Plaintiff not appearing on date of hearing — Dismissal is under Order 7, Rule 11 and not of entire suit on merits under Order 9, Rule 8 — Second suit by plaintiff on same cause of action not barred by Order 9, Rule 9, Civil P. C. AIR 1964 Manipur 7 (8).

(16) Provisions of Order 9, Rules 8 and 9 have application to proceedings under Section 10, Hindu Marriage Act (1955). An order dismissing a petition for his default to appear has to be read as an order under Order 9, Rule 8, and the remedy is provided in Rule 9. After availing the remedy under Rule 9, it is not permissible to pursue at the same time alternative remedy of appeal. AIR 1966 Mys 1 (4): (1965) 1 Mys LJ 329 (DB).

(17) Petition under Section 10, Hindu Marriage Act (1955) — Dismissal for default of petitioner's appearance — Order amounts to a decree and is appealable as such. AIR 1966 Mys 1 (2): (1965) 1 Mys LJ 329 (DB).

(18) Dismissal for default of proceedings under Section 10 of Hindu Marriage Act (1955) — Absence of petition not leading to any advantage or disability — Application of Rules 8 and 9 of Order 9, non repugnant to Section 23 of Act of 1955. AIR 1966 Mys 1 (2): (1965) 1 Mys LJ 329 (DB).

3. "Suit", meaning of. — (1) The import of Secs. 268 and 295 of the Succession Act is that a Court is empowered to make use of this rule if the circumstances of the case permit. AIR 1958 All 149 (151, 152, 153) •• ILR (1949) 1 Assam 54 (56) (DB).

(2) Where an application under Sec. 47, Civil P. C., is dismissed for default of appearance, a fresh application on the same allegations is not maintainable. AIR 1937 Oudh 337 (338): 13 Luck 309 (DB).

(3) It has been held that an application for a personal decree under O. 34, R. 6 is not barred under this rule merely because a previous application for the same purpose has been dismissed for default. AIR 1951 Mys 48 (50): ILR (1951) Mys 377 (DB) •• AIR 1937 Sind 273 (278): 31 Sind LR 180 (DB).

(4) The bar under this rule does not apply to a fresh application for adjudication as insolvent after the dismissal of a prior application for default. AIR 1927 Mad 579 (580) (DB).

(5) Once an application under Sec. 10 of the Displaced Persons (Debts Adjustment) Act, 1951 has been dismissed in default, remedy is to apply for restoration and not file a fresh application. ILR (1957) Punj 1777 (1778).

(6) Provisions of O. 9 do not apply to execution proceedings. The executing Court, however, has inherent power to restore the application in the execution proceedings to file. AIR 1958 Andh Pra 341 (341, 342) •• AIR 1958 Orissa 200 (201, 202): ILR (1958) Cut 351.

(7) When an application made to a Civil Court to make a complaint of an offence falling under Sec. 195 (1) (b) or (c), Criminal P. C., is dismissed for default, an application to set aside the dismissal under O. 9, R. 9, Civil P. C., is not competent. AIR 1957 Andh Pra 898 (898).

(8) Where an election tribunal can dismiss an election petition in default, it has also the power to restore it under O. 9, R. 9. Provisions of the Representation of the People Act (1951) are no bar to restoration. 1964 All LJ 155 (DB).

(9) Proceedings under Section 7-B, U. P. (Temporary) Control of Rent and Eviction Act (1947) — Two stages of proceedings — In second stage proceedings are disposed of as a suit — Provisions of Civil P. C. apply to the suit — Plaintiff absent on day of hearing — Suit rightly dismissed under O. 9, R. 8 — Fresh suit on same cause is barred under O. 9, R. 9. AIR 1964 All 36 (37).

(10) Proceedings under Section 3 (1) of M. P. Temporary Postponement of Execution of Decrees Act (5 of 1956) are in substance independent original proceedings to which provisions of O. 9, R. 8 would apply. Therefore when such an application is dismissed for default an application under O. 9, R. 9 for its restoration would lie. AIR 1964 Bom 232 (234): 64 Bom LR 417.

4. Minor plaintiff. — (1) A suit by a minor is liable to be dismissed for default of appearance on the part of the next friend. AIR 1957 Andh Pra 293 (294): ILR (1955) Andhra 451 (DB) •• (1910) 8 Ind Cas 547 (547) (Lah) •• AIR 1954 Bom 214 (215): ILR (1954) Bom 330.

(2) Where the next friend is guilty of gross negligence in the conduct of the suit, the minor can bring a fresh suit, notwith-

Order 9, Rule 9 — Note 4 (contd.)
standing this rule, either himself after attaining majority or through another next friend. AIR 1947 Mad 153 (154) (DB) °° (1895) 22 Cal 8 (14) (DB) °° 1967 Ker LT 490 (492).

(3) The minor plaintiff can also apply under this rule for setting aside the order of dismissal. AIR 1957 Andh Pra 293 (294): ILR (1955) Andhra 451 (DB) °° AIR 1925 Mad 774 (775) (DB).

(4) Failure of next friend to appear in Court due to negligence — Dismissal of suit and application for restoration — High Court has power to interfere in revision to restore the suit. (1961) 1 Andh WR 320 (322) °° (1965) 1 Mad LJ 277 (277): 77 Mad LW 477 °° AIR 1961 Andh Pra 446 (448): (1961) 2 Andh WR 15 (DB).

5. Suit by shebait of idol. — (1) Where a suit instituted by a person as the shebait of an idol is dismissed for default owing to the negligence of the shebait, a fresh suit by another shebait on the same cause of action will not be barred. AIR 1942 Cal 99 (105, 117, 118): ILR (1941) 2 Cal 477 (DB).

6. "Sufficient cause." — (1) This rule applies to voluntary as well as involuntary absences. AIR 1948 Mad 480 (480).

(2) The only ground for restoring a suit under this rule is the existence of a sufficient cause for the non-appearance of the party at the time the suit was called on for hearing. AIR 1956 Cal 1 (5) °° AIR 1938 Cal 74 (75): ILR (1938) 1 Cal 213 °° 1968 Ker LT 599 (600): 1968 Ker LR 307.

(3) Court must exercise a judicial discretion in deciding what is sufficient cause. AIR 1952 Bhopal 33 (34) °° 1958 Andh LT 787 (789) °° AIR 1938 Bom 199 (204) (SB).

(4) A party should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part. AIR 1952 Bhopal 33 (34) °° AIR 1938 Bom 199 (202) (SB).

(5) The test to be applied as a general rule is to see whether the party applying, honestly intended to be present at the hearing of the suit and did his best to do so. AIR 1952 Bhopal 33 (34) °° AIR 1923 Mad 63 (64): 46 Mad 60.

(6) Even though the plaintiff was negligent enough to start for the last train and missed it, the suit ought to be restored, observing that negligence is human and not irreparable and can be amply compensated by costs. AIR 1925 All 601 (602).

(7) Unless any concrete fact is alleged from which an inference can fairly be drawn that the failure of the next friend to appear has in any way prejudiced the interest of the minor, the Court is not bound to restore the suit. AIR 1949 Mad 46 (51): ILR (1948) Mad 719 (DB).

[See however AIR 1934 Mad 616 (617) °° AIR 1935 Mad 196 (197).]

(8) The fact of the minority of a plaintiff is not by itself a sufficient cause for setting aside any order of dismissal that may have been passed owing to the absence of the next friend irrespective of the reasons for such absence. AIR 1948 Nag 55 (56): ILR (1947) Nag 474 °° AIR 1954 Bom 214 (215): ILR (1954) Bom 330 °° AIR 1954 Trav-Co 352 (352).

(9) In the case of absence of the pleader it should be considered whether there was bona fide and reasonable attempt on the part of the vakil to put in appearance and due regard must be had to the exigencies of his professional duties. AIR 1940 Rang 162 (164): 1940 Rang LR 512 (FB) °° AIR 1938 Nag 370 (371).

(10) Where the absence of vakil is due to a bona fide mistake, or where by the mistake of the pleader the party did not get intimation in time, the suit was ordered to be restored to file. AIR 1929 Lah 69 (69) °° (1864) 2 Bom HCR 267 (269) °° AIR 1923 Mad 581 (581) (DB) °° 1937 Mad WN 976 (976) (DB).

(11) The mere absence of a party's pleader or the fact that the pleader was engaged elsewhere does not amount to sufficient cause. AIR 1921 Nag 3 (4) °° AIR 1932 Bom 634 (635) °° AIR 1927 Lah 791 (791).

[But see (1959) 63 Cal WN 877 (881) (DB). (Cousel engaged in appeal Court, constitutes sufficient cause for non-appearance.)]

(12) If a party does all that he is required to do under the law to retain a pleader and the pleader fails to appear, it must be held that there is sufficient cause for the non-appearance of the party. AIR 1938 Nag 370 (371) °° AIR 1936 Nag 85 (86).

(13) Where the counsel has failed to put in appearance on the date of hearing what is reasonably necessary to be done as a condition precedent to the restoration of the suit is that he should satisfy the Court that there was sufficient cause for his non-appearance when the suit or appeal was called for hearing. AIR 1957 Raj 11 (15): ILR (1956) 6 Raj 926 (DB).

(14) If the party was trying to appear on the date fixed in the case and if he made honest efforts in that behalf, even though the manner in which he proceeded about the task was not likely to achieve the purpose, it could not be said that the party had misconducted himself or acted with gross negligence. AIR 1962 All 407 (411): 1962 All LJ 495 (DB).

(15) After a preliminary decree in a partition suit was passed, it was not competent to the Court to dismiss the suit subsequently for non-appearance of the plaintiff. The preliminary decree can only be reversed, on appeal and whatever default there may be in the subsequent stages of the suit, that preliminary decree itself cannot be vacated. The fact that the preliminary decree is for accounts does not make any substantial dif-

Order 9, Rule 9 — Note 6 (contd.)

ference. AIR 1968 Andh Pra 289 (289): (1967) 2 Andh WR 13.

(16) Application for restoration of suit dismissed due to negligence of Advocate's clerk — Advocate filing on the same day without any delay another application supported by affidavit showing sufficient cause for restoration of earlier application — Application could be allowed as case is not one of gross negligence. AIR 1966 Andh Pra 263 (267): (1964) 2 Andh WR 315.

(17) The failure of a lawyer to appear in a case, for which his client is in no way responsible, may not always be a sufficient cause for non-appearance. But if non-appearance of the pleader is the party's non-appearance and such non-appearance takes place without any fault on the part of the party and in spite of his best efforts to prevent it, it is not fair to hold that there is still no sufficient cause for such non-appearance of the party. AIR 1959 Cal 389 (395): 63 Cal WN 300 (DB). (24 Suth WR 141, Criticised.) °° AIR 1964 Orissa 104 105, 106).

(18) The fact that the name of the plaintiff's attorney was wrongly printed in the Peremptory cause List as a result of which he was misled may amount to a sufficient cause within the meaning of O. 9, R. 9. AIR 1961 Cal 474 (475, 476): 65 Cal WN 249 (DB).

(19) The word appearance in O. 9 has a technical meaning and does not mean physical presence of a party. When a party engages a lawyer to conduct his case, appearance of such party must be the appearance of such party through the lawyer. Laches or negligence of a lawyer cannot be held to be that of the party. AIR 1966 Cal 307 (310): 69 Cal WN 828.

(20) Appearance through counsel is valid and sufficient appearance. AIR 1959 Cal 389 (392): 63 Cal WN 300 (DB).

(21) Appearance by counsel instructed to apply only for adjournment which is refused is not appearance within the meaning of Civil P. C. AIR 1959 Manipur 23 (24).

(22) Plaintiff's Counsel reporting no instructions, but plaintiff present in Court — Dismissal of suit — The plaintiff should be deemed to have appeared on the date when the suit was dismissed — If the plaintiff did appear within the meaning of the ratio of AIR 1949 Mad 78: (1948) 1 Mad LJ 65, then the dismissal must be deemed to be one under O. 17, R. 3 and an appeal will lie and an application under O. 9, R. 9, would not be maintainable. AIR 1968 Mad 222 (222): (1967) 2 Mad LJ 502 (502). (AIR 1955 Mad 258, **Dissented.**)

(23) Appearance does not mean physical appearance of party — In application under the rule each case has to be judged in the light of its own facts. AIR 1967 Orissa 152 (153): 31 Cut LT 1131.

(24) Sufficient cause — Land acquisition cases before District Judge — Transfer of cases to Court of subordinate Judge made suo motu — Information about transfer not communicated to parties or their pleaders — Parties held, had good cause for not appearing before transferee Court — This alone regarded as sufficient cause — In all cases of transfer made by Court suo motu, notice of transfer must be given to parties or their lawyers. AIR 1968 Pat 439 (440).

7. Restoration of suit in favour of one of several plaintiffs — Whether can operate in favour of all. — (1) An order under this rule restoring a suit dismissed for default on the application of one of several plaintiffs may, if the Court so directs, operate in favour of all the plaintiffs though they have not applied for restoration. AIR 1919 Oudh 4 (6): 23 Oudh Cas 18 (DB).

(2) Joint trial of suits — Application made in one suit for relief pertinent to that suit only not to be treated as one made in other suit. **AIR 1964 SC 993 (1005): (1964) 5 SCR 946.** (F. A. F. O. No. 116 of 1959, dated 6-5-1963 (All), **Reversed.**)

(3) Some of plaintiffs absent — Decree in terms of compromise entered into by present plaintiffs on their own behalf — Absent plaintiff's cannot appeal — In respect of them there is dismissal for default — Their remedy is to apply for restoration. AIR 1963 All 412 (413): 1963 All LJ 256 (DB).

8. Conditional order of restoration. — (1) An order for restoration of a suit dismissed for default on condition of payment of costs to the opposite party within a time fixed by the order and directing that in case of default the application for restoration is to stand dismissed is legal and valid. AIR 1936 All 477 (478) (DB).

[But see AIR 1950 Cal 564 (565) °° (1965) 1 Mad LJ 209 (210): 77 Mad LW 578.]

(2) Where the Court orders restoration of suit on payment of costs to defendant who accepts the same, he cannot subsequently challenge the order for restoration. AIR 1955 Raj 145 (147): ILR (1955) 5 Raj 746 (DB) °° AIR 1954 Madh B 12 (14): ILR (1953) Madh B 388.

(3) Restoration of suit subject to condition of payment of cost by certain date — Money sent by post to defendant's counsel along with intimation to Court — **Held** that by writing a letter to the Court the plaintiff had virtually put it beyond his power to recall the money remitted. For all practical purposes this was virtual payment; and the Court ought not to have refused to restore the suit on a technical view of the word 'payment'. AIR 1961 All 87 (87).

9. Notice — Sub-rule (2). — (1) An order of restoration without notice to the defendant as required by sub-rule (2) is void. Madh BLJ 1954 HCR 855 (857, 858) °° AIR 1951 Orissa 266 (268): ILR (1949) 1 Cut 572 (DB) °° AIR 1967 J. & K. 11 (13): 1966 Kash LJ 410.

(2) Where a suit instituted against several defendants is dismissed for default and the

Order 9, Rule 9 — Note 9 (contd.)

application for restoration mentions only one of them as opposite party and an order for restoration is passed after the service of notice on that defendant alone the order cannot have the effect of restoring the suit as against the other defendants. Madh B LJ 1954 HCR 324 (325).

(3) The authority of the advocate of the defendant does not terminate on the dismissal of the suit ex parte and therefore the service of the notice of the application for restoration of the suit on him is a valid notice. The mere fact that he made a note on the notice that his power to represent the defendant had come to an end by the order of dismissal of suit does not terminate his authority. AIR 1957 Raj 391 (392): ILR (1957) 7 Raj 154 °° AIR 1963 All 374 (375, 376). (63 Ind Cas 47 (Pat) and AIR 1942 Mad 403, **Dist.**)

(4) In a case where the petitioner claimed the seat in election petition for himself, the candidates other than the returned candidate are opposite parties in a very limited sense so as not to be included in the expression the opposite party occurring in O. 9, R. 9, because they had to be impleaded due to the provisions of S. 82, Representation of the People Act (1951). Where therefore none of the opposite parties except the returned candidate was served with notice under sub-clause (2) of R. 9 of O. 9, the order allowing the application for restoration cannot be said to be without jurisdiction. 1964 All LJ 155 (161): ILR (1964) 1 All 498 (DB).

(5) The failure to comply with the provision of O. 9, R. 9 (2) in setting aside the order of dismissal without giving notice to the defendant does not, in any way, affect the jurisdiction of the Court, although in doing so it commits an error of law. AIR 1959 Pat 225 (227): 1958 BLJR 848 (DB).

10. Appeal. — (1) The dismissal of an application under this rule is appealable under O. 43, R. 1, Cl. (c). AIR 1946 Pat 184 (185) °° AIR 1958 Him Pra 9 (10) •• ILR (1948) 1 Cal 141 (144).

(2) No appeal lies from an order granting an application. (1913) 7 Low Bur Rul 24 (26) (DB) °° (1880) 5 Cal 711 (712).

(3) The dismissal of an application under this rule need not be on the merits and an appeal will lie also from an order dismissing such an application for non-prosecution. AIR 1951 Pepsu 31 (32) °° AIR 1943 Mad 584 (585) °° AIR 1936 All 737 (739) (DB).

(4) An order made by a Judge on the Original Side of the High Court rejecting an application for restoration is a "judgment" within the meaning of Clause 15 of the Letters Patent, and is appealable, whereas an order granting an application is not a "judgment". AIR 1916 Cal 361 (366): 43 Cal 857 (SB) °° AIR 1922 Cal 407 (407): 49 Cal 616 (DB).

(5) Orders dismissing for default applications for restoration of application under O. 9, Rr. 9 and 13 — No appeal. AIR 1961 All 561 (563).

(6) An order restoring the suit made under O. 9, R. 9, is not appealable, as it is not a judgment; it merely sets aside the decree passed and restores the suit, but decides nothing. Similarly an order restoring the suit dismissed partly for default of appearance of plaintiff, even when his counsel was present at the hearing of the suit, though an order under R. 9 of O. 9, is yet an order merely setting aside the decree and restoring the suit for further hearing. This order also decides nothing and therefore the principle which bars an appeal from an order made under R. 9 of O. 9, applies equally to this order and equally bars an appeal. AIR 1959 Cal 389 (396): 63 Cal WN 300. (AIR 1922 Cal 407, Foll.)

(7) "Final order" under Section 40 of Displaced Persons (Debts Adjustment) Act (1951) may mean any order which has the effect of terminating proceedings before Tribunal — Order dismissing application for default is a final order and hence appealable even though such dismissal is liable to be set aside under O. 9, R. 9. 1962 Jab LJ 599 (602) (DB).

(8) An appeal lies under O. 43, R. 1 (c) or (d) from an order rejecting for default an application under R. 9 or R. 13 of O. 9, respectively, because on a plain reading of Cls. (c) and (d) of O. 43, R. 1, there is no ground for discriminating between rejection of an application on merits and its rejection for default. AIR 1959 Pat 121 (123, 124): 1958 BLJR 783 (FB). (AIR 1918 Pat 612 and ILR 7 Pat 333, **Overruled**; AIR 1929 Pat 529 (2) and AIR 1927 Pat 240, **Approved.**)

(9) A party cannot be held to have no right of appeal simply because he is not likely to obtain relief unless he satisfies the appellate Court by affidavits or otherwise that on the facts of the case, the dismissal of the application filed by him under R. 9 or R. 13 of O. 9 was wrong or unjustified. AIR 1959 Pat 121 (125): 1958 BLJR 783. (View of Ram Labhaya, J., expressed in AIR 1954 Assam 1 (FB), **Dissented from.**)

11. Revision. — (1) A revision lies to the High Court against an order granting an application under this rule. AIR 1956 All 216 (217) °° AIR 1941 Oudh 367 (369) (DB) •• 1968 All WR (HC) 658: 1969 All LJ 264.

(2) Where a trial Court found that the grounds alleged were not sufficient but ordered restoration as a matter of grace revision lies. AIR 1925 Mad 209 (210, 211) •• (1912) 14 Ind Cas 221 (224) (DB) (Oudh). [But see AIR 1919 Cal 979 (2) (980) (DB).]

(3) Where the order is made without jurisdiction, or amounts to an erroneous refusal to exercise jurisdiction, or illegality or material irregularity in the exercise of jurisdiction revision lies. ('46) AIR 1946 Mad 482 (482) °° ('52) AIR 1952 Bhopal 33 (35).

(4) Where the order is made summarily without recording evidence or reasons a revision lies. AIR 1918 Cal 330 (331) (DB) ••

R. 10. Procedure in case of non-attendance of one or more of several plaintiffs.—Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

[1882, S. 105; 1877, S. 105; 1859, S. 116.]

R. 11. Procedure in case of non-attendance of one or more of several defendants.—Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

[1882 and 1877, S. 106; 1859, S. 116.]

R. 12. Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.—Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

[1882 and 1877, S. 107; 1859, S. 117. See Ss. 132, 133; O. 3, R. 1; O. 5, R. 3, O. 10, R. 4 and O. 29, R. 3.]

Order 9, Rule 9 — Note 11 (contd.)

AIR 1923 Mad 177 (178) °° AIR 1931 All 452 (452) (DB).

(5) The question what is sufficient cause is a matter in the Court's discretion and the High Court will not ordinarily interfere in revision with the exercise of such discretion. AIR 1951 Ajmer 47 (2) (48) °° AIR 1957 Raj 11 (14): ILR (1956) 6 Raj 926 (DB) °° AIR 1951 Madh B 107 (108).

(6) Where in an appeal against an order restoring a suit dismissed in default, the appellate Court found that plaintiff had sufficient reason for his non-appearance, and that his evidence was trustworthy there is no material irregularity in the exercise of the appellate Courts jurisdiction and High Court will not interfere in revision. AIR 1968 Mys 283 (287): (1967) 1 Mys LJ 414.

(7) If a wrong principle has been adopted by the lower Courts in awarding costs under O. 9, R. 9, or under any other provision the revisional Court is entitled to interfere. AIR 1961 Madh Pra 169 (171): 1961 MPLJ 1124.

[See also AIR 1961 Mys 83 (86) (DB).]

12. Limitation. — (Also see under Article 163 Limitation Act (1908). (1) Application under Order 9, Rule 9 is governed by Article 163, Limitation Act. AIR 1961 Cal 474 (476): 65 Cal WN 249 (DB).

(2) Where both plaintiff and counsel were absent on date for evidence and suit was dismissed under O. 17, R. 3, an application under O. 9, R. 9, was dismissed as not maintainable. However the order was later changed to an order under O. 9, R. 8 read with O. 17, R. 2. A second application under O. 9, R. 9, would therefore be maintainable and limitation would start from the date when the order was revised. 1968 MPLJ 183.

(3) Application under — Delay in filing cannot be condoned. AIR 1967 Pat 366 (367).

Order 9, Rule 10

1. Non-attendance of plaintiffs. — (1) Some of plaintiffs absent — Decree in terms of compromise entered into by present plaintiffs on their own behalf — Absent plaintiffs cannot appeal — In respect of them there is dismissal for default — Their remedy is to apply for restoration. AIR 1963 All 412 (413): 1963 All LJ 256.

Order 9, Rule 11

1. Non-attendance of defendants.— (1) The rule contemplates that a decree may be a contested one as against some of the defendants and ex parte as against the rest, but the decree is liable to be set aside on an application by the ex parte defendant or defendants. AIR 1945 Sind 98 (104): ILR (1945) Kar 1 °° AIR 1919 Cal 217 (218) (DB) °° (1871) 15 Suth WR 210 (210) (DB).

(2) The Court has full power to pass the same decree against the absent defendants as against the contesting defendants. AIR 1948 All 117 (120): ILR (1947) All 301 °° AIR 1964 Cal 328 (332).

(3) The Court should not pass a decree in an ex parte case, without any proof whatever by the plaintiff; it should consider the interest of the absent party. AIR 1924 Cal 647 (648) (DB).

(4) Where on the date of the first hearing the Court passes an ex parte decree against the defendant who does not appear and proceeds with the suit as against the other defendants who appear, the procedure is in violation of the provision of this rule. AIR 1953 Trav-Co 220 (222): ILR (1953) Trav-Co 89 (FB).

Order 9, Rule 12

1. Scope. — (1) The rule applies to all cases where the Court has ordered a person to appear, whether or not the Court

R. 13. Setting aside decree ex parte against defendant.—In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

[1882, S. 108; 1877, Ss. 108, 109, 588; 1859, S. 119.]

HIGH COURT AMENDMENTS

Allahabad

Add the following further proviso:

"Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim." [See Note 17].

Order 9, Rule 12 — Note 1 (contd.)

is specifically empowered to do so. (1912) 17 Ind Cas 762 (762) (DB) (Mad) °° AIR 1928 Oudh 262 (263) (DB).

(2) Where there is a failure to attend on the part of a party, the fact that his pleader is present or the party ordered to appear happens to be the next friend of a minor plaintiff, will not prevent the Court from acting under this rule. AIR 1918 Mad 1256 (1257): 41 Mad 256 (DB) °° AIR 1932 Mad 414 (414) °° AIR 1920 Mad 213 (215).

[But see (1912) 17 Ind Cas 762 (762) (DB) (Mad).]

(3) When plaintiff was ordered to appear on a particular day and the case was not taken up that day, the Court ought not to dismiss the suit for failure of the plaintiff to appear on a subsequent day to which the case was adjourned. AIR 1917 All 95 (96): 39 All 476.

(4) Where one of serveral plaintiffs fails to appear in obedience to the order of Court, the suit cannot be dismissed as against other co-plaintiffs also. AIR 1919 Pat 36 (37): 4 Pat L Jour 152 (DB) °° AIR 1926 Lah 577 (578).

2. "Subject to all the provisions of the foregoing rules."— (1) The very fact that the Court is empowered to proceed under the foregoing rules also indicates that the party aggrieved has the corresponding right of applying for restoration either under R. 9 or R. 13 as the case may be. AIR 1932 All 595 (596) (DB).

(2) Where a party has been ordered to appear under the proviso to R. 1 of O. 3 and does not appear, then the provisions of R. 6 or R. 8 of O. 9, apply to him and the suit can be dismissed in default of appearance of plaintiff and proceeded ex parte if defendant fails to appear. But where a plaintiff, who is of unsound mind, refuses to appear in Court, the provisions of this rule as also of O. 3, R. 1 do not and cannot apply. ILR (1955) Patiala 459 (462, 464).

(3) Plaintiff summoned as witness — Plaintiff not appearing — Court must be satisfied that there was not sufficient cause for plaintiff's failure to appear in person before O. 9, R. 12 is invoked. AIR 1959 Andh Pra 645 (646): (1959) 2 Andh WR 532.

ORDER 9, RULE 13 — SYNOPSIS

1. Scope.
2. Decree passed by the Presidency Court of Small Causes.
3. Decree passed by the Provincial Court of Small Causes.
4. When a decree can be said to be ex parte.
5. Remedies in the case of an ex parte decree.
6. Whether the remedies are concurrent.
7. Hearing of application pending appeal.
8. Hearing of application after disposal of appeal.
9. Suit to set aside an ex parte decree — Ex parte decree obtained by fraud.
10. Application to be made to the Court which passed the decree.
11. Fresh vakalatnama, if necessary.
12. Who can apply to set aside.
13. Application by the legal representative of the defendant.
14. Grounds for setting aside an ex parte decree.
15. Summons not duly served.
16. Minor defendant.
17. "Upon such terms as to costs," etc.
18. Proviso to the rule.

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta—see Act 27 of 1962, Ss. 13 and 15 (w.e.f. 1-12-1963).

Bombay: Dadra and Nagar Haveli[a]

For R. 13 substitute the following :—

13. Setting aside decree ex parte against defendant.—In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that there was sufficient cause for his failure to appear when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also:

Provided also that no such decree shall be set aside merely on the ground of irregularity of service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

Explanation—Where a summons has been served under Order V, Rule 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965].

Order 9, Rule 13 — Synopsis (contd.)

19. Effect of setting aside the ex parte decree.

20. Ex parte decree against a firm.

21. Appeal.

22. Revision.

23. Limitation.

1. Scope. — (1) The proceedings contemplated under this rule are not merely a branch of the suit which terminated when the ex parte decree was passed; the suit itself does not revive until after the proceedings in the application are terminated successfully. AIR 1927 Lah 200 (207): 8 Lah 54 (DB).

[See however AIR 1941 Rang 314 (315): 1941 Rang LR 254.]

(2) The rule applies to suits and not to appeals. AIR 1929 All 279 (280): 51 All 634 ** AIR 1930 All 841 (843): 52 All 839 (DB) ** (1867) 7 Suth WR 425 (426).

[But see (1906) 9 Oudh Cas 288 (288).]

(3) This rule applies to orders passed ex parte in insolvency proceedings under the Provincial Insolvency Act, V of 1920, by virtue of Section 5 of that Act. AIR 1940 Pat 58 (59) (DB) ** 1958-2 Andh WR 316 (318) (DB) ** AIR 1932 Mad 63 (65).

[But see (1904) 8 Cal WN 468 (469, 470) (DB).]

(4) The rule applies to orders passed ex parte in proceedings under the Land Acquisition Act. AIR 1948 Mad 416 (417, 418).

(5) The rule does not apply to a proceeding to set aside an ex parte decree passed under Section 17 of the Arbitration Act of 1940. AIR 1956 Pat 28 (31) (DB) ** AIR 1969 Cal 381 (383, 384) ** AIR 1964 Pat 509 (510). (**Held,** in the circumstance High Court was not justified in interfering in revision.) ** AIR 1962 Raj 12 (17): ILR (1961) 11 Raj 76. (Principles of Order 9, Rule 13. C. P. Code can however be applied to such decrees.)

(6) The rule applies to applications made on the Original Side of a High Court to set aside ex parte decree. AIR 1952 Cal 544 (546, 549): ILR (1952) 2 Cal 338 (FB). (AIR 1928 Cal 772: 55 Cal 473. **OVERRULED.**) ** AIR 1952 Cal 322 (323) (DB).

(7) The rule applies to proceedings under the Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949). AIR 1954 Mad 18 (18) ** (1960) 1 Andh WR 1 (4).

(8) Order 9, Rule 13, applies to proceedings under Hindu Marriage Act 1955. AIR 1961 Bom 225 (227): 63 Bom LR 125.

(9) The Code does not in terms provide for an application to set aside an ex parte order. It is only when a decree has been passed that an application to set aside such decree has been expressly provided for by the Code. AIR 1939 Mad 385 (385).

Calcutta: Andaman and Nicobar Islands

Renumber Rule 13 as Rule 13 (1) and add the following as sub-rule (2):—

(2) The defendant shall, for service on the opposite party, present along with his application under this rule either—

(i) as many copies thereof on plain paper as there are opposite parties, or

(ii) if the Court by reason of the length of the application or the number of the opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements."

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17.

Gujarat

Renumber R. 13 as R. 13 (1) and add the following sub-rule to it:—

"13 (2) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule [17-8-1961].

Kerala: Laccadive, Minicoy and Amindivi Islands

(1) Renumber Rule 13 as Rule 13 (1).

(2) Delete the full-stop at the end of the existing proviso and add the words "after notice to them".

(3) After the existing proviso as amended add a further proviso as in Madras.

(4) Add sub-rule (2) as in Madras [9-6-1965]; Reg. 8 of 1965, S. 3.

Order 9, Rule 13 — Note 1 (contd.)

(10) Order under Order 9, Rule 7 does not operate as res judicata in application under Order 9, Rule 13. **AIR 1964 SC 993 (1002): (1964) 5 SCR 946.**

(11) An application to set aside a decree in a summary suit is not regulated by Order 9, Rule 13 but by Order 37, Rule 4. AIR 1958 Bom 10 (12): ILR (1957) Bom 520 (DB).

(12) Andhra Pradesh Industrial Disputes Rules (1958), Rule 26 does not empower Labour Court to restore ex parte order under Order 9, Rule 13. (1967) 2 Andh WR 97 (98): (1969) 1 Lab LJ 9.

(13) Inherent power of courts not to override express provisions — Order 9, Rule 7 and Order 9, Rule 13 between them exhaust the whole gamut of situations that might arise during course of trial. **AIR 1964 SC 993 (1004): (1964) 5 SCR 946** ** AIR 1962 All 590 (602): 1962 All LJ 501 (DB). (Objection under S. 46, U. P. Zamindari Abolition and Land Reform Act (1 of 1951) decided ex parte — Restoration application under O. 9, R. 13 barred — Inherent jurisdiction cannot be invoked.) ** AIR 1960 All 360 (361): 1959 All LJ 818 (DB). (Independently of Order 9, Rule 13 Court is not entitled to set aside ex parte decree under its inherent powers.)

[See also (1963) 67 Cal WN 935. (Ex parte order under Section 5 of Calcutta Thika Tenancy Act, can be set aside under inherent powers — Order 9, R. 13 inapplicable.)]

(14) Suit cannot be restored against defendants who have been exonerated. AIR 1960 Andh Pra 114 (114, 115).

(15) Order 9, R. 13 can apply only to persons who are alive on the date where the effective orders were passed. It does not apply to cases where parties were dead at that date. AIR 1967 Ker 135 (139): 1967 Ker LT 777.

(16) Application for setting aside ex parte order under Section 24 of Bombay Act XXVIII of 1947 — Not maintainable under this provision as such order is not a decree. AIR 1967 Guj 101 (102, 103): (1966) 7 Guj LR 431 (DB) ** AIR 1961 Raj 29 (30): ILR (1960) 10 Raj 169. (A consent decree passed upon a compromise entered into by the counsel of the defendant cannot be set aside under O. 9, Rule 13 read with Section 151.)

[See also AIR 1954 Madh Bha 81 (82): Madh BLJ 1954 HCR 147.]

(17) Execution proceeding not being amenable to Order 9, Rule 13, remedy open to defendant under Order 9, R. 13 is to invoke inherent jurisdiction under S. 151, AIR 1969 Pat 79 (81, 82) ** AIR 1969 Pat 79 (82) ** AIR 1968 Orissa 140 (143): 34 Cut LT 560. (Conversion of application under Section 47 into one under Order 9. Rule 13 permissible — Execution Court, held, did not lack inherent jurisdiction.)

(18) Neither party ready on earlier hearing dates — Joint petition for time to compromise, given by both parties — On date of such petition suit not even a year old — Refusal of time and ex parte hearing against defendant wrong. AIR 1969 Pat 98 (99) (DB).

(19) The rule applies to proceedings before claims officer under Bihar Land Reforms Act. 1963 BLJR 315 (316).

(20) Punjab Gram Panchayat Act (IV of 1953) (as amended in 1962), S. 13-G — Prescribed authority has jurisdiction

Madhya Pradesh

(a) Renumber the existing rule as sub-rule (1).

(b) Substitute "there was sufficient cause for his failure to appear" for "he was prevented by any sufficient cause from appearing" occurring in sub-rule (1) so renumbered.

(c) Add the following as an additional proviso and explanation to sub-rule (1):—

"Provided also that no such decree shall be set aside merely on the ground of irregularity in service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

Explanation.—Where a summons has been served under Order 5 Rule 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this sub-rule."

(d) Add the following as sub-rule (2):

"(2) The provisions of Section 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub-rule (1)" [16-9-1960].

Madras and Pondicherry

(1) Renumber Rule 13 as Rule 13 (1) [Dis. No. 621 of 1914] and insert the following as proviso to sub-rule (1):

"Provided further that no Court shall set aside a decree paseed ex parte merely on the ground that there has been an irregularity in the service of summons, if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim" [R. O. C. No. 1810 of 1926].

(2) Add the following as sub-rule (2) to Rule 13:

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)" [Dis. No. 621 of 1941]; Act 26 of 1968, S. 3 and Sch., Pt. II.

Order 9, Rule 13 — Note 1 (contd.)

under Section 13-G to set aside ex parte order in suitable cases. (1966) 68 Punj LR 312: ILR (1966) 2 Punj 571.

(21) Setting aside ex parte decree passed under Section 73 of Madras Village Courts Act (I of 1889) — **Held,** Court had power to act under Rule — Court does not act as persona designata but as Court. (1968) 81 Mad LW 384.

(22) Provisions of Order 9, Rule 13, C. P. C. cannot be applied to reference proceedings under Section 146 Cr. P. C. before a civil Court. AIR 1963 Mad 338 (341): (1963) (2) Cri LJ 381: (1963) 1 Mad LJ 376 (DB). (Remarks to the contrary in AIR 1961 Mad 384 disapproved.)

[But see AIR 1961 Mad 384 (385): 1961 (2) Cri LJ 351: (1961) 1 Mad LJ 284.]

(23) A restoration proceeding and an application for review are essentially different. In a review application the Court has to consider the propriety or otherwise varying or setting aside the judgment on merits. In restoration application the Court is concerned with a limited question whether the party was prevented by sufficient cause from attending the Court. A review application cannot be considered in a broader sense to include restoration application. AIR 1964 Orissa 205 (209): ILR (1963) Cut 723 (DB).

(24) The Court has a discretion under Order 9, Rule 13 to grant application for setting aside the ex parte decree or to reject it. AIR 1961 Bom 254 (256): 63 Bom LR 48 ** 1966 All WR (HC) 137 (138).

(25) The expression ex parte order in the Andhra Pradesh Buildings (Lease Rent and Eviction) Control Act and Rules thereunder include the order passed by the Rent Controller or the Appellate Authority for defeult of appearance of the petitioner or the appellant as well as the respondent. AIR 1967 Andh Pra 1 (3): (1966) 2 Andh WR 349 (FB). (AIR 1964 Andhra 388 (389), **OVERRULED.)**

2. Decree passed by the Presidency Court of Small Causes. — (1) Section 37 of the Presidency Small Cause Courts Act, XV of 1882, does not apply to an ex parte decree and an application will consequently lie under this rule to set it aside. (1892) 17 Bom 507 (509) (DB) ** AIR 1967 Bom 361 (366): 68 Bom LR 857.

(2) Where an application is made under this rule and is dismissed, an application cannot be made under S. 38 of that Act for a new trial. (1905) 3 Cal L Jour 199 (201) (DB).

Mysore

Add the following further proviso to Rule 13 :

Provided further that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim [30-3-1967].

Orissa

(1) (i) Renumber existing rule as sub-rule (1);

(ii) for the words "he was prevented by any sufficient cause from appearing," substitute "there was sufficient cause for his failure to appear"; and

(iii) Add the following to the existing sub-rule (1)—

"Provided further that no such decree shall be set aside merely on the ground of irregularity in service of summons if the Court is satisfied that the defendant knew of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

Explanation.—A summons served under O. 5, Rule 15 on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit shall not be deemed to have been duly served within the meaning of this rule".

(2) Add the following as sub-rule (2) :—

"The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)" [7-5-1954].

Punjab, Haryana and Chandigarh

Renumber Rule 13 as Rule 13 (1) and add the following as sub-rule (2) namely :—

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)" [17-12-54]; Act 31 of 1966, Ss. 29 and 32.

Order 9, Rule 13 (contd.)

3. Decree passed by the Provincial Court of Small Causes. — (1) Section 17 of the Provincial Small Cause Courts Act (IX of 1887) requires the deposit of decretal amount or the furnishing of security as a condition precedent to the entertaining of an application to set aside an ex parte decree. AIR 1956 Bhopal 10 (11) ** AIR 1954 Madh B 147 (148) ** (1950) 54 Cal WN (2 DR) 67 (68) **AIR 1968 Pat 271 (274).

[But see 1963 Ker LT 352. (Application for setting aside ex parte decree of Small Cause Court not accompanied by deposit — Subsequent deposit within period of limitation validates application.)]

(2) Where security is furnished within the period of limitation but on its being found to be insufficient the deficiency is made up after the expiry of limitation, the provisions of Section 17 of the Provincial Small Cause Courts Act should be held to be complied with. AIR 1937 Oudh 206 (207) ** AIR 1936 Oudh 407 (409): 12 Luck 287.

(3) Application for permission to give security made within time and previous to the application under Order 9, R. 13 — Court passing order to give security, passed beyond time and ultimately dismissing application under Order 9, R. 13 for not obtaining permission within time — As the delay was due to the action of the Court the application under O. 9, Rule 13 should not have been dismissed — Inherent power under Section 151, C. P. C. should have been used to mitigate the hardship. AIR 1960 All 612 (614): (1960) All LJ 678.

(4) Even where the Small Cause Court by which an ex parte decree was passed has been abolished, the requirements under Section 17 as to deposit or security should be complied with in the case of an application to set aside the ex parte decree. AIR 1934 All 943 (944) ** AIR 1962 All 514 (515): 1962 All LJ 285.

(5) An order setting aside an ex parte decree of a Provincial Small Cause Court is one passed under the Code. AIR 1935 Mad 380 (381): 38 Mad 687 (FB).

(6) A Small Cause Court can set aside an ex parte order passed against a garnishee in execution proceedings on sufficient grounds being shown for the garnishee's absence. AIR 1957 Mad 353 (354).

(7) Application for setting aside ex parte decree together with security as required by Section 17, Provincial Small Cause Courts Act — Court setting aside the ex parte decree but decreeing the suit on merits — Execution of subsequent decree against the surety — Surety not liable to satisfy subsequent decree. AIR 1968 Andh Pra 306 (307): (1967) 2 Andh WR 15.

(8) Application for setting aside ex parte decree passed by High Court in revision — Proviso to Section 17 (1) Provincial Small Cause Courts Act does

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not apply. AIR 1966 Punj 364 (365): ILR (1966) 2 Punj 890.

(9) Ex parte decree passed by Court of Small Causes — Application to set aside ex parte decree dismissed — **Held** order of dismissal was passed by Court not in its capacity as Court of Small Causes but as special Court exercising jurisdiction under Rent Act and appeal lay against order under Section 29. (1967) 8 Guj LR 772: ILR (1967) Guj 894.

4. When a decree can be said to be ex parte. — (1) Where a suit is decided under Order 17, Rule 3 the decree is not ex parte so as to entitle the defendant to apply under this rule. AIR 1954 All 222 (223) (DB) ** ILR (1953) 3 Raj 603 (606) ** (1965) 31 Cut LT 871 (876, 877): ILR (1966) Cut 51 ** AIR 1964 Assam 144 (144): ILR (1964) 16 Assam 579 ** 1962 Mys LJ (Sup) 553. (Principle for deciding whether dismissal of suit falls under Order 17, Rule 2 or O. 17, Rule 3 explained.) ** AIR 1961 Assam 99 (100): ILR (1961) 13 Assam 463.

(2) The decree referred to under this rule is clearly a decree passed either at the first hearing under Rule 6 of this Order or at an adjournment hearing under Order 17, Rule 2 read with O. 9. (1909) 2 Ind Cas 67 (68) (DB) (Cal) ** 1956 Madh BLJ 399 (401) ** AIR 1952 All 208 (209): ILR (1950) All 240 (DB) ** AIR 1952 Mad 160 (161): ILR (1952) Mad 547 ** AIR 1967 Assam 14 (15): ILR (1964) 16 Assam 260 ** AIR 1967 Orissa 14 (16): ILR (1965) Cut 846 ** AIR 1962 Mys 21 (21, 22): 39 Mys LJ 533. (The proceedings in which the final decree is prepared are proceedings in a suit, thus attracting the provisions of not only Rule 13 of Order 9 but also of Rule 2 of Order 17. AIR 1944 Nag 181, Foll.)

[See also 1966 All LJ 1078 (1079): 1966 All WR (HC) 399. (Suit dismissed for default under Order 9, Rule 8 — This rule applies.) ** AIR 1964 Tripura 60 (62) ** 1962 BLJR 695.]

[See however 1954 All L Jour 368 (370).]

(3) Under Order 17, Rule 2 specific provision is made for the Court to proceed under Order 9 and the aggrieved party is also entitled in such a case to the remedy provided for by this rule. AIR 1933 Nag 370 (372): 30 Nag LR 94 ** AIR 1936 All 619 (621) (DB) ** AIR 1967 Andh Pra 152 (153): (1966) 1 Andh WR 340 ** AIR 1967 Assam 14 (16): ILR (1964) 16 Assam 260 ** AIR 1964 J and K 63 (65): 1963 Kash LJ 242 (DB) ** AIR 1962 All 549 (550).

(4) A final decree passed in the absence of the defendant is an ex parte decree within the meaning of this rule. AIR 1952 Nag 177 (180): ILR (1949) Nag 674 (DB) ** ILR (1946) 1 Cal 333 (335) (DB).

[But see AIR 1949 Pat 68 (68).]

(5) The fact that the Court was wrong in law in passing a decree ex parte does not detract from the fact that the decree was in fact passed ex parte. AIR 1952 All 198 (200) (DB).

(6) A decree cannot be ex parte when there is evidence already on record and the Court goes into the merits before decreeing the suit. AIR 1916 Oudh 335 (335, 336) ** AIR 1931 All 294 (301): 53 All 612 (FB).

[See 1963 All LJ 450 (455, 456) (DB) ** (1963) 1 Mys LJ 544 (545, 546).]

(7) The recitals on the record are not conclusive as to the character of the decree and the defendant is entitled to show that the decree is, as a matter of fact, ex parte. (1913) 20 Ind Cas 67 (68) (DB) (Cal) ** AIR 1937 Pat 17 (18) (DB) ** (1897) 1 Cal WN cxxvii (cxxviii) (DB).

(8) In a suit brought against a community under Order 1, Rule 8 the members of the community are represented in the suit through the persons named as parties to the suits and cannot be deemed to be absent even if they are not personally present when the suit is decided in the presence of the representatives and suit so decided on merits cannot be said to have been decided ex parte. 1957 All L Jour 720 (721).

(9) Dismissal of application for default of appearance — Not an ex parte order — Application for restoration of such application not maintainable —Madras Buildings (Lease and Rent Control) Rules (1951), R. 12 (3). ILR (1962) Mad 421.

5. Remedies in the case of an ex parte decree. — (1) An ex parte decree is only voidable. Unless and until it is annulled. it would have all the force of a valid decree. AIR 1954 Trav-Co 513 (515): ILR (1954) Trav-Co 1269 (FB).

(2) A defendant against whom an ex parte decree has been passed has following courses open to him:

(a) To apply under this rule to set aside the ex parte decree. AIR 1946 Nag 393 (396): ILR (1946) Nag 586 ** AIR 1929 Cal 323 (325): 56 Cal 21 (DB) ** AIR 1969 Pat 78 (81) ** AIR 1965 Mys 300 (302): (1965) 1 Mys LJ 297 ** 1961 Ker LJ 793 (793) (Validity of decree cannot be challenged in execution.) ** AIR 1960 Raj 245 (247): 1960 Raj LW 217 (DB).

(b) To apply for a review AIR 1946 Nag 393 (396): ILR (1946) Nag 586 ** (1957) 61 Cal WN 949 (950) ** AIR 1919 Mad 844 (844) ** AIR 1969 Pat 79 (81) ** 1961 Ker LJ 793 (793).

(c) To appeal from the decree. AIR 1946 Nag 393 (396): ILR (1946) Nag 686 ** AIR 1917 All 475 (476): 39 All 143 (DB) ** (1878) 2 All

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67 (70, 71): 5 Ind App 283 (PC) ** AIR 1969 Pat 79 (81) ** AIR 1965 Mys 300 (302): (1965) 1 Mys LJ 297 ** 1961 Ker LJ 793 (793) ** AIR 1960 Raj 245 (247): 1960 Raj LW 217.

(d) To file a revision in case of small cause suit, AIR 1935 Mad 196 (198).

(e) To institute a suit on the ground of fraud. (1909) 1 Ind Cas 86 (88) (DB) (Cal).

(3) The remedy under this rule is not barred on account of the rejection by the Court of the petitioner's application to set aside an ex parte order under Order 9, Rule 7 and the refusal to hear the defendant. AIR 1948 Nag 362 (364): ILR (1948) Nag 252.

(4) The fact that proper remedy far setting aside ex parte decree is by way of an application under this rule is no ground for dismissing defendant's appeal from decree. ILR (1961) Mys 1096 (1098).

6. Whether the remedies are concurrent. — (1) The defendant may apply for a review without applying under this rule or even after an application under this rule has been rejected. (1912) 15 Ind Cas 554 (554) (DB) (Cal) ** (1873) 20 Suth WR 284 (284) (DB).

(2) The fact that an application for a review is made at a time when an application under this rule would be barred by limitation is no ground for refusing a review. (1912) 15 Ind Cas 554 (554) (DB) (Cal) ** AIR 1920 Mad 633 (634) (DB).

[But see (1912) 13 Ind Cas 318 (319) (Lah) ** AIR 1920 Lah 261 (262).]

(3) Both remedies, appeal and application, for setting aside ex parte decree can be followed by the defendant. 1966 MPLJ 507 (509): 1966 Jab LJ 820.

7. Hearing of application pending appeal. — (1) The mere filing of an appeal does not take away the jurisdiction of the trial Court to entertain an application under this rule. In fact, such an application ought to be presented to the Court which passed the decree. AIR 1921 Mad 568 (568, 569): 44 Mad 731 (DB) ** AIR 1924 Lah 224 (225) ** (1911) 33 Cal 394 (404) (DB).

(2) Where a decree is ex parte against some defendants and contested against the rest and the contesting defendants alone appeal without impleading the ex parte defendants as respondents the application by the ex parte defendants ought to be made only to the trial Court. AIR 1921 Cal 248 (249): 48 Cal 153 (DB) ** AIR 1918 Mad 665 (666) (DB).

(3) Even if the ex parte defendants have been impleaded as pro forma respondents in appeal, the proper Court to which application ought to be made is the trial Court. AIR 1924 All 173 (175) ** AIR 1922 Mad 33 (33, 34) (DB).

8. Hearing of application after disposal of appeal. — (1) Where an Appellate Court gives a decision in appeal from an ex parte decree, the Court of first instance has no jurisdiction to entertain or dispose of an application to set aside the decree. The same principle will apply where an application in revision had been preferred against the decree and such application has been decided. AIR 1954 Madh B 4 (5): ILR (1953) Madh B 62 ** 1954 Ker L Tim 322 (322, 323) ** AIR 1937 Nag 381 (382): ILR (1940) Nag 496 (DB) ** AIR 1934 All 134 (136): 56 All 608 ** AIR 1967 Bom 310 (311, 312): 68 Bom LR 461 ** (1967) 71 Cal WN 262 (269). (Case under Calcutta Thika Tenancy Act (2 of 1949).

[But see AIR 1944 Mad 576 (576) ** AIR 1927 Mad 722 (723, 724) ** AIR 1946 Pesh 7 (8) (DB).]

(2) Where the appeal is dismissed for default, there is no decree of the Appellate Court which can be said to supersede the decree of the trial Court so as to prevent the defendant from applying to the trial Court. AIR 1945 All 352 (354): ILR (1945) All 499 (DB).

(3) When the ex parte defendants are not impleaded as parties to the appeal by other defendants, the decree of the Appellate Court does not prevent them from applying to the trial Court under this rule. 1955 Ker L Tim 58 (58) ** AIR 1917 All 281 (289): 39 All 13 (DB) ** AIR 1932 Cal 773 (774) (DB).

(4) Where the ex parte decree declares the liability of two defendants separately and specifically and one of the defendants appeals against the decree, an application by the other defendant to set aside the ex parte decree may be made to the trial Court. AIR 1932 All 340 (341): 54 All 423.

9. Suit to set aside an ex parte decree — Ex parte decree obtained by fraud. — (1) A suit will lie to set aside an ex parte decree on the ground of fraud. AIR 1955 Sau 28 (30) (DB) ** AIR 1954 Ajmer 6 (1) (6) ** **AIR 1964 SC 1889 (1891, 1892): (1964) 7 SCR 760** ** AIR 1962 Guj 10 (13, 14): (1961) 2 Guj LR 509 ** AIR 1961 Pat 88 (90).

(2) If the plaintiff suppresses the fact of a compromise effected and obtains an ex parte decree the decree can be set aside by a separate suit. ILR (1953) Mys 468 (469) ** AIR 1914 Mad 158 (159) (DB).

(3) The falsity of the claim on which the former suit was based will not in itself amount to fraud in obtaining the decree in such suit. AIR 1942 Pat 357 (360) (DB) ** AIR 1937 Pat 384 (384).

(4) Where non-service of summons in the previous suit has not by itself been found sufficient to prove fraud it is permissible to go into the merits of the previous suit to see if there was a motive for wilful or fraudulent suppres-

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sion of the notice or summons in order to obtain a decree based on a false claim. AIR 1955 Sau 28 (30) (DB) ** AIR 1940 Cal 489 (493): ILR (1940) 2 Cal 477 (DB) ** AIR 1961 Pat 88 (90).

[See also AIR 1967 All 221 (225): 1968 All LJ 656 ** AIR 1959 Cal 776 (778): 63 Cal WN 740 (DB).]

(5) In a suit to set aside the ex parte decree on the ground of fraud, the onus lies on the party suing to show that there was some fraud in relation to the proceedings of the Court. AIR 1941 Cal 215 (216): ILR (1940) 2 Cal 418 ** AIR 1937 Pat 384 (384) ** AIR 1961 Orissa 57 (61): (1962) 32 Com Cas 584.

(6) A suit is maintainable notwithstanding the fact that it has not been preceded by an application under this rule or that an application was filed under this rule and proved infructuous. AIR 1916 Cal 876 (878) (DB) ** AIR 1955 Him Pra 63 (63) ** AIR 1924 Pat 241 (242) (DB) ** ILR (1962) 1 All 77 (82): 1962 All LJ 84.

(7) Where the question raised in the suit has already been decided adversely to the applicant in an application under this rule, such decision will operate as res judicata. AIR 1953 Punj 118 (119): ILR (1953) Punj 609 (DB) ** AIR 1949 All 198 (199): ILR (1949) All 320.

(8) Where the only fraud alleged is bare non-service of summons, no suit can succeed. AIR 1950 Pat 284 (285) (DB) ** AIR 1940 Cal 536 (537) ** AIR 1962 Guj 10 (13, 14): (1961) 2 Guj LR 509 ** AIR 1961 Orissa 73 (74) ** AIR 1960 Cal 309 (311): ILR (1959) 2 Cal 524 (DB).

(9) Where the whole suit is attacked on the ground of fraud and the incident of improper or defective service is relied on as one indicium of fraud, the suit will lie. AIR 1949 All 198 (200): ILR (1949) All 320 ** AIR 1957 Cal 242 (243) (DB) ** (1902) 29 Cal 395 (400): 29 Ind App 99 (PC).

(10) A fraudulent suppression in the matter of service of the summons can afford a sufficient ground for setting aside the ex parte decree. AIR 1942 Oudh 217 (219): 17 Luck 341 ** (1910) 37 Cal 197 (203) (DB).

(11) The mere fact that the ex parte decree has been procured by false or perjured evidence is no ground for setting it aside. Something more should be proved in support of the allegation of fraud. AIR 1955 Sau 28 (29, 30) (DB) ** AIR 1919 Mad 1044 (1046): 41 Mad 743 (FB). ((1906) 29 Mad 179, **Overruled.**) ** AIR 1962 Guj 10 (13, 14): (1961) 2 Guj LR 509. (The fraud must be actually positive amounting to an intentional contrivance to keep the parties and the Court in ignorance of the real facts and obtaining a decree by such a contrivance.)

[See also AIR 1965 Guj 145 (147): (1964) 5 Guj LR 1009 (DB).]

(12) The question whether the original suit itself is revived after the ex parte decree in that suit has been set aside in a subsequent suit, depends on the issues and the actual decision in the later suit. AIR 1955 Assam 231 (234): ILR (1955) 7 Assam 215 (DB) ** AIR 1948 Pat 33 (35) ** AIR 1931 Pat 204 (205): 10 Pat 516 (FB) ** AIR 1962 Guj 10 (13, 14): (1961) 2 Guj LR 509 .

10. Application to be made to the Court which passed the decree. — (1) The rule requires an application by the defendant, for an order to set aside the decree. AIR 1936 Oudh 50 (51): 11 Luck 519 (DB).

(2) Where, by reason of territorial readjustment, the Court itself becomes different the defendant is not debarred from applying to the Court which is seised of the matter. AIR 1922 Mad 10 (12): 40 Mad 1 (DB) ** AIR 1964 Mad 463 (465): 77 Mad LW 245.

(3) It has been held that an application should be made only to the trial Court even after disposal of the appeal against the ex parte decree. AIR 1927 Mad 722 (723, 724).

(4) An omission on the part of the applicant to sign and verify his application to set aside an ex parte decree is merely a technical defect and cannot defeat the ends of justice. AIR 1950 Mys 70 (72): ILR (1951) Mys 126 (DB).

11. Fresh vakalatnama, if necessary. — (1) A pleader who had duly appeared in the suit is not obliged to file a fresh vakalatnama for the purpose of an application under this rule. AIR 1944 All 238 (239): ILR (1944) All 592 * AIR 1941 Rang 314 (315): 1941 Rang LR 254.

(2) When a suit is decreed ex parte upon counsel's declaration of no instructions, the same counsel cannot present an application under this rule without filing a fresh vakalatnama. AIR 1951 Mad 686 (2) (686).

(3) Vakalatnama accompanying petition to set aside ex parte decree, initially signed by persons not legally authorised to sign — Validation by signature of defendant himself at later stage permissible — Defect is only formal. AIR 1960 Cal 61 (62): 63 Cal WN 832 (DB). (AIR 1953 Bom 28, Foll.)

12. Who can apply to set aside. — (1) Any one of several defendants against whom the decree is ex parte can apply. (1904) 8 Cal WN 621 (625) (DB). ** (1967) 2 An WR 250 (252, 253): (1967) 2 Andh LT 341.

(2) Where the real question is whether the plaintiff or the contesting defendants are really entitled to the claim in suit and an ex parte decree is passed, the contesting defendants are competent to apply under this rule. AIR 1934 All 163 (164): 56 All 578 (DB).

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(3) A person who is not a party though he may be interested in the suit is not entitled to apply under this rule. AIR 1926 Cal 1015 (1015) (DB).

[See however AIR 1952 Pat 72 (73).]

[But see AIR 1955 Nag 238 (239): ILR (1955) Nag 509 (DB).]

(4) A person against whom the suit is dismissed cannot apply. (1911) 11 Ind Cas 141 (142) (All) ** AIR 1927 Mad 227 (228).

(5) Under O. 9, R. 13, only a defendant can apply. A minor or for the matter of that a person of unsound mind, not properly represented in a suit and against whom an ex parte decree has been passed cannot be regarded as a defendant at all and in consequence he cannot apply under O. 9. R. 13, Civil P. C., to set aside an ex parte decree. AIR 1957 Madh B 10 (10, 11).

(6) Mortgage suit — Ex parte final decree — Subsequent sale of property by judgment-debtor — Judgment-debtor can apply because he is bound to make good title to vendee. AIR 1959 All 251 (253): 1958 All LJ 688.

(7) Where an ex parte decree is passed in pending suit against a company the only person competent to make application to set aside the decree after there has been appointment of provisional liquidator is such person and not the company. AIR 1962 Cal 192 (194): 65 Cal WN 1060.

(8) Application by legal representative of deceased defendant is competent. 1962 BLJR 695 (697).

13. Application by the legal representative of the defendant.—(1) When a defendant dies after an ex parte decree is made against him, his legal representative can apply under this rule to set it aside. AIR 1954 Mys 32 (32): ILR (1953) Mys 544 ** AIR 1923 All 30 (30) (DB).

[But see (1905) 28 Mad 361 (362) (DB) ** (1899) 21 All 274 (276) (DB).]

14. Grounds for setting aside an ex parte decree.—(1) In an application under this rule, the Court has to satisfy itself (a) whether the summons has not been duly served or (b) whether the applicant has been prevented by sufficient cause from appearing and if either of these conditions is satisfied, the Court is bound to set aside the ex parte decree. AIR 1954 Sau 84 (84) ** AIR 1935 All 565 (566) ** (1947) 51 Cal WN 189 (195) (DB) ** AIR 1961 Bom 225 (226): 63 Bom LR 125. (A finding that prima facie the applicant has failed to prove sufficient cause for her absence, will not justify dismissal of her application for setting aside the ex parte decree.)

(2) Where one or other of the conditions in the rule is not satisfied the Court has no jurisdiction to grant the application for any other reason. AIR 1954 Ajmer 6 (1) (6) ** AIR 1952 Assam 190 (191) ** AIR 1931 All 294 (296): 53 All 612 (FB) ** AIR 1961 Assam 47 (47, 48) (DB) ** 1961 Ker LT 522 (524). (Court cannot allow it under inherent jurisdiction.)

(3) The Court should decide upon evidence or proper affidavits and come to a definite finding as to the facts alleged in the application. AIR 1925 Mad 1264 (1265) ** AIR 1957 Andh Pra 519 (520) ** (1913) 21 Ind Cas 457 (457) (Mad) ** AIR 1926 Oudh 118 (119) ** AIR 1920 Pat 621 (622) ** (1963) 2 Mys LJ 482 (485). (Application under O. 9, R. 13 not accompanied by affidavit — But applicant giving evidence on oath regarding allegations in application — Court is not justified in disbelieving allegations by reason of absence of affidavit.) ** (1961) 1 Andh WR 212 (217): 1961 Andh LT 473 (DB). (Application under Order 9, Rule 13 — "Sufficient cause" — Affidavit is evidence.) ** 1961 Jab LJ 1239. (It is always a matter depending on the nature of the illness whether a certificate of a prior date should be sufficient to prove the continuance of illness till the date of hearing on which the default in appearance was committed.)

(4) Close holiday — Defendant absent —Court passing ex parte decree — Order of trial Court should be vacated in interest of justice. AIR 1959 All 505 (508): 1959 All LJ 306 (DB).

(5) Defendant in appeal against ex parte decree can urge that he was prevented from appearing by sufficient cause. (1964) 68 Cal WN 1064 (1071) (DB) ** AIR 1963 All 361 (362).

(6) Ex parte decree on Original Side —Name of wrong solicitor given in Prospective Warning and Peremptory lists — Non-appearance by solicitor — Not sufficient ground for passing ex parte decree. AIR 1963 Cal 100 (104).

(7) Ex parte decree — Order setting aside — Grounds not appearing in order or poceedings — Order not valid. AIR 1962 J and K 14 (15).

(8) Ex parte decree liable to be set aside when resulting from erroneous order striking out the defence under O. 11, R. 21. AIR 1968 All 119 (124) (DB).

(9) Where a party is negligent he cannot be said to have had sufficient cause for non-appearance. 1966 All WR (HC) 137 (138).

(10) Court diary showing date originally fixed as 10-3-1965 but subsequently changed to 10-2-1965 — Case taken up for hearing on 10-2-1965 — Time petition filed by defendant rejected and ex parte decree passed on 10-2-1965. **Held** on facts and the circumstances of the case that lower Court had committed error of law. AIR 1968 Pat 271 (274).

(11) Setting aside ex parte decree — Application for — Applicant contending that he was suffering from typhoid and there was sufficient cause for his absence on date of trial — Medical certificate, however, disclosing that he was suffering from chronic malaria during that period. **Held,** applicant being not in a position to attend Court on that day, though

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there was discrepancy with regard to nature of fever, Court ought to have exercised discretion in favour of applicant and set aside ex parte decree. (1968) 2 Andh LT 272.

(12) Ex parte hearing — Neither party ready on earlier hearing dates — Joint petition for time to compromise, given by both parties — On date of such petition suit not even a year old — Refusal of time and ex parte hearing against defendant wrong. AIR 1969 Pat 98 (99) (DB). (AIR 1925 Pat 534 and AIR 1929 Pat 609 Foll.)

(13) Voluntary retirement from a suit by the defendant after his adjournment petition has been rejected by the Court cannot equate to a sufficient cause as preventing him from appearing in Court. (1960) 2 Orissa JD 389 (391): ILR (1960) Cut 591.

(14) Restoration petition — Sufficient cause for non-appearance on date fixed made out — Rejection on ground of previous negligence — Not proper. (1960) 2 Orissa JD 389 (390): ILR (1960) Cut 591.

(15) See also the undermentioned cases for sufficient cause. AIR 1969 Orissa 77 (78): 35 Cut LT 46. (That a woman defendant gave birth to a child 6 days before or after date of hearing was sufficient cause for her absence in Court.) ** AIR 1968 Bom 387 (388): 70 Bom LR 253 ** AIR 1968 Bom 57 (59):69 Bom LR 121. (Sufficient cause is not different from good cause.) ** (1967) 2 Andh WR 250 (252): (1967) 2 Andh LT 341. (Failure of counsel to inform date of hearing to party — Constitutes sufficient cause.) ** AIR 1967 Bom 361 (362, 363): 68 Bom LR 857. (Tenant hence can be held to have been absent on the date of hearing because he was unaware of it and his absence therefore can be said to be for good and sufficient reason.) ** AIR 1967 Orissa 14 (16, 17): 32 Cut LT 228. (Orissa amendment — Non-availability of their advocate for conducting their case — Defendants had sufficient cause for their failure to appear.) ** AIR 1967 Orissa 14 (16, 17): ILR (1965) Cut 846 (851) ** AIR 1962 Madh Pra 211 (211): 1962 MPLJ 192 (DB) ** AIR 1961 Andh Pra 128 (129): 1960 Andh LT 480. (Counsel engaged in another Court — Held sufficient cause — Affidavit of counsel not necessary.) ** (1961) 1 Andh WR 212 (216): 1961 Andh LT 473 (DB). (No notice to respondent — He could not engage counsel also as he fell seriously ill — Case of sufficient cause.) ** AIR 1961 Cal 534 (536, 537): 65 Cal WN 535. (Want of knowledge of date of hearing is sufficient cause.) ** AIR 1959 Cal 173 (174): 62 Cal WN 503 (DB). (Sudden illness of lawyer is 'sufficient cause'.) ** AIR 1959 Pat 342 (343) (DB). (Illness of witnesses and Documents to be produced filed already in other Courts — Sufficient cause.)

15. Summons not duly served.—(1) The onus of proving that the summons has not been duly served is upon the applicant claiming the benefit of this rule. AIR 1953 Trav-Co 101 (101, 102) ** AIR 1924 Pat 446 (447): 3 Pat 236 (DB) ** AIR 1928 Nag 80 (80): 22 Nag LR 166 ** (1963) 29 Cut LT 607 (609): ILR (1963) Cut 864.

(2) The Court must decide the matter upon enquiry and upon evidence. (1911) 9 Ind Cas 31 (32) (DB) (All) ** AIR 1923 Mad 27 (28).

(3) A summons cannot be said to be duly served if it is a misleading document having no relevance to the real proceeding which is contemplated and having no reference to the order ultimately passed. AIR 1924 All 818 (823): 46 All 864 (DB).

(4) Where the summons is served, not upon the defendant but on his brother, or where the service is by registered post and the defendant denies receipt of the same, or where there is a failure to follow the procedure laid down in O. 5, R. 17 or where, in the case of a substituted service, there is nothing on record to show that the provisions of O. 5, Rr. 19 and 20 were complied with or where the defendant is not served in sufficient time to enable him to appear and defend the Court is justified in setting aside the ex parte decree. AIR 1957 Andh Pra 1 (2, 4): ILR (1956) Andhra 250 (FB) ** AIR 1957 All 805 (808) ** AIR 1957 All 76 (76, 77) (DB) ** (1911) 9 Ind Cas 763 (763) (DB) (Mad) ** 1956-2 Mad L Jour 86 (86) ** AIR 1954 Trav-Co 513 (514): ILR (1954) Trav-Co 1269 (FB) ** 1961 Ker LT 378 (379): (1961) 1 Ker LR 522. (Summons not served in sufficient time — Amounts to 'sufficient cause' within O. 9, Rule 13) ** (1960) 2 Orissa JD 306 (307): ILR (1960) Cut 522. (Summons intended for pardanashin lady tendered to a male member of family who was separate — Service of summons held invalid and is good ground for setting aside ex parte decree.)

(5) Where the summons has not been duly served the fact that the defendant knew of the suit will be no ground for not restoring the suit. AIR 1916 Cal 181 (184): 43 Cal 447 (SB) ** AIR 1954 Assam 223 (224) (DB) ** AIR 1962 Orissa 15 (16).

(6) If there has been no due service of summons, the defendant is not to blame and unless he acquiesces the order under O. 9, R. 13 should be unconditional. AIR 1960 Madh Pra 234 (235): 1960 MPLJ 773 (DB).

(7) Service on the defendant for a day on which there was curfew order and persons were prevented from going to Court is not due service. AIR 1957 All 76 (77).

(8) Service of summons by registered post without justification — Summons refused by defendant — Summons not duly served. AIR 1960 Madh Pra 378 (380): 1960 MPLJ 1074.

(9) Order 5, R. 10, Proviso (Punjab) — Subsequent service by registered post —

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Not one duly served. AIR 1959 Punj 467 (468): 60 Punj LR 374.

(10) Summons not returned unserved — Recourse to substituted method of service is not open — No ex parte decree can be passed against defendant. 1965 Cur LJ 709.

(11) A summons cannot be regarded as duly served unless it is accompanied by a copy of the plaint. AIR 1959 Punj 467 (468): 60 Pun LJ 374.

(12) Appearence of defendant at hearing of pauper application — After the registration of the suit defendant is entitled to service of summons under O. 5, R. 1 — Non service of summons and ex parte decree passed — The decree passed ex parte must be set aside under O. 9, R. 13. AIR 1960 Cal 538 (539).

(13) Summons served and defendant remaining present on date of hearing — Matter remaining pending for two years — Case taken for hearing without fresh summons — Ex parte decree — It cannot be served that summons was not duly served within the meaning of Art. 164 Limitation Act. AIR 1961 Assam 80 (80).

(14) When the date mentioned in the summons for hearing of the parties happens to be a holiday and no fresh notice is issued to the defendant who consequently remains absent on the next date of hearing the Court cannot pass an ex parte decree against the deft. and if passed is liable to be set aside. ILR (1962) 2 Punj 880 (885, 886). (1957 Pat LR 99, Approved.) ** AIR 1964 Madh Pra 261 (262).

(15) Substituted service ordered — Ex parte decree passed — Application under Order 9, Rule 13 not alleging failure to fulfil conditions under Order 5, R. 20 (1) nor denying knowledge of suit claim — Substituted service is effectual. AIR 1969 Pat 112 (113) (DB).

(16) Service by post to a person living outside the jurisdiction of Court but within India, is valid — Substituted service by publication in newspapers has the same effect as personal service — Return of summons with an endorsement of refusal by addressee, is prima facie proof of service. 1967 Ker LT 322: 1967 Ker LJ 651.

16. Minor defendant. — (1) The mere fact that the guardian did not appear or that the court guardian failed to appear owing to want of instructions, or that there are mere irregularities in the matter of the appointment of a guardian, is not a sufficient ground for setting aside the ex parte decree. AIR 1936 Mad 961 (962) (DB) ** AIR 1935 Mad 435 (436): 38 Mad 1045 (DB) ** (1912) 15 Ind Cas 904 (904) (All) ** AIR 1926 All 545 (545): 49 All 123 (FB).

(2) Where the guardian has wrongfully or negligently allowed a claim against a minor to be decreed ex parte, the decree can be set aside under this rule. AIR 1955 Trav-Co 166 (166, 167): ILR (1955) Trav-Co 325 (DB) ** AIR 1946 Nag 393 (396): ILR (1946) Nag 586 ** AIR 1935 Mad 435 (436): 58 Mad 1045 (DB) ** (1966) 1 Mad LJ 293 (295): 79 Mad LW 85 ** (1965) 1 Mad LJ 277 (277, 278): 77 Mad LW 477.

(3) It is open to the minor to impeach an ex parte decree got against him by a separate suit in cases where he can show that the guardian has been guilty of fraud or gross negligence and if his interest were prejudiced thereby. AIR 1918 Nag 187 (191) ** (1900) 24 Bom 547 (552) (DB) ** AIR 1931 Mad 6 (7) (DB).

(4) Dismissal of application by minor under Order 9, Rule 13 no bar to fresh suit by minor to set aside ex parte decree. 1964 Jab LJ 388 (394).

17. "Upon such terms as to costs." etc. — (1) The Court has a wide discretion in imposing such terms on the applicant as it thinks fit before setting aside the ex parte decree. AIR 1953 Mad 464 (465) ** ILR (1954) Bom 371 (374) ** 1956 Mad WN 385 (1) (385) ** AIR 1952 Mad 160 (161): ILR (1952) Mad 547.

(2) Where on an application for setting aside an ex parte decree the Court passes an order that the decree will be set aside on condition that the petitioner should deposit in Court the costs awarded by the decree within a certain time and in default the petition is to stand dismissed and the petitioner commits default in payment of the costs within the prescribed time, the Court has no power thereafter to extend the time under Section 148. The period prescribed under the section can be extended only during the currency of the previous order. AIR 1957 Andh Pra 780 (781): ILR (1956) Andhra 109 (DB) ** AIR 1965 Cal 354 (355) ** AIR 1961 Bom 254 (257): 63 Bom LR 48.

(3) The Court ought not to impose very onerous terms on the applicant. ILR (1954) Bom 371 (374) ** AIR 1933 All 601 (602) (DB).

(4) The Court has no power to order, pending the trial of an application under this rule, that the applicant should deposit the costs of the suit or furnish security for the decree amount and dismiss the application for failure to comply with such order. AIR 1944 All 236 (237): ILR (1944) All 504 (DB) ** AIR 1958 Raj 237 (238): ILR (1958) 8 Raj 295 (DB) ** AIR 1940 Mad 585 (585) (DB).

18. Proviso to the rule. — (1) In a suit for specific performance of a contract for sale, the decree is not of such a nature that it must be set aside against all the defendants. ILR (1953) 3 Raj 422 (425) (DB).

[See AIR 1960 Bom 485 (487): 62 Bom LR 722. (An ex parte decree for

Order 9, Rule 13 — Note 18 (contd.)
money passed against defendants 2 and 3 of a partnership for breach of a contract is not of such a nature that it cannot be set aside as against one defendant only.)]

(2) Where the decree is of such a nature that it cannot be set aside only against the defendant applying under this rule it may be set aside wholly against all the defendants including those who have not applied or even those against whom a decree has been passed on the merits. AIR 1954 Assam 183 (185): ILR (1954) 6 Assam 303 (FB) ** AIR 1957 Ker 37 (37, 38) ** 1958 All L Jour 367 (371, 372) (DB) ** AIR 1950 Kutch 18 (19) ** AIR 1959 All 251 (253): 1958 All LJ 688.

(3) The right to set aside an ex parte decree is conferred expressly only upon the party who applies to set aside the decree. There is no right whatever in the party who has not applied to set aside the decree to have it set aside. AIR 1952 Bom 446 (447) (DB) ** AIR 1961 Raj 281 (283): 1961 Raj LW 343 ** (1960) 2 Andh WR 160: 1960 Andh LT 476. (AIR 1952 Bom 446 and (1908) 18 MLJ 543: ILR 31 Mad 454, Rel. on.)

(4) The following are some of the classes of cases in which the decree cannot be set aside only as against the defendant applying without setting it aside as against the other defendants also.

(a) Where the decree is joint and indivisible. AIR 1954 Assam 183 (185): ILR (1954) Assam 303 (FB) ** AIR 1927 Mad 550 (550).

(b) Where the decree proceeds on a ground common to all the defendants. (1871) 15 Suth WR 371 (371) (DB) ** AIR 1917 Lah 194 (195).

(c) Where it is necessary that the whole decree should be re-opened in the interests of justice. (1907) 5 Cal L Jour 202 (203) (DB) ** (1911) 33 All 264 (271): 38 Ind App 37 (PC).

(d) When the suit will result in two inconsistent decrees if the ex parte decree be not set aside against the other defendants also. (1902) 24 All 383 (388) (FB) ** AIR 1936 Lah 243 (243).

(e) Suit against mother and her illegitimate minor son for nullification of parenthood and cancellation of maintenance allowance to him — Ex parte decree against both held to be nullity as against the minor — Causes of action against mother and her son being intertwined, decree against mother also is liable to be set aside. AIR 1969 Orissa 52 (53).

(5) Where a suit is dismissed against defendant A and an ex parte decree is passed against defendant B, the Court has no jurisdiction to set aside the dismissal in favour of A on the application of B to set aside the decree. AIR 1954 Assam 183 (185, 188): ILR (1954) 6 Assam 303 (FB) ** AIR 1954 Nag 125 (126) ** AIR 1927 Sind 245 (246) (DB) ** (1903) 18 Ind Cas 327 (327) (Lah).

[But see AIR 1934 All 1051 (1051, 1052) ** AIR 1924 Pat 771 (772) (DB).]

(6) Several defendants — Decree in favour of some— Ex parte against others — Setting aside of ex parte decree — Proviso will not apply. AIR 1969 Orissa 77 (79): 35 Cut LT 46.

19. Effect of setting aside the ex parte decree. — (1) The effect of setting aside an ex parte decree is to restore the parties to the position they previously occupied and the Court should proceed to decide the suit as it stood before the decree. AIR 1953 Trav-Co 426 (427) (DB) ** AIR 1951 Ajmer 78 (1) (78).

(2) The trial of the suit should commence de novo as against the persons in whose favour the decree was set aside and the evidence that had been taken in the ex parte proceedings should not be used against them. AIR 1957 Cal 170 (171) ** AIR 1951 Ajmer 78 (1) (78) ** (1912) 16 Ind Cas 96 (97) (Mad) ** AIR 1962 All 381 (382): 1962 All LJ 305 (DB).

[But see AIR 1956 Mad 633 (634) (DB).]

(3) Where on failure to pay adjournment costs, the defence is struck off and an ex parte decree is passed, on setting aside the ex parte decree the order striking off the defence should also be set aside. AIR 1956 Bom 245 (245).

(4) Any attachment that has been issued or any sale that has taken place in pursuance of the ex parte decree becomes null and void and the Court can also order restitution. (1906) 29 Mad 175 (176) (DB) ** AIR 1953 Trav-Co 426 (427) (DB) ** AIR 1917 Cal 564 (565) (DB).

(5) The question as to whether, when an ex parte decree is set aside, by a decree in a subsequent suit the original suit in which that decree was obtained is revived or not depends upon the pleadings, the issues and the actual decision in the subsequent suit. AIR 1957 Mad 512 (513) ** AIR 1964 Raj 71 (72): 1963 Raj LW 302.

(6) Decree set aside under Order 9, Rule 13 — Decree at least varied — Restitution under Section 144 maintainable. (1966) 70 Cal WN 1027 (1030, 1031).

(7) When an appeal in revision against an order rejecting an application under Order 9. Rule 13 is finally decided against the applicant the ex parte decree is revived and limitation for application for execution of the ex parte decree starts from such date. (1965) 31 Cut LT 627 (631).

Order 9, Rule 13 (contd.)

20. Ex parte decree against a firm. — (1) This rule is applicable to ex parte decree against firms also. AIR 1942 Sind 99 (100): ILR (1942) Kar 220 (DB).

(2) An ex parte decree passed against a firm after it has been served in the manner contemplated by Order 30 cannot be set aside on the application of a partner who alleges that he has not been duly served. ILR (1955) Madh B 345 (346) (DB) ** AIR 1924 Bom 366 (367): 47 Bom 778 (DB) ** AIR 1960 Mys 205 (206): 37 Mys LJ 967. (Ex parte decree against firm after notice to firm — Application to set aside by partner — Not maintainable.)

(3) Where the partner who is served under Order 30 is absent owing to unavoidable causes and ex parte decree is passed against the firm, he can apply under this rule for setting aside the decree. AIR 1942 Sind 99 (100): ILR (1942) Kar 220 (DB).

(4) Where the applicant denies that he is a partner of the firm along with other defendants, the Court can enquire into the matter and set aside the decree. AIR 1942 Sind 97 (98): ILR (1942) Kar 218 (DB) ** (1910) 8 Ind Cas 448 (449) (DB) (Low Bur.)

21. Appeal. — (1) No appeal lies from an order setting aside ex parte decree. AIR 1954 Assam 168 (169): ILR (1953) 5 Assam 290 (DB) ** ILR (1954) Bom 371 (373) ** (1878) 1 All 748 (750) (FB) ** AIR 1962 Bom 241 (243): 63 Bom LR 947 (FB). (Setting aside ex parte decree under Order 9, Rule 13 is not judgment within meaning of Letters Patent, (Bom.), Cl. 15.)

(2) Where, on the failure of the applicant to comply with certain terms, it is ordered that the petition will stand dismissed, it is only the final order passed on failure to fulfil the conditions imposed that is appealable. AIR 1953 Mad 360 (361, 362) ** AIR 1927 Bom 1 (3): 51 Bom 67 (FB). (**Overruling** AIR 1926 Bom 353: 50 Bom 326.)

[But see AIR 1914 All 336 (337) (DB).]

(3) Order rejecting the application to set aside ex parte decree is appealable under Order 43, Rule 1, Clause (d) whether the rejection is on the merits or on default. 1954 All WR (HC) 368 (369) ** AIR 1948 Mad 416 (418) ** AIR 1954 Assam 1 (7, 9): ILR (1953) 5 Assam 538 (FB) ** AIR 1952 Assam 75 (76) ** AIR 1960 Orissa 176 (177): ILR (1960) Cut 41 ** AIR 1959 Pat 121 (124): 1958 BLJR 783.

(4) Order 43 does not provide for appeal from order dismissing for default application for restoration of application under Order 9, Rule 13 and hence no appeal lies from order of dismissal. AIR 1961 All 561 (563).

(5) The fact that a final decree has been passed in the case is no ground for refusing to entertain an appeal from an order rejecting an application to set aside an ex parte preliminary decree. AIR 1928 Cal 720 (721) (DB).

[But see AIR 1925 Cal 790 (791) (DB).]

(6) Suit for recovery of money on basis of loan dismissed against defendants 1 and 2 but decreed ex parte against defendant 3 — Restoration proceedings by defendant 3 — Defendants 1 and 2 impleaded — Restoration disallowed — Appeal — Defendants 1 and 2 not impleaded — Appeal must fail on ground that there was likelihood of inconsistent findings in same suit. (1961) 27 Cut LT 331 (339).

(7) In appeal against ex parte decree defendant can show from the records error, defect or irregularity affecting the decision. 1966 MPLJ 507 (511): 1966 Jab LJ 820 (DB).

(8) According to the practice of the Madras High Court there is jurisdiction in the Court to grant, in proper cases, stay of execution of decree pending an appeal against the order refusing to set aside an ex parte decree. (1960) 2 Mad LJ 11 (12): 72 Mad LW 806.

22. Revision. — (1) An order setting aside an ex parte decree not being appealable a revision will lie therefrom if the conditions of Section 115 of the Code are satisfied. AIR 1948 Sind 33 (33): ILR (1947) Kar 73 ** 1950 Bur LR (HC) 100 (104) ** AIR 1961 All 96 (97). (No clear finding as to sufficient cause — Material irregularity within Section 115 (c).)

(2) Where the order of the lower Court is passed in defiance of the provisions of this rule a revision will lie. AIR 1931 All 294 (302): 53 All 612 (FB) ** AIR 1958 Pat 27 (29) (DB) ** AIR 1958 Raj 237 (238): ILR (1958) 8 Raj 295 (DB).

[But see 1951 Mad WN 785 (786).]

(3) The High Court will not interfere with a finding of fact as to sufficient cause or otherwise or interfere with any of the conditions imposed by the Court in the exercise of its discretion. AIR 1953 J and K 11 (11): 11 J and KLR 101 ** AIR 1951 Kutch 69 (70) ** 1957 All WR (HC) 189 (191) ** AIR 1926 All 142 (143): 48 All 199 (DB) ** AIR 1966 Orissa 41 (42): 31 Cut LT 1092 ** AIR 1966 Orissa 24 (26): 31 Cut LT 769 ** AIR 1964 Bom 38 (39): 65 Bom LR 584 ** AIR 1961 Madh Pra 169 (171): 1961 MPLJ 1124.

[See however ILR (1954) Bom 371 (376).]

(4) Application for setting aside ex parte decree time barred — Trial Court entertaining application and restoring suit — This was exercise of jurisdiction not vested — High Court could set it aside in revision. AIR 1966 Orissa 59 (60): 31 Cut LT 1011.

(5) Order refusing to set aside ex parte decree — Appellate District Court —

R. 14. No decree to be set aside without notice to opposite party.—No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

[1882, 1887, S. 109.]

HIGH COURT AMENDMENTS

Assam and Nagaland

Same as that of Calcutta.

Calcutta: Andaman and Nicobar Islands.

Cancel the word "thereof" and substitute therefor the following words:—

"together with a copy thereof" (or concise statement as the case may be)." (3-2-1933.)

Order 9. Rule 13 — Note 22 (contd.)

Court not coming to independent finding after discussing evidence — Amounts to failure to exercise jurisdiction. ILR (1963) Cut 351 (352, 353).

(6) Application dismissed— Time spent in such proceedings cannot be deducted in computing time prescribed for appeal against the decree. ILR (1961) 11 Raj 365.

(7) Application under Order 9, Rule 13 dismissed — Recall of dismissal order followed by order allowing application — Revision against order allowing application — High Court can interfere even with the earlier orders since the last order allowing application is the result of earlier ones. AIR 1967 Pat 399 (400)

23. Limitation. — (1) Application under this rule made prior to commencement of new Limitation Act (1963) — Provisions of new Act cannot be made applicable to such application. 1966 All LJ 640 (641): 1966 All WR (HC) 700 (DB).

(2) Application to set aside such order under Order 9, Rule 13 read with Section 141, Civil P. C. — Not governed by Article 164, Limitation Act (1908) but residuary clause in Article 181. AIR 1966 All 105 (107). (Ex parte order passed under Section 25 Guardians and Wards Act.) ** AIR 1968 Orissa 207 (208): 34 Cut LT 472. (Limitation runs from date when suit is decreed ex parte and not from when such decree is signed.) ** 1963 Cal LJ 192 ** 1963 BLJR 484 (486) ** AIR 1962 All 590 (601, 602): 1962 All LJ 501 (DB) ** AIR 1961 Assam 80 (80).

(3) No proper service on defendant — Ex parte decree — Application to set it aside — Application is proper if filed within period calculated from time of knowledge of decree. 1961 Ker LT 876 (877) ** 1965 Cur LJ 709 (Punj) ** AIR 1964 Madh Pra 261 (262) ** 1963 BLJR 484 (486) ** AIR 1962 All 590 (601, 602): 1962 All LJ 501.

(4) Application for setting aside ex parte decree — Filed more than 30 days from the date of the decree — Contention that it was within 30 days from the knowledge of the decree — **Held,** it is not necessary for the Courts to find out the actual date of the knowledge of the petitioner when they find, as a fact the date asserted by the petitioner is wrong. AIR 1969 Pat 246 (248).

(5) Setting aside of ex parte decree after its executing had become time-barred — Passing of second decree — Time for execution will begin to run from second decree as it gets altered by the decree being set aside under Order 9, Rule 13. 1962 Ker LT 715 (718) ** AIR 1963 Orissa 102 (103, 104): (1962) 4 Orissa JD 288.

(6) Setting aside ex parte decree — Application for, barred by limitation — Application allowed as 'special case' — Order held illegal.

Held, it could not be done as a matter of judicial generosity in any 'special case.' and that the application should have been dismissed as barred by limitation. 1961 Ker LT 18 (19): 1960 Ker LJ 1430.

(7) Applicant under Order 9, Rule 13 can invoke benefit of Section 18, Limitation Act only if he proves fraud. 1960 Raj LW 606 (609).

(8) Title suit decreed ex parte against 5 out of 12 defendants on 21-12-1961 — Application by five defendants under Order 9, Rule 13 filed on 17-8-1965 — Case of defendants one and indivisible — Three of defendants could only be fixed with knowledge of decree beyond 30 days — Application held not barred under Article 123. AIR 1969 Orissa 196 (197).

(9) Ex parte preliminary decree in foreclosure suit passed on 9-4-1963 — Application for setting aside ex parte decree filed by defendant on 15-4-1965 — Application dismissed by trial court and first appellate court — Revision — Question whether summons was not duly served on him — Essentially this is question of fact and does not relate to domain of jurisdiction and is not to be ordinarily interfered with — Court failing to bestow attention on crucial factors in evidence lending some probability to defence version — Order of appellate court set aside — Case remanded for rehearing of appeal. AIR 1969 Orissa 183 (184).

ORDER 9, RULE 14

1. Notice to opposite party. — (1) The rule is imperative that no ex parte decree can be set aside without notice to the opposite party so as to give him an opportunity to be heard. AIR 1920

HIGH COURT AMENDMENTS

Rule 15

(Bombay: Dadra and Nagar Haveli[a])

Add the following as Rule 15:—

15. Application of the provisions of this Order to Appeals.—In the application of this order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant,' respondent, and the word 'suit,' an appeal. **(1-11-1966.)**

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Gujarat

Same as that of Bombay (17-8-1961).

Mysore

Add the following as Rule 15:—

"15. The provisions of Section 5 of the limitation Act, 1963, shall apply to an application made under sub-rule (1) of Rule 9 or Rule 13. (30-3-1967.)

ORDER X

EXAMINATION OF PARTIES BY THE COURT

R. 1. Ascertainment whether allegations in pleadings are admitted or denied.—At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

[1882, S.117; 1877, S. 114.]

Order 9, Rule 14 — Note 1 (contd.)

Oudh 220 (220): 23 Oudh Cas 104 ** ('34) AIR 1934 Pat 396 (397) ** (1967) All WR (HC) 700 (701). (Order setting aside ex parte decree — Notice not served on opposite party — Order liable to be set aside.)

(2) A mere oral notice given to a pleader who appeared in execution proceedings in connection with the same decree but who was different from the pleader who appeared in the suit or a service on plaintiff's pleader in the absence of any order of the Court, or a service on plaintiff's chela is not sufficient. (1913) 19 Ind Cas 241 (242) (Mad) ** (1921) 63 Ind Cas 47 (48) (DB) (Pat) ** AIR 1920 Oudh 220 (220): 23 Oudh Cas 104.

(3) The words "opposite party" do not include a Court auction-purchaser or an attaching decree-holder who has attached the ex parte decree or a co-defendant in a case. (1899) 26 Cal 267 (270) (DB) ** AIR 1936 All 410 (410) (DB) ** (1910) 7 Ind Cas 66 (66) (DB) (Mad) ** AIR 1955 Trav-Co 113 (114): ILR (1954) Trav-Co 1151 (DB).

ORDER 10, RULE 1

1. "Shall ascertain." — (1) The powers vested in Civil Courts by this order are mainly intended to draw by viva voce examination, the real points in controversy between the parties and thus prevent the real matter in dispute remaining undecided or left out of consideration. AIR 1952 All 355 (356): ILR (1951) 2 All 215 ** Madh BLJ 1954 HCR 1698 (1699) ** AIR 1924 Nag 191 (195).

(2) The provisions of this rule are peremptory and permitting parties to file a series of written statements against each other is not justified. AIR 1922 Oudh 178 (188, 189) (DB) ** (1896) 9 CPLR 11 (11) ** AIR 1929 Bom 413 (413).

(3) An examination under this rule is not necessary or proper where the pleadings on record are complete and clear AIR 1941 Sind 41 (45): ILR (1941) Kar 146 (DB) ** (1926) 92 Ind Cas 1006 (1007) (Lah).

(4) It is the duty of the parties themselves to come to Court with a clear case and it is not for the Courts to make out a case for the plaintiff. 1954 Raj LW 673 (675).

(5) It is not essential that the party must be present in order to answer questions under this rule. ILR (1956) 6 Raj 921 (924) (DB).

(6) Where in a suit for redemption, the mortgagors suppressed the fact of sale in favour of the mortgagee, and even after the mortgagee put forward a case of sale, the mortgagors did not choose to put in further pleadings it was held that it was bounden duty of trial Court to have examined parties. ILR (1957) 7 Raj 101 (104).

2. Effect of statement by party or his pleader. — (1) The party or his pleader can properly refuse to make admissions about matters not directly involved in

R. 2. Oral examination of party or companion of party.—At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

[1882, S. 118; 1877, Ss. 118, 119; 1859, S. 125.]

R. 3. Substance of examination to be written.—The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

[1882 and 1877, S. 119; 1859, S. 125.]

Order 10, Rule 1 — Note 2 (contd.)

the suit especially when the questions are put at the suggestion of the opposite party. AIR 1930 Lah 229 (230).

(2) The Court must record the admissions or denials made under this rule but cannot act upon the answer recorded and pass final judgment in the suit without framing issues in the case. AIR 1922 Oudh 178 (188, 189) (DB) ** 1905 All WN 170 (170) (DB) ** (1882) 10 Ind App 74 (79) (PC).

(3) Where all defendants confess judgment, Court may record their joint statement and pass a decree on admission. AIR 1934 Lah 540 (541).

(4) The statement under O. 10, Rule 1 made by a party under this rule are conclusive against him. Such a statement is in the same position as written pleadings of the parties. AIR 1968 All 259 (260, 261): ILR (1967) 2 All 547 ** (1966) 7 Guj LR 1123.

(5) When no written statement is filed by defendant, no question of his examination under Order 10. Rule 1 really arises and hence if a document unduly stamped is admitted in that examination it cannot be said that there was judicial determination of the matter of its admissibility. AIR 1967 Him Pra 29 (30).

(6) Admissions in the statement under Order 10, Rule 1, though conclusive for the purpose of the case cannot replace other pleas taken in the written statement. 1966 Raj LW 580: ILR (1967) 17 Raj 517.

[See also Madh BLJ 1954 HCR 1698 (1699) ** AIR 1962 All 447 (449).]

(3) Where appellant who was examined in the trial Court was recalled and examined by the appellate Court without recording reasons for his examination acted in violation of Rules 27 and 29 of Order 41 and the procedure followed was highly irregular. There was no justification for the procedure adopted by the appellate Court. AIR 1967 Ker 83 (84): 1966 Ker LT 291. **(AIR 1951 SC 193** and **AIR 1931 PC 175** and AIR 1946 Mad 203, Rel. on.)

(4) The powers under this rule can be used by Small Cause Court to obtain full and further particulars in a complicated case. ('56) AIR 1956 Bhopal 9 (10).

(5) This rule does not contemplate the examination of a party's pleader. AIR 1941 Sind 41 (45): ILR (1941) Kar 146 (DB).

(6) Party cannot be allowed to deviate from his pleadings — Admission made by party under Order 10, Rule 2 is conclusive against him. AIR 1962 All 111 (112).

(7) Appellate Court cannot explain away by surmises or conjectures statements made under Order 10, Rule 2 and recorded under Order 10, Rule 3, unless there is clear proof of error. AIR 1965 All 266 (267).

(8) Statements under the rule are not conclusive against those who make them. AIR 1968 All 259 (260, 261): ILR (1967) 2 All 547.

(9) Prior to framing of issues personal attendance of party for examination under Order 10, Rules 2 and 4 cannot be ordered. AIR 1965 J and K 60 (61): 1964 Kash LJ 390. (Case under J and K Agriculturist Relief Act (1 of 1983 SMT), Section 8.)

ORDER 10, RULE 2

1. Oral examination. — (1) Object of the examination under this rule is to ascertain the matters in dispute and not to take evidence. AIR 1926 All 411 (412) (DB) ** 1965 All WR (HC) 352: 1965 All LJ 722.

(2) It is not intended to be a substitute for a regular examination on oath or to supersede the ordinary procedure at trial as prescribed in Order 18. AIR 1949 Mad 707 (708) (DB) ** AIR 1926 All 411 (412) (DB) ** **AIR 1931 PC 175 (176, 177).**

ORDER 10, RULE 3 — NOTE 1

(1) Appellate Court cannot explain away by surmises or conjectures statement made under Order 10, Rule 2 and recorded under Order 10, Rule 3 unless there is clear proof of error. AIR 1965 All 266 (267).

R. 4. Consequence of refusal or inability of pleader to answer.—(1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in Rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

[1882 and 1877, S. 120; 1859, S. 127; See O. 5, R. 3.]

ORDER 10, RULE 4 — SYNOPSIS

1. Scope.
2. Order for personal appearance.
3. Effect of non-attendance.
4. Effect of dismissal.
5. Appeal and revision.

1. Scope. — (1) The rule enables the Court to get obscure points cleared up by obtaining information from either of the parties, and also, if possible, to get admissions so as to narrow down the issues. (1903) 5 Bom LR 687 (688) (DB) ** AIR 1933 All 517 (519) (DB).

2. Order for personal appearance. — (1) This rule is a penal provision and its terms have to be strictly complied with. ILR (1956) 6 Raj 921 (925) (DB).

(2) An order under this rule can be passed only where the Court finds that there is a material question relating to the suit that has to be answered and the pleader refuses or is unable to answer it. ILR (1956) 6 Raj 921 (926) (DB) ** AIR 1918 Oudh 429 (429): 21 Oudh Cas 252 (DB) ** AIR 1965 J and K 60 (61): 1964 Kash LJ 390.

(3) The order should be specific and sufficiently explicit and must state the reasons therefor. (1872) 17 Suth WR 141 (142) (DB) ** (1909) 2 Ind Cas 463 (464) (All).

(4) Prior to framing of issues personal attendance of party for examination under Order 10, Rules 2 and 4 cannot be ordered. AIR 1965 J and K 60 (61): 1964 Kash LJ 390.

(5) Order under Clause (2) of Rule 4 can be made only on failure of party to attend in pursuance of order made in circumstances mentioned in Cl. (1) of Rule 4. 1961 Jab LJ 387: ILR (1961) Madh Pra 164.

3. Effect of non-attendance. — (1) This rule is a self-contained one applicable to all cases and where a judgment is pronounced against a party for failure to attend as directed, the order must be taken to have been made only under this rule, and not under Order 9. AIR 1921 Mad 417 (418) (DB).

[See also AIR 1932 All 595 (596) (DB).]

[But see AIR 1917 All 136 (136) (DB). (Order is under Order 9 though purported to have been passed under this Rule.)]

(2) Non-appearance of plaintiff on date fixed for issue or for examination entails dismissal of the suit in the same manner as on any other ground due to failure of the plaintiff to be present at the trial. AIR 1968 Orissa 225 (226): 34 Cut LT 1389.

(3) A person exempted under the Code from appearance in Court has a lawful excuse for not appearing. (1863) Marsh 627.

4. Effect of dismissal. — (1) A dismissal of a suit under this rule operates as res judicata in the subsequent suit on the same subject-matter. (1911) 11 Ind Cas 986 (986) (DB) (Bom).

(2) A dismissal of a suit for redemption under this rule does not bar a subsequent suit for redemption of the same mortgage. AIR 1929 Bom 116 (119).

5. Appeal and revision. — (1) An appeal lies from an order pronouncing judgment under sub-rule (2) of this rule under Order 43. Rule 1, Clause (e). 1957 All WR (HC) 73 (74).

(2) An order striking off the defence of one of the defendants for his failure to appear in person when ultimately the Court passed a final order decreeing the suit against all the defendants is not open to appeal. AIR 1917 All 300 (300): 39 All 450 (DB).

(3) An order striking out the written statement of the defendant who is a contumacious party does not fall within the purview of the words "case decided" under Section 115, Civil P. C. and is not revisable. 1957 All WR (HC) 73 (74, 75).

ORDER XI

DISCOVERY AND INSPECTION

[See S. 30.]

R. 1. Discovery by interrogatories.—In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of witness.

[1882, S. 121; R.S.C., O. 31, R. 1.]

ORDER 11, RULE 1 — SYNOPSIS

1. Scope of the rule as to interrogatories.
2. Interrogatories and pleadings.
3. Interrogatories and cross-examination.
4. Interrogatories as to evidence or witnesses.
5. Interrogatories on questions of law.
6. Opposite parties.
7. Leave of Court.
8. Impleading party for discovery.
9. Probate proceedings.
10. Land acquisition and other proceedings.

1. Scope of the rule as to interrogatories. — (1) The main object of interrogatories is to save expense by enabling a party to obtain from his opponent information as to facts material to the questions in dispute between them, and to obtain admissions of any facts which he has to prove on any issue which is raised between them. AIR 1952 Nag 135 (137): ILR (1952) Nag 650 (DB) ** AIR 1921 Mad 381 (382) (DB) ** AIR 1960 Cal 536 (537, 538): ILR (1961) 1 Cal 6 ** (1969) 39 Com Cas 23: (1969) 1 Com LJ 38 (All).

(2) As a general rule, interrogatories will be allowed whenever the answers to them will serve either to maintain the case of the party administering them or to destroy the case of the adversary. AIR 1952 Nag 135 (137): ILR (1952) Nag 650 (DB).

(3) Interrogatories can be administered even for discovering the nature of the opponent's case. AIR 1914 Cal 767 (767): 41 Cal 6.

2. Interrogatories and pleadings. — (1) A party is entitled to interrogate his opponent with a view to ascertain what case he has to meet and the facts relied on, and to limit the generality of the pleadings and find out what is really in issue. AIR 1934 Nag 181 (182).

(2) The interrogatories are not, like pleadings, confined to the material facts on which the parties intend to rely. Either party may interrogate as to any link in the chain of evidence necessary to support his own case. AIR 1952 Nag 36 (39).

(3) Where in a suit on a promissory note, the defendant pleads want of consideration, the onus of proof lies on him and he cannot escape from the onus of proof without laying any evidentiary basis by seeking to get admissions from the plaintiffs by interrogatories. AIR 1933 Mad 298 (299).

(4) Where evidence sought to be adduced by interrogatories is not admissible under Sections 92 and 126, Evidence Act and as being opposed to parties' own pleading, Court acts without jurisdiction in issuing commission for examination on interrogatories of a counsel in Pakistan. AIR 1963 Punj 27 (28).

3. Interrogatories and cross-examination. — (1) Interrogatories which are really in the nature of cross-examination, such as questions put only to test the credibility of the party interrogated, will not be allowed. (1912) 37 Bom 347 (351) ** AIR 1967 Orissa 19 (22, 23): 31 Cut LT 294. (Dispute relating to plaintiff's income directly in issue — Interrogatories directed to get information and admission from plaintiff regarding business, income of firm and quantum of his interest therein — Interrogatories cannot be said to be fishing, hence must be allowed.)

(2) A party is not bound to answer the interrogatories which are likely to lead into an incrimination of himself in any criminal offence. AIR 1960 Mad 184 (185): (1960) 1 Mad LJ 401 (DB).

4. Interrogatories as to evidence or witnesses. — (1) Interrogatories as to the evidence which a party intends to adduce in support of his case, or the contents of his brief or as to the names of his witnesses are not permissible. AIR 1933 Cal 151 (153) (DB) ** AIR 1917 Cal 658 (658) (DB) ** (1963) 2 Lab LJ 147 (149): (1963) 6 Fac LR 202 (Cal). (Proceedings under Sections 10 and 11 (3) of Industrial Disputes Act.)

R. 2. **Particular interrogatories to be submitted.**—On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them; and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

[R.S.C., O. 31, R. 2.]

Order 11 Rule 1 — Note 4 (contd.)

(2) Where in a suit for damages, the defendant wanted the plaintiff to "state how your estimate of damages to the amount of Rs. 13,000 mentioned in the 8th paragraph of the plaint is arrived at," it was held that the plaintiff was not bound to answer it. (1887) 14 Cal 703 (706).

(3) Consignor in suit for damages against railway can have recourse to provisions as to discovery and interrogatories to prove his case. AIR 1968 Madh Pra 199 (201, 202): 1968 MPLJ 338 (DB).

[See also 1964 All WR (HC) 41. (Interrogatories served on railway — Answers vague — Adverse inference may be drawn.)]

5. Interrogatories on questions of law.—(1) Interrogatories must be as to questions of fact and must not ask for conclusions of law, inferences of facts, or construction of documents. (1896) 23 Cal 117 (123).

6. Opposite parties.—(1) Where A and B are co-defendants in a suit but B colludes with the plaintiff, he may be regarded as a "party opposite" to A and the latter can, therefore, deliver interrogatories to B. (1899) 17 Bom 384 (388).

(2) Where a co-defendant colludes with the plaintiff he cannot be regarded as a party opposite to the plaintiff and the latter cannot, therefore, deliver interrogatories to him. AIR 1921 Mad 381 (381) (DB).

(3) No interrogatories can be served on an ex parte defendant. AIR 1921 Mad 381 (381, 382) (DB).

7. Leave of Court.— (1) It is the duty of the Court to determine whether the applicant should be allowed to interrogate the other side, but not to determine at that stage what questions the party interrogated should be compelled to answer. (1880) 5 Cal 707 (709).

(2) An order granting leave to deliver interrogatories is not an order to answer interrogatories, that party may have good grounds for refusing to answer them or some of them. AIR 1947 All 343 (344): ILR (1947) All 389 ** (1891) 18 Cal 420 (421) (FB) ** AIR 1926 All 553 (553).

(3) A party has a right to come into Court and ask that the order be reconsidered, and, if found to have been wrong, be set aside. (1880) 5 Cal 707 (710).

[See (1964) 6 Orissa JD 53. (Munsiff not applying his mind to facts in pleadings, point at issue and relevancy of interrogatories — Munsif commits material irregularity.)]

(4) Where interrogatories relate to matters in suit, application under rule cannot be rejected. (1964) 6 Orissa JD 53 (55, 56). (Suit on mortgage bond.)

[See also AIR 1963 Pat 235 (241, 242, 243): ILR 45 Pat 215 (DB). (Election petition — Interrogatories asking whether opposite party had certain subsisting contracts with State Government — Tribunal held was not justified in refusing leave.)]

(5) Before interrogatories, could be ordered it is also incumbent upon the election tribunal functioning as a judicial authority to apply, its mind and see the effect, import and significance of the interrogatories that are sought to be administered. AIR 1960 Mad 184 (185) : (1960) 1 Mad LJ 401 (DB).

8. Impleading party for discovery. — (1) A person should not be made a party to an action merely for the purpose of getting discovery, however important the discovery might prove to be. (1893) 17 Bom 341 (348): 20 Ind App 1 (PC) ** (1886) 10 Bom 167 (170).

9. Probate proceedings.—(1) This Order applies to probate proceedings. The Judge can direct an executor on delivery of interrogatories to make a full discovery of the assets of the deceased. Strictest relevancy may not be required and the Judge has got power to exclude anything which is offensive or improper. AIR 1916 Cal 953 (954) : 43 Cal 300.

10. Land acquisition and other proceedings.—(1) This Order applies to proceedings under the Land Acquisition Act, 1894, by virtue of Section 53 of that Act. (1910) 38 Cal 230 (250) (DB).

(2) The rule applies to proceedings under Section 36 (6)(a)(ii) of the Bengal Money-Lenders Act of 1940. AIR 1941 Cal 537 (538) (DB).

Order 11, Rule 2 — Note 1

(1) The Court under this rule has no power to settle the interrogatories but to state merely what interrogatories should be administered. AIR 1916 Cal 953 (954): 43 Cal 300 (DB).

(2) Leave should be given as to such only of the interrogatories as the Court considers necessary either for disposing fairly of the suit or for saving costs. AIR 1934 Nag 181 (182).

R. 3. Costs of interrogatories.—In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

[1882, S. 123; R. S. C. O. 31, R. 3.]

R. 4. Form of interrogatories.—Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

[R.S.C., O. 31, R. 4.]

R. 5. Corporations.—Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

[1882, S. 124; R.S.C., O. 31, R. 5.]

R. 6. Objections to interrogatories by answer.—Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited bona fide for the purpose of this suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

[1882 and 1877, S. 125; R. S. C., O. 31, R. 6.]

Order 11 Rule 2 — Note 1 (contd.)

[See AIR 1961 Tripura 23 (25). (Suit based on lease — Question relating to title of property not material to suit.)]

(3) An order disallowing interrogatories is a "case decided" and is open to revision. AIR 1934 Nag 181 (182).

[But see AIR 1920 Sind 1 (5): 14 Sind LR 28 (DB)**AIR 1961 Tripura 23 (24). (Court in revision will not go into details of interrogatories.)]

ORDER 11, RULE 6 — SYNOPSIS

1. Scope.
2. "Not sufficiently material at that stage."
3. "Any other ground."
4. Fishing interrogatories.
5. Wagering contracts.

1. Scope. — (1) This rule enables the party interrogated to file his objections and indicate the grounds of objection which he might take. (1880) 5 Cal 707 (710) ** (1880) 5 Cal L Rep 171 (171).

(2) The mere fact that a party can apply under Rule 7 to have the interrogatories set aside or struck out does not take away his right to have his objection adjudicated upon. AIR 1918 All 303 (304, 305) (DB).

[See also AIR 1961 Tripura 23 (24). (Party sought to be interrogated objecting to answer all interrogatories — Proper procedure is to apply under Order 11, R. 7.)]

(3) A party can object to answer an interrogatory on any of the grounds given in this rule although he had previously objected to the delivery of the interrogatory on the same grounds and his objections were overruled. (1947) 51 Cal WN 250 (252. 253) ** (1964) 68 Cal WN 804.

(4) Rules 6 and 7 must be read together. (1969) 39 Com Cas 23: (1969) 1 Com LJ 38 (All).

2. "Not sufficiently material at that stage." — (1) The word "material" means more than relevant. A fact may be relevant but not material at a particular stage. (1887) 14 Cal 703 (706).

(2) Plaintiff's application for interrogatories and discovery of documents after defendants had filed written statement — Rejection on ground that they were not material before recording of oral evidence — Order held was wrong and proper procedure was to frame all issues and adopt procedure under Rule 12. AIR 1952 Nag 135 (137): ILR (1952) Nag 650 (DB).

(3) The Court is not justified in ordering a plaintiff to answer interrogatories which are in the nature of eliciting evidence, before the defendant has filed his written statement. AIR 1932 Mad 316 (317).

(4) The Court has a discretion to order discovery at once on other grounds. (1884) 10 Cal 808 (814) ** (1902) 4 Bom LR 342 (348) (DB).

3. "Any other ground."—(1) In general, questions excluded by Ss. 121 to 129 of the Evidence Act and which could not be asked if the party were in the witness-box cannot be taken as interrogatories. (1890) 15 Bom 7 (10).

R. 7. Setting aside and striking out interrogatories.—Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

[R. S. C., O. 31, R. 7 (Annulled in 1917).]

R. 8. Affidavit in answer, filing.—Interrogatories shall be answered by affidavit to be filed within ten days, or within such other times as the Court may allow.

[1882 and 1877, S. 126; R.S.C., O. 31, R. 8. See R. 9 below]

R. 9. Form of Affidavit in answer.—An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

[R.S.C., O. 31, R. 9.]

R. 10. No exception to be taken.—No exceptions shall be taken to any affidavit in answers, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

[Cf. R.S.C., O. 31, R. 10 (Annulled in 1917).]

R. 11. Order to answer or answer further.—Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case

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Order 11 Rule 6 — Note 3 (contd.)

(2) Questions relating to communications made for the purpose of litigation between third persons and the legal adviser of a party or between third persons and the party for the purpose of submission to the adviser may be objected. (1905) 7 Bom LR 709 (711, 712).

(3) It is open to an assessee of income-tax to object to answering interrogatories on statements made by him in income-tax proceedings on the ground that they are privileged. AIR 1934 Nag 181 (182).

(4) Even if no objection is taken by the party it is the duty of the Court to consider whether a rule of public policy does not prevent the disclosure of the documents or of the information sought. (1902) 4 Bom LR 342 (350) (DB).

4. Fishing interrogatories.—(1) The questions asked must not be "fishing", that is to say, they must refer to some definite and existing state of circumstances and must not be put merely in the hope of discovering some flaw in the opponent's case. (1890) 17 Cal 840 (848, 849) (DB).

(2) Questions must not be asked with the object of filling up blanks in the interrogator's own pleadings. AIR 1914 Cal 767 (768): 41 Cal 6.

5. Wagering contracts.— (1) In cases where the defence of wagering is set up, the Court will refuse to allow the party setting up this defence to interrogate his opponent generally as to his business transactions apart from the particular transactions in the suit. (1913) 37 Bom 347 (351).

Order 11 Rule 7 — Note 1

(1) Where a party virtually objects to delivery of interrogatories his objection is one under R. 7 and not under R. 6. (1964) 68 Cal WN 804 ** AIR 1961 Tripura 23 (24).

(2) Court in revision will not go into details of interrogatories. AIR 1961 Tripura 23 (24).

Order 11 Rule 8 — Note 1

(1) Interrogatories need not be answered personally but may be answered through a recognised agent. Order 3, Rule 1 applies to such cases. AIR 1949 All 326 (328): ILR (1949) All 354 (DB) ** AIR 1941 Nag 205 (206) : ILR (1942) Nag 258.

(2) Rule does not automatically and without order of Court give objector time beyond ten days to object to particular interrogatories or to whole set of interrogatories. (1969) 39 Com Cas 23: (1969) 1 Com LJ 38 (All).

Order 11 Rule 9 — Note 1

(1) To claim privilege under Ss. 123 and 124 of the Evidence Act, it must be stated in so many words in the affidavit. ILR (1956) 1 Cal 370 (371).

(2) In a suit against the State for damages for illegal detention order in answer to interrogatories, the competent authority to swear an affidavit is the District Magistrate or his successor. ILR (1956) 1 Cal 370 (372).

Order 11 Rule 11 — Note 1

(1) It is only under this rule that the Court is to decide whether the party interrogated must answer or not and to pass

may be. And an order may be made requiring him to answer further, either by affidavit or by viva voce examination, as the Court may direct.

[1882 and 1877, S. 127; R.S.C., O. 31, R. 11.]

R. 12. Application for discovery of documents.—Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

[1882, S. 129, para 1; 1877, S. 129; R.S.C., O. 31, R. 12.]

R. 13. Affidavit of documents.—The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

[1882, S. 129, para 2; R.S.C., O. 31, R. 13.]

Order 11, Rule 11 — Note 1 (contd.)
an order requiring him to answer or to answer further as the case may be, the interrogatories delivered to him. AIR 1926 All 553 (553) (DB).

(2) In the absence of an order under this rule, no action can be taken against the defaulting party under Rule 21. AIR 1947 All 343 (344): ILR (1947) All 389.

(3) An order granting leave under O. 11, R. 1 to deliver interrogatories does not amount to an order to answer interrogatories under this rule. AIR 1947 All 343 (344): ILR (1947) All 389.

(4) Interrogatories as to contents of statement of assessee in income-tax proceedings — Objection to answer is proper. AIR 1934 Nag 181 (182).

[See (1968) 81 Mad LW 63 (64): 68 ITR 733. (Objection to answer on ground of privilege under S. 137 (1) and (2) of Income-tax Act (1961) — Party to litigation cannot claim privilege.)]

ORDER 11, RULES 12 AND 13—SYNOPSIS

1. Scope.
2. Application for discovery of documents may be made without affidavit.
3. Professional or legal privilege.
4. Documents relating solely to the case of the party giving discovery.
5. Where production of public official document is injurious to public interest.
6. Court may inspect a privileged document.
7. Contents of affidavit of documents.
8. Corporation.
9. Advocate-General.
10. Affidavit of documents, if conclusive—Further affidavit.
11. Effect of non-disclosure of documents.
12. Right to seal part of documents.

1. Scope.—(1) The primary object of the provisions in Rr. 12 to 20 of O. 11 is to save costs and to assist Courts in the administration of justice. AIR 1957 Punj 14 (15).

(2) These rules enable a party to apply to the Court for the purpose of compelling his opponent to disclose the documents he has in his possession or power. (1895) 23 Cal 117 (125) ** AIR 1959 Bom 181 (181): 61 Bom LR 39 (DB).

(3) The object of the procedure prescribed by the rules is two-fold: (1) to secure as far as possible that all material documents are disclosed by putting the opposite party on oath, and (2) to put an end to what might otherwise lead to a protracted inquiry as to the material documents actually in the possession or under the control of the opposite party. AIR 1920 Pat 131 (137): 5 Pat LJ 550 (DB).

(4) These rules do not preclude an application under Rule 18, sub-rule (2). (1911) 38 Cal 428 (430).

(5) Where it is obvious that the decision of the matter would depend to a very large extent upon documentary evidence, the case is essentially one in which recourse should be taken to the provisions of this order. AIR 1951 Cal 39 (40).

(6) Where the decision of a case depends upon documentary evidence, in such a case even in the absence of any application the Judge should himself record the requisite orders under S. 30. AIR 1940 Cal 331 (332): ILR (1940) 1 Cal 504.

(7) Any contract which departs from the ordinary law of the land embodied in this

Order 11 Rules 12 and 13—Note 1 (contd.) rule should be construed strictly and the right to demand discovery of documents from which the party proposes to prove his case must be upheld unless there are words in the contract itself which destroy that right. AIR 1952 Nag 36 (40).

(8) The law only requires that where an application for discovery is made, the discovery should be made on oath. Mere seeking of clarification is not the same thing as an order of discovery of documents. AIR 1958 Andh Pra 450 (451) (DB).

(9) The mere filing of an application under R. 12 does not automatically cast an obligation on any party to make the discovery. It is for the Court to see whether it would refuse or allow the same. AIR 1958 Andh Pra 450 (451) (DB).

(10) There is a duty on the part of the Court to apply its mind and to pass an order on an application under R. 12 on sound judicial principles and not arbitrarily or capriciously. AIR 1958 Andh Pra 450 (451) (DB) ** AIR 1957 Punj 14 (15, 17) ** (1963) 4 Guj LR 783: ILR (1963) Guj 812. (Failure to give particulars of documents — No ground for rejecting application.)

(11) In an industrial dispute concerning retrenchment involving issue as to state of Company's business, Industrial Tribunal has power to order inspection of books and documents of company by workmen. AIR 1961 Cal 185 (188) : (1961) 2 Lab LJ 14.

(12) Authority under Payment of Wages Act has jurisdiction to order petitioner to make discovery of documents in his possession. AIR 1959 Bom 181 (181): 61 Bom LR 39 (DB).

2. Application for discovery of documents may be made without affidavit. — (1) An application under Rule 12 need not be supported by an affidavit as is generally required in the case of other applications. (1895) 23 Cal 117 (125) ** AIR 1924 All 510 (511): 46 All 417 (DB).

[See also AIR 1961 J and K 20 (24, 25). (Application under Order 11, Rule 14 need not necessarily be preceded by application under Order 11, Rule 12.)]

3. Professional or legal privilege. — (1) A party is not bound to produce any confidential communication between him and his legal advisers. (1891) 15 Bom 7 (10) ** AIR 1927 Bom 367 (367, 368).

(2) Statements laid by clients before counsel for the purpose of obtaining legal advice are privileged. (1880) 4 Bom 576 (582).

(3) If the communications are not made confidentially there is no privilege. (1879) 3 Bom 91 (93) (DB) ** (1894) 18 Bom 263 (272) (DB) ** (1903) 5 Bom LR 122 (123) (DB).

(4) A mere communication between a principal and agent, though confidential is not privileged even after litigation has commenced and legal advice has been taken as to its course. (1891) 15 Bom 7 (10) ** (1895) 22 Cal 105 (111).

(5) The reports made by a servant to his master are not privileged though they may relate to the subject matter of the suit. AIR 1927 Bom 367 (367, 368).

4. Documents relating solely to the case of the party giving discovery.—(1) A party need not produce any document which he can swear relates solely to his own title to any real property and to contain nothing which tends to establish the title of his opponent. AIR 1940 Cal 331 (333): ILR (1940) 1 Cal 504.

[See AIR 1962 Cal 325 (326) : (1963) 33 Com Cas 1 (DB). (Entry disclosed in the affidavit described as 'copy of relevant entries in the overdraft cheque passing register of the plaintiff"—**Held,** to be bad disclosure according to all law relating to discovery as it did not specify even the date of the entry.)]

(2) A party cannot be compelled to produce documents which form the exclusive evidence of his own case or title. AIR 1927 Bom 367 (367).

(3) If documents are necessary to support the adversery's case their production cannot be refused. (1884) 10 Cal 808 (814).

(4) Objection to production of documents can be raised under O. 11 R. 13 C. P. C. which have to be decided by the Court calling upon the party to discover and produce those documents. AIR 1959 Punj 189 (192) : 61 Pun LR 118.

(5) A party is not confined to the affidavit in which the claim is first set up; he is entitled to put in and use a further affidavit in support of his claim of privilege. (1894) 22 Cal 105(110).

5. Where production of public official document is injurious to public interests. — (1) Public official documents need not be produced when an objection is taken in the affidavit of documents by the head of the department or by some responsible officer. (1904) 27 Bom 189 (216).

(2) As a general rule, if the objection is taken by the proper person, the Court will not go behind it — Thus an objection to the production of the document duly taken by the head of a Government department should be treated by the Court as conclusive. AIR 1953 Mad 228 (228).

[But see AIR 1948 Sind 100 (107) (FB). (AIR 1947 Sind 154: ILR (1946) Kar 416, **Overruled.**)]

6. Court may inspect a privileged document.—(1) Where privilege is claimed by a party the Court may inspect the document to decide whether the privilege claimed is proper and valid. AIR 1953 Mad 228 (228) ** AIR 1931 PC 254 (259, 261).

[See AIR 1968 All 42 (43, 44) : 1967 All LJ 469. (Court must consider objectively whether questioned documents related to affairs of State. **AIR 1961 SC 493,** Foll.) ** AIR 1967 Punj 387 (388, 389) : (1968) 1 Lab LJ 446.]

Order 11 Rules 12 and 13—Note 6 (contd.)

(2) Until the Court has decided upon the admissibility of a privileged document, a party has no right of inspection. AIR 1939 Cal 386 (387): ILR (1939) 2 Cal 46 (DB).

7. Contents of affidavit of documents.—(1) A party who is ordered under R. 12 to make discovery on oath should set forth in his affidavit all documents which are or have been in his possession or power relating to the matter in question. AIR 1940 Cal 331 (333): ILR (1940) 1 Cal 504 ** (1886) 8 All 265 (267) (DB) ** AIR 1962 Cal 325 (337): (1963) 33 Com Cas 1 (DB).

(2) Document relating to a matter in dispute in the suit is not confined to such as would be admissible in evidence. AIR 1940 Cal 331 (333): ILR (1940) 1 Cal 504.

(3) It is always desirable to adopt the form given in the Code, as otherwise an affidavit may be regarded as insufficient. (1898) 2 Cal WN 17 (17).

[See also ILR (1965) 2 All 303 (DB). (An affidavit should be in accordance with the rules of the Court and the provisions of Civil Procedure Code.)]

(4) When the affidavit is insufficient, a summons may be taken to consider its sufficiency. (1875) 1 Cal 178 (179).

(5) Ordinarily, an affidavit of documents must be made by the party himself; but the Court may in special cases allow the affidavit to be made by the agent of the party. AIR 1934 Pat 693 (694).

(6) Where there are several defendants or plaintiffs all of them must ordinarily join in the affidavit. AIR 1956 Bhopal 5 (6) ** (1890) 15 Bom 7 (9).

(7) It is the duty of an attorney to be very careful in ascertaining from his client, who has to make an affidavit of documents, exactly what materials and documents are in his possession. It is further his duty the moment he finds that there are other documents which have not been disclosed, at the very earliest moment, to bring those documents to the notice of his opponent and give him an opportunity of inspecting them. AIR 1921 Cal 267 (269) ** AIR 1962 Cal 325 (337): (1963) 33 Com Cas 1 (DB).

(8) The Court has a discretion to order a particular party to discover on oath before calling upon others to do so in respect of documents which are or were in their power or possession. Such discretion, unless it has been exercised arbitrarily, will not be interfered with in revision. AIR 1956 Bhopal 5 (6).

8. Corporation.—(1) A corporation can obtain discovery and inspection from the other party and can be compelled to make discovery and give inspection. AIR 1948 Sind 100 (104): ILR (1947) Kar 253 (FB).

(2) The Court has power to order an officer of a company or corporation to give discovery. AIR 1939 Cal 386 (387): ILR (1939) 2 Cal 46 (DB).

(3) A public body cannot burke discovery on the ground that there are a large number of papers, the production of which would flood the Court. AIR 1922 All 1 (4): 44 All 202 (DB).

9. Advocate-General.—(1) The Advocate-General cannot be called upon to make discovery on oath in a suit filed by him at the instance of relators under S. 92 Civil Procedure Code. But an affidavit of documents may be required from the latter. (1906) 30 Bom 474 (476).

10. Affidavit of documents, if conclusive — Further affidavit. — (1) Even when a party is not in "possession" of a document which he has been called upon to disclose by an order under R. 12 it is incumbent upon him to file an affidavit stating that he has not got the document. AIR 1950 Nag 8 (9): ILR (1950) Nag 46 ** AIR 1947 Nag 236 (238): ILR (1947) Nag 190.

(2) The affidavit of documents filed by a party is conclusive, and must be accepted by the party seeking discovery as true, both with regard to the documents that are, or, have been, in the possession or power of the party making discovery. AIR 1944 Lah 209 (213, 214) (DB) ** AIR 1920 Pat 131 (134, 135) (DB) ** AIR 1924 All 510 (511): 46 All 417 (DB).

(3) The party seeking discovery cannot, for the purpose of obtaining a further affidavit or inspection of documents for which privilege is claimed, as a rule, interrogate with a view to show that the affidavit is untrue. AIR 1944 Lah 209 (213, 214) (DB).

(4) Where, from the affidavit itself, or from the documents referred to therein, or from admissions made either in pleadings or otherwise, it appears that the party making discovery has or has had other relevant documents in his possession or power, the affidavit can be controverted. AIR 1951 Cal 39 (39) ** (1875) 1 Cal 178 (179) ** (1893) 17 Bom 384 (388).

(5) Where the basis on which the first affidavit has been made turns out to have been wrong the affidavit can be controverted. (1897) 2 Cal WN 17 (17).

(6) In a suit for ejectment the Court will not as a rule go behind the affidavit and where, in such a suit, either party claims to refuse production on the ground that the documents relate solely to his own title, the Court cannot go behind the affidavit and enquire whether his statement is true or not. (1893) 17 Bom 581 (583, 584).

(7) In a suit for the recovery of the price of materials supplied to the defendant in which the defence was that the materials were defective, the Court ordered the production of the engineer's report referred to in his pleadings, where his statement showed that the report was not of the character described by the defendant. (1895) 22 Cal 105 (110, 111).

11. Effect of non-disclosure of documents —(1) Where no application is made under

R. 14. Production of documents.—It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

[1882 and 1877, S. 130, R.S.C., O. 31, R. 14.]

Order 11 Rules 12 and 13—Note 11 (contd.) this rule, a party is not bound to produce any document. He is entitled to refrain from producing any document which he considers irrelevant and no adverse presumption can be drawn against the party from its non-production. (1953) 32 Pat 983 (993) ** AIR 1942 All 242 (247): ILR (1942) All 247 (DB) ** AIR 1915 PC 96 (98); 37 All 557: 42 Ind App 202 ** ILR (1961) Cut 635.

(2) Where, from the nature and circumstances of the case, it is the imperative duty on the part of a party to produce documents, an adverse inference can be drawn from its non-production. AIR 1917 PC 6 (8): 40 Mad 402: 44 Ind App 98.

(3) Suit for recovery of amount due on basis of adjustment of accounts signed by defendant — Defendant denying correctness of amount found due — Defendant in possession of account books kept by him and from which balance could be ascertained — Non-production of account books by defendant — He cannot be heard to say that it was no part of his duty to produce account books unless he was called upon to do so. **AIR 1953 SC 225 (226): 1953 SCR 758.**

(4) Where an order is made against a party for discovery and he alleges as to some of the documents that they have been destroyed or may have perished, he is bound to give evidence of diligent search for them. In the absence of such evidence, presumption that, if produced, they will be unfavourable to that party will arise. AIR 1917 PC 1 (4).

(5) Where the defendants deliberately refuse to produce relevant documents, it is a fair assumption that they would have supported the case rather of the plaintiffs than of the defendants if they had been produced. AIR 1944 All 188 (191): ILR (1944) All 241 (DB) ** AIR 1966 Pat 434 (436): 1966 BLJR 808 (DB).

12. Right to seal part of documents. — (1) A party may seal up such portions of the documents produced by him as he swears are privileged. He must, however, specify what parts of the documents referred to he claims to seal up and the grounds upon which the claim is based. (1893) 20 Cal 587 (589).

(2) A party may seal up portions of documents which do not relate to the matters in question. (1897) 3 Cal WN 495 (497).

(3) When the right of the party to seal up parts of the documents is contested, the Court will appoint an officer to whom the party desiring inspection is to state in confidence why he wants to inspect any portion of the documents sealed, and the officer, after looking at the documents as to whether and in what way the part noted or desired to be noted is material to the case, should make a report for the orders of the Court. (1895) 23 Cal 117 (126) ** (1879) 4 Cal 835 (836).

(4) The Court can order the sealed parts to be unfastened for its personal inspection. (1901) 28 Cal 424 (426).

ORDER 11, RULE 14 — SYNOPSIS

1. Scope.
2. "Possession or power."
3. "Relating to any matter in question in such suit."
4. Effect of section 163 of the Evidence Act.
5. Waiver of privilege.
6. Partner.
7. Revision.

1. Scope.—(1) An order for production of documents under this rule is quite different from an order for discovery under Rule 12 or an order for inspection under Rule 18. AIR 1924 Mad 582 (583) (DB) ** (1928) 112 Ind Cas 285 (285) (All) ** (1912) 14 Ind Cas 51 (52) (DB) (Cal).

(2) An order under this rule is quite different from an order for answering interrogatories under Rule 11. AIR 1922 All 235 (237): 44 All 566 (DB).

(3) An order for production can only be made after an order for discovery has been made under Rule 12. AIR 1923 Pat 337 (338) (DB) ** AIR 1961 J and K 20 (24, 25). (It is not in every case that an application under O. 11, Rule 14 must necessarily be preceded by an application under O. 11, R. 12.)

[But see AIR 1955 All 251 (252) (DB) ** (1946) 50 Cal WN 845 (847).]

(4) Under this rule the Court acts of its own motion and not on the application of any party. AIR 1929 All 83 (83) ** 1889 Pun Re No. 80, p. 300 (301).

(5) The Court cannot delegate the exercise of the power under this rule to a Commissioner. (1909) 4 Ind Cas 364 (367) (DB) (Cal).

(6) No order should be made against a party unless he has directly or indirectly admitted the document to be in his possession or power. Madh BLJ 1954 HCR 899 (899) ** AIR 1920 Pat 191 (135): 5 Pat L Jour 550 (DB).

Order 11 Rule 14 — Note 1 (contd.)

(7) No order should be made under this rule unless documents are in existence. AIR 1941 Mad 709 (709): ILR (1941) Mad 716 ** 1892 Pun Re No. 59, page 216 (221) (DB).

(8) The words "at any time during the pendency of any suit" show that an order for production can be made even before the issues are framed. (1909) 4 Ind Cas 364 (366) (DB) (Cal) ** AIR 1961 Madh Pra 348 (348, 349): 1960 Jab LJ 1184. (Even at the stage of preparing judgment.)

(9) An order for production can be made even before the written statement is filed. (1946) 50 Cal WN 845 (847).

(10) The Court has a discretion in compelling production of documents even though they are not strictly privileged. (1905) 7 Bom LR 709 (711) ** (1946) 50 Cal WN 845 (849).

(11) An order under this rule must not be a general order that all the documents in the defendant's possession should be produced. 1898 Pun Re No. 58 p. 191 (193) (DB).

(12) Where the general description is sufficient for the identification of the documents or books sought to be produced a general order may be passed. (1922) 65 Ind Cas 661 (664) (Lah).

(13) Where the documents are produced in obedience to the order of the Court the Court can deal with them in such manner as appears to it to be just. (1907) 30 Mad 230 (230) (DB) ** 1898 Pun Re No. 58, p. 191 (194) (DB).

(14) Proceedings before Commission under J and K Commission of Inquiry Act (32 of 1962) — Commission has unfettered powers in asking for production of documents — Privilege under Section 123, Evidence Act cannot be claimed unless Section 5 (2) of J and K Act is made applicable. AIR 1965 J and K 75 (76, 77): 1965 (2) Cr LJ 212: 1965 Kash LJ 160.

(15) In proceedings under the Industrial Disputes Act, 1947 the tribunal in compelling production of documents is not bound to act in accordance with the conditions laid down in the Civil P. C. Under Section 11 of the Industrial Disputes Act the Tribunal can follow the procedure which it thinks fit in the circumstances of the case provided it is in accordance with the provisions of the rules framed thereunder and also with the principles of natural justice. AIR 1959 Punj 189 (192): 61 Pun LR 118.

(16) Refusal to produce documents under Rule 14 — Rule 21 is not attracted — Order dismissing suit is without jurisdiction. AIR 1966 Tripura 16 (17).

2. "Prossession or power." — (1) Documents filed in Court are not in the possession or power of a party; they are in the possession and power of the Court. AIR 1936 Nag 130 (131): ILR (1936) Nag 142.

3. "Relating to any matter in question in such suit." — (1) The order under this rule is to be limited to such documents alone as relate to the matters in dispute and the Court must, before it makes the order, determine what are the matters in question in the suit. (1909) 4 Ind Cas 364 (366) (DB) (Cal) ** (1912) 14 Ind Cas 51 (52) (DB) (Cal).

(2) Where, in suit on a promissory note, the defendant puts in no defence, there is no justification for an order directing the plaintiff to produce his accounts. AIR 1937 Nag 136 (137): ILR (1937) Nag 266.

(3) A Judge cannot invoke the aid of this rule for the purpose of bringing into existence a document which may be useful for the case. (1912) 14 Ind Cas 51 (52) (DB) (Cal).

(4) Copies of income-tax returns cannot be ordered to be produced under this rule. AIR 1941 Mad 709 (709): ILR (1941) Mad 716 ** AIR 1957 Mad 401 (403).

(5) Defendant managing director of a company — Plaintiff suing defendant in his personal capacity wanting inspection of company documents — Defendant not a party to suit in his capacity of director — He cannot be compelled to produce documents under Order 11, Rule 14. (1968) 81 Mad LW 354: (1968) 2 Com LJ 260.

4. Effect of Section 163 of the Evidence Act. — (1) The notice to produce documents mentioned in Section 163 of the Evidence Act clearly refers to a notice to produce as mentioned in Order 11. which may be given by a party privately to the other party concerned, and the applicability of Section 163 of the Evidence Act is not affected by the mere fact that due to the non-production by the other party an order to produce the documents has to be passed by the Court. AIR 1953 All 689 (691).

5. Waiver of privilege. — (1) Where a party expressly refers to documents in the pleadings as the source of his own information and knowledge of facts relevant to the suit and then sets up these facts by way of answer to the plaintiff's claim, he cannot afterwards contend that the documents are confidential and intended merely for his legal advisers or for the purpose of evidence in the case. (1898) 22 Cal 105 (111).

(2) The fact that a portion of a privileged document is read to the plaintiff's solicitor by the defendant's solicitor does not amount to a waiver of the privilege as regards the parts not so read. (1880) 4 Bom 631 (634).

6. Partner. — (1) One partner of a firm represents the other partners for the purpose of production of documents. (1876) 1 Bom 496 (499) ** (1922) 65 Ind Cas 661 (664) (Lah).

R. 15. Inspection of documents referred to in pleadings or affidavits.—Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

[1882 and 1877, S. 131; R.S.C., O. 31, R. 15; See R. 16.]

Order 11 Rule 14 — Note 6 (contd.)

(2) A notice to one partner is notice to all the partners when they are sued as a firm. (1922) 65 Ind Cas 661 (664) (Lah).

7. Revision. — (1) Orders granting or refusing production are discretionary orders which will not be interfered with in revision. (1886) 9 Mad 256 (257) ** (1911) 9 Ind Cas 672 (672) (Mad) ** (1907) 30 Mad 230 (230).

(2) Where the lower Court has not understood the provisions of the rule its order under this rule will be interfered with in revision. AIR 1924 Mad 846 (846): 47 Mad 934.

(3) Where the lower Court has acted on an erroneous assumption while passing an order under this rule, the High Court will interfere with the order in revision. AIR 1939 Mad 52 (53).

(4) An order made under this rule without jurisdiction is liable to be set aside in revision. AIR 1941 Mad 709 (710): ILR (1941) Mad 716 ** AIR 1938 Rang 276 (277): 1938 Rang LR 243 (DB).

ORDER 11, RULE 15 — SYNOPSIS

1. Scope.
2. "At any time."
3. Documents referred to in the pleadings or affidavits.
4. Who can inspect under this rule.
5. Copies of documents produced, if can be taken.

1. Scope. — (1) A Court has no jurisdiction to order inspection of documents except as provided in Rules 15 to 18. (1902) 4 Bom LR 342 (350) (DB).

(2) The privilege of inspection by a party of his adversary's documents is not a matter of routine but is to be permitted or refused only on judicial considerations. AIR 1924 Mad 846 (847): 47 Mad 934.

(3) The object of the rule is to give the opposite party the same advantage as if the documents had been fully set out in the pleadings. (1884) 10 Cal 808 (813, 814) ** AIR 1935 Mad 234 (236).

(4) By referring to a document in his pleadings, a party does not lose the privilege that he might have claimed in respect of the document. (1893) 17 Bom 581 (584).

(5) Where documents are objected to on the ground of immateriality the Court will, if necessary, order them to be produced for its own inspection in order to Judge of their materiality. (1901) 28 Cal 424 (426).

(6) A party who fails to comply with a notice under this rule is not absolved from the penalty prescribed thereby merely because the party giving the notice has not proceeded to apply to the Court for an order for inspection under Rule 18. AIR 1935 Mad 234 (235).

(7) The fact that the accounts referred to by the plaintiff in his plaint would be required by him every day is no reason for not giving inspection of the same to the defendant. AIR 1935 Mad 234 (235).

(8) Where the plaintiff wishes to inspect account books of the defendant with a view to fish out, if possible. some possible entries in support of his case, the Court will not encourage such a fishing enquiry. AIR 1957 Punj 14 (17).

[See also AIR 1968 Pat 474 (475, 476). (Word 'document' in Order 7, Rules 14 and 17 means only entry or entries in the accounts and not whole book of account.)]

(9) An Election Tribunal constituted under the Representation of the People Act cannot order the Returning Officer, who is not a party to an election petition to produce the ballot papers for inspection by the parties under Order 11, Rule 15 but an order for such production can be made apart from and independently of the provisions of O. 11, under the provisions of the Representation of the People Act. **AIR 1964 SC 1249 (1251, 1252): (1964) 6 SCR 238.**

(10) In a proper case the tribunal under the Representation of the People Act may call upon the returning officer to produce the ballot papers and may permit inspection by the parties before it of the ballot papers. This power may be exercised subject to the statutory restrictions about the secrecy of the ballot paper. **AIR 1964 SC 1249 (1251, 1252):**

Order 11 Rule 15 — Note 1 (contd.)
(1964) 6 SCR 238. (Held, on the facts of the case the High Court was not justified in interfering with the order of refusal to grant inspection by Election Tribunal. AIR 1964 All 86, **Reversed.)**

(11) The provisions of the C. P. Code do not bar the inspection of the papers in the custody of the Court in an election petition AIR 1964 All 86 (93): ILR (1964) 1 All 299 (DB).

[Reversed on another point in **AIR 1964 SC 1249.]**

(12) Industrial Tribunal has power to order inspection of books and documents. AIR 1961 Cal 185 (188): (1961) 2 Lab LJ 14.

(13) In exercising the power in respect of production discovery and inspection of documents under Section 11 (3) of the Industrial Disputes Act the Industrial Court should follow the provisions of Rules 15 and 18 of O. 11, Civil P. C. The tribunal may hear the parties on the point and insist upon proper affidavits being filed regarding the relevancy of the documents before ordering their production. (1968) 1 Lab LJ 702: 33 FJR 174 (Pat) (DB).

2. "At any time."— (1) Where a document is referred to in the pleadings or affidavits of a party. the opposite party is entitled as of right to claim inspection thereof. AIR 1944 Pat 177 (178): 22 Pat 644 (DB) ** (1911) 12 Ind Cas 506 (507) (Lah).

(2) A party is entitled to claim inspection even before the filing of the written statement. AIR 1956 Andhra 115 (116) ** AIR 1938 Nag 239 (240): ILR (1940) Nag 331 ** AIR 1964 Tripura 25 (26, 27).

(3) No inspection will, as a general rule, be ordered of documents other than those referred to in the pleadings or affidavits, till after the written statement is filed. AIR 1956 Andhra 115 (117) ** AIR 1944 Pat 177 (178): 22 Pat 644 (DB) ** AIR 1966 Mad 375 (376, 377): (1966) 2 Lab LJ 420. (Documents not referred in the pleadings of other party — Order 11, Rule 18 (2) of Civil P. C. is applicable — Neither Rule 15 nor Rule 18 (1) has any application.)

[See AIR 1968 Punj 173 (178) (FB). (Order under rule should be made at a stage well before the leading of evidence.)]

[See also AIR 1964 Cal 184 (187, 188): 68 Cal WN 203 (DB). (The delinquent in disciplinary proceedings is entitled to inspect the evidence collected against him before commencement of the examination of witnesses against him.)]

(4) Defendant desiring to inspect documents should proceed promptly — Delay is good ground for refusing time for filing written statement. AIR 1938 Nag 239 (241): ILR (1940) Nag 331.

(5) In application for inspection of documents for preferring review petition unless it is shown that conclusion was arrived at by Court by relying on certain documents and that those documents should be inspected it will not be proper to grant request. AIR 1967 Mad 337 (338, 339): (1965) 2 Mad LJ 275.

(6) Proceedings between A and B in which the right to a certain lease is in dispute — Observations of Court in tax case of A that the lease standing in name of B really belonged to A — Observations not only quoted in affidavits filed in the proceedings to show that lease belonged to A but also in the judgment — B has an interest in repelling the effect of those observations and his application for granting inspection of the documents on the basis of which those observations were made by the Court should be allowed even though he was not a party to the tax case. (1967) 80 Mad LW 595: 69 ITR 361.

3. Documents referred to in the pleadings or affidavits. — (1) A party is not entitled to inspect the documents incidentally referred to in the pleadings of the opposite party if they are not material for the case of either party. AIR 1923 Bom 73 (74): 46 Bom 866.

(2) Inspection should be allowed when documents in question are themselves material facts on which the claim in the plaint is based. AIR 1943 Lah 207 (208).

(3) A document referred to in the plaint and entered in the list attached thereto under the provisions of Order 7, Rule 14, sub-rule (2) is one that can be said to be referred to in the pleadings. (1908) 32 Bom 152 (153) ** AIR 1931 Mad 825 (826): 55 Mad 421 ** AIR 1967 Orissa 156 (157): 33 Cut LT 206. (Documents merely mentioned in list filed under Order 7, Rule 14 but not referred to in pleadings or affidavits — Order 11, Rule 15 does not contemplate inclusion of such documents.)

[But see ILR (1953) 2 Cal 309 (312) ** AIR 1938 Nag 239 (240): ILR (1940) Nag 331.]

4. Who can inspect under this rule. — (1) The pleader who himself has no vakalatnama and only pleads in the case under instructions from another pleader who has the vakalatnama has no right of inspection of the documents. ILR (1953) 2 Cal 309 (316).

(2) A former employee of a party in charge of his books cannot be engaged by opposite party for the purpose of inspection. (1898) 25 Cal 294 (297) ** AIR 1924 Mad 846 (847): 47 Mad 934.

5. Copies of documents produced, if can be taken. — (1) The right to inspection includes a right to take copies of documents produced, unless they relate exclusively to the case of the party producing them and contain nothing to support his adversary's case. (1909) 4 Ind Cas 364 (367) (DB) (Cal) ** (1907) 30 Mad 230 (231) (DB) ** AIR 1967 Cal 628 (629) (DB).

R. 16. Notice to produce.—Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.

[R.S.C., O. 31, R. 16; See R. 15.]

R. 17. Time for inspection when notice given.—The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents or such of them as he does not object to produce, may be inspected at the office of his pleader or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

[1882, S. 132; R.S.C., O. 31, R. 17.]

R. 18. Order for inspection.—(1) Where the party served with notice under Rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

Order 11, Rule 16 — Note 1

(1) Form No. 7 in Appendix C must be followed as closely as possible, but it is not necessary to use the very words thereof. AIR 1922 All 235 (237): 44 All 565 (DB).

Order 11. Rule 17 — Note 1

(1) If a party does not desire to produce documents he should refrain from delivering the notice under the rule but wait to see if the plaintiff applies under R. 18. When the notice is served at a time when the suit was stayed, the ten days' time begins to run only from the date the suit is revived. (1887) 14 Cal 768 (777) (DB).

(2) Where. in a suit instituted in Bombay for breach of a contract to gin cotton in the defendant's mill at Broach, the plaintiff applied for inspection of the defendant's account books in Bombay but the defendant offered to give inspection in Broach, it was held that the latter place was the place where the books were kept and was the proper place for inspection. (1881) 5 Bom 467 (469).

(3) The Court is not a proper place to offer the inspection of account books. AIR 1935 Mad 234 (235).

ORDER 11, RULE 18

1. Scope. — (1) In the case of documents not mentioned in the pleadings or the affidavits, an affidavit has to be filed by the applicant satisfying the Judge that the document is relevant to the case. ILR (1953) 2 Cal 309 (313) ** AIR 1931 All 221 (222): 53 All 442 (DB).

(2) In the case of documents mentioned in the pleadings, the relevancy is admitted while in the case of documents not so mentioned, the relevancy has to be proved. AIR 1931 All 221 (222): 53 All 442 (DB).

(3) The filing of the affidavit under sub-rule (2) is not always necessary, when the Judge is satisfied as to the relevancy of the document; at any rate, the want of an affidavit cannot invalidate an order passed under this rule. AIR 1931 All 221 (222): 53 All 442 (DB).

[See however AIR 1922 All 235 (237): 44 All 565 (DB).]

(4) The filing of an affidavit does not entitle a party immediately to an order for inspection. AIR 1920 Pat 131 (135): 5 Pat L Jour 550 (DB).

(5) The Court should give the opposite party an opportunity of replying by an affidavit the application for inspection, and if the opposite party, swears an affidavit that the documents are not in his possession or power, the Court will regard this as final and conclusive. AIR 1920 Pat 131 (135): 5 Pat L Jour 550 (DB) ** AIR 1924 All 510 (511): 46 All 417 (DB).

(6) An order under sub-rule (1) cannot be made unless notice has been given under the provisions of Rule 15. AIR 1926 Sind 272 (272): 20 Sind LR 309 (DB) ** (1887) 14 Cal 768 (776, 777) (DB).

(7) The fact that the party giving the notice has not proceeded to apply to the Court under sub-rule (1) of this rule for an order for inspection does not

(2) Any application to inspect documents except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

[1882 and 1877, Ss. 133, 134; R.S.C., O. 31, R. 18.]

Order 11 Rule 18 — Note 1 (contd.)

negative the liability for the penalty laid down by Rule 15. AIR 1935 Mad 234 (235).

(8) In the case of income-tax assessment proceeding pending before the High Court a third party, who showed a possibility of his interest being affected could have inspection of the records but not copies. (1967) 80 Mad LW 595.

(9) Order for inspection of documents — Tribunal — No reasons furnished — **Held** order was not in compliance with requirements of Order 11, Rule 18 (2) and should, therefore. be quashed. AIR 1966 Mad 375 (378): (1966) 2 Lab LJ 420.

(10) Order for inspection of documents not referred in the pleadings of other party — Rule 18 (2) is applicable — Neither Rule 15 nor Rule 18 (1) has any application. AIR 1966 Mad 375 (377): (1966) 2 Lab LJ 420.

(11) In a suit on basis of accounts, a defendant applying for inspection under Rule 18 (1) can inspect only particular entry or entries referred to in his plaint. AIR 1968 Pat 474 (475).

(12) If a defendant wants inspection of entries in account books other than those referred to in plaint, he has to take recourse to procedure under R. 18 (2). AIR 1968 Pat 474 (475).

(13) Defendant cannot be compelled to produce any document or give inspection thereof for facilitating cross-examination or enabling plaintiff to understand genuineness or purport of documents forming basis of defendant's claim. AIR 1960 Mad 510 (512) (1960) 1 Mad LJ 292.

(14) Order passed by Industrial Tribunal in contravention of Rules 15 and 18 is beyond its jurisdiction and must be quashed. 1959 Ker LT 462: 1959 Ker LJ 399.

2. Discretion of Court. — (1) Under sub-rule (1), the Court has a discretion limited to the terms of the proviso, in making an order for inspection and the onus rests on the party resisting an order, to show that it should not be made in the special circumstances of the case; but it would not be a proper exercise of discretion to refuse inspection on the general ground that it was sought before the written statement was filed; nor can the mere number of the documents afford any guide to the exercise of discretion. AIR 1956 Andhra 115 (116) ** AIR 1931 Mad 825 (828): 55 Mad 421.

(2) Generally, inspection of documents will not be ordered under sub-rule (2) before the written statement. AIR 1956 Andhra 115 (117) ** AIR 1964 Tripura 25 (27).

(3) The Court can have no jurisdiction under sub-rule (2) to order inspection before directing an affidavit of document to be filed. AIR 1956 Cal 592 (593) ** (1968) 1 Lab LJ 702: 33 FJR 174 (Pat) (DB) ** AIR 1964 Tripura 25 (27): ** 1959 Ker LT 462 (464). (Applies to proceedings before Industrial Tribunal.)

(4) Inspection of documents — Court finding party entitled to it — Prayer for copies of them cannot be refused. AIR 1967 Cal 628 (629) (DB).

(5) Industrial dispute concerning retrenchment — Issue as to state of company's business — **Held** — Industrial Tribunal had power to order inspection of books and documents of company by workmen. AIR 1961 Cal 185 (188): (1961) 2 Lab LJ 14.

(6) Order for inspection of documents — Question whether employer was carrying on an industry — **Held,** the documents were in the possession of employer and were necessary for determining the question and no further proof of right to inspection was necessary. AIR 1966 Mad 375 (378): (1966) 2 Lab LJ 420.

(7) Under sub-rule (2) possession of documents not disputed by other party — Affidavit regarding possession of documents not necessary. AIR 1966 Mad 375 (377): (1966) 2 Lab LJ 420.

(8) Election Tribunal under the Representation of the People Act (1951) has powers to direct discovery and inspection of documents, but the powers are confined within limits of Order 11. Order for production of ballot papers cannot be made under Order 11, Rule 15 or Rule 18 (2) where Election Officer is not a party to an election petition. However, the Election Tribunal has this power under Sections 100 (1) (a) (iii), 101, 102 and Rule 63 of the Conduct of Election Rules 1961. **AIR 1964 SC 1249 (1251): (1964) 6 SCR 238.** (The Supreme Court held that the High Court was in error in interfering with the exercise of discretion by the Election Tribunal which proceeded on sound principles. AIR 1964 All 86, **Reversed.**]

R. 19. Verified copies.—(1) Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

Order 11 Rule 18 — Note 2 (contd.)

(9) Where the Court was satisfied that particulars were given in the amended plaint sufficient to lay the foundation in support of allegations of fraud, it was held that inspection must precede particulars. AIR 1960 Ker 201 (207): 1959 Ker LT 1186.

(10) Application for inspection of documents and copies thereof for preferring review petition without making any reference to specific documents or giving reasons for inspection — Court is concerned only with making available material that may be necessary to prefer review petition and unless it is shown that conclusion was arrived at by Court by relying on certain documents and that those documents should be inspected, it will not be proper to grant request. AIR 1967 Mad 337 (339): (1965) 2 Mad LJ 275.

(11) Judgment by High Court in income-tax reference application — Company A affected by findings of Court but not party in reference application — Application by A for inspection of documents relating to reference application for purpose of his defence in company petition and for prosecuting original suit — **Held** that party seeking to have judgment in reference application reviewed or to prefer appeal before Supreme Court had to pray for and obtain relief from High Court or Supreme Court after filing review petition or appeal and after convincing Court of his right to inspection and copies of documents. AIR 1967 Mad 337 (339): (1965) 2 Mad LJ 275.

(12) Inspection of documents ordered to avoid hardships to other parties. Order cannot be sustained as the Court had not applied the tests laid down in proviso to Rule 18 (1). AIR 1969 Guj 213 (221).

3. Convenient place for inspection. — (1) In deciding a question as to the place where the inspection of documents is to be given. the Court should be guided by the balance of convenience. (1935) 39 Cal WN 667 (668).

4. Appeal. — (1) No appeal lies under the Code from an order for inspection under this rule; nor does it lie under Clause 15 of the Letters Patent, as an order directing inspection to be given is not a "judgment." (1872) 9 Bom HCR 398 (408, 412) (SB) ** (1909) 2 Ind Cas 167 (167) (DB) (Bom).

5. Revision. — (1) An order allowing the defendant before he filed the written statement to inspect the plaintiff's account will not be interfered with in revision when discretion was exercised fairly. 1956 Madh BLJ 566 (568).

(2) An order allowing inspection of the plaintiff's account under this rule is not revisable under Section 25, Provincial Small Cause Courts Act. AIR 1956 Ajmer 32 (32, 33).

(3) Controversy between parties in regard to right and obligation in relation to inspection of documents — Decision of Court thereon held would amount to "case decided" within meaning of Section 115. AIR 1969 Guj 213 (219).

Order 11, Rule 19 — Note 1

(1) The prohibition with regard to the inspection of a State document arises out of the privilege of the State and is not a procedural matter with which alone sub-rule (2) of this rule deals. 1957 Cri L Jour 134 (135) (Madh B).

(2) The power given by sub-rule (2) to the court to inspect any document for which privilege is claimed is subject to the limitation contained in Section 162, Evidence Act and hence the Court cannot claim to do under this rule what it is prohibited from doing under S. 162, Evidence Act. AIR 1931 PC 254 (259) ** AIR 1950 East Punj 228 (234) (FB) ** 1957 Cri L Jour 134 (135) (Madh B).

(3) The rule no doubt does not require affidavit but judicial decisions have insisted on affidavits in support of the privilege claimed being filed. AIR 1951 Nag 212 (214): ILR (1950) Nag 690.

(4) Where the Court having jurisdiction under the Rule has not acted with material irregularity or illegality in arriving at its conclusion on the question of privilege there is no cause for interference in revision. AIR 1951 Nag 212 (214): ILR (1950) Nag 690.

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

[R.S.C., O. 31, R. 19A.]

R. 20. Premature discovery.—Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

[1882 and 1877, S. 135; R.S.C., O. 31, R. 20.]

Order 11, Rule 19 — Note 1 (contd.)

(5) Claim of privilege under S. 123 of Evidence Act can be allowed when it strictly falls within the four corners of provisions of law because admission of such claim deprives the subject of evidence on matters directly in issue. AIR 1967 Punj 387 (389): (1968) 1 Lab LJ 446.

(6) The provisions of Order 11, Rule 19 (2) must be read subject to Section 162 of the Evidence Act (1872). **AIR 1961 SC 493 (513): (1961) 2 SCR 371.**

ORDER 11, RULE 20

1. Scope. — (1) This rule empowers the Court to determine an issue for the exclusive purpose of deciding the right to discovery of documents which is to be used at the trial. AIR 1953 Nag 281 (282): ILR (1953) Nag 88 (DB) ** (1882) 6 Bom 572 (578) (DB) ** (1881) 18 Ch D 477 (483).

(2) The Court has a discretion to postpone discovery or inspection until some issue in the suit is determined. AIR 1953 Nag 281 (282): ILR (1953) Nag 88 (DB) ** (1910) 38 Cal 230 (251, 252) (DB).

(3) The rule does not make it compulsory that the Court should do so before ordering discovery and inspection in every case. AIR 1953 Nag 281 (282): ILR (1953) Nag 88 (DB).

(4) The rule does not apply where discovery is wanted for the determination of the issue in the suit. AIR 1932 Mad 284 (286): 55 Mad 704 ** AIR 1935 Mad 288 (289).

(5) An order under this rule is not a "judgment" and no appeal lies therefrom. (1902) 4 Bom LR 342 (347) (DB).

(6) Where the Court orders discovery and inspection without giving any reasons therefor the court does not judicially exercise the discretion vested in it under this rule and the High Court has power to interfere with it under S. 115 of the Code. AIR 1957 Punj 14 (16).

(7) Suit for reopening accounts of dissolved partnership on allegations of fraud — Plaintiff applying for inspection of accounts produced by defendant — On sufficient particulars being submitted to lay foundation for allegations of fraud, inspection allowed to precede particulars. On facts, conditions imposed by single Judge were held to be harsh, and not warranted by any provision of C. P. C. and unnecessary. See also O. 11, Rule 18. AIR 1960 Ker 201 (207, 208): 1959 Ker LT 1186 (DB).

(8) Relevancy of documents for purpose of suit is not sufficient reason for ordering premature inspection. AIR 1960 Mad 510 (512): (1960) 1 Mad LJ 292.

(9) Where the decision in any suit depends on the finding on a preliminary issue which goes into the very root of the plaintiff's case a Court, cannot order inspection of the defendant's documents before the determination of such an issue. AIR 1960 Mad 510 (512): (1960) 1 Mad LJ 292.

(10) Mere filing of documents by one party does not entitle the other party to inspect them if the first party objects to the inspection before determination of a particular issue or question. AIR 1960 Mad 570 (572): (1960) 1 Mad LJ 292.

(11) S. S. C. examinee not entitled to see confidential instructions of Board. AIR 1965 Bom 28 (30): 66 Bom LR 569.

2. Revision. — (1) Court ignoring provisions of Order 11 Rules 18 and 20 while ordering inspection of documents acts illegally and with material irregularity within meaning of Section 115. AIR 1969 Guj 213 (221, 222).

R. 21. Non-compliance with order for discovery.—Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

[1882 and 1877, S. 136; R.S.C., O. 31, R. 21; See Rr. 11, 12 and 18.]

ORDER 11, RULE 21 — SYNOPSIS

1. Scope.
2. Committal for contempt.
3. Appeal.
4. Review.
5. Order, if can be set aside under Order 9, Rule 9 or Rule 13.

1. Scope.—(1) In the absence of an order under Rr. 11, 12 or 18 and the disobedience thereof by the party against whom the order is made, the Court cannot act under this rule. ILR (1954) 2 All 153 (160) ** AIR 1943 Pat 69 (71): 21 Pat 735 (DB) ** (1891) 18 Cal 420 (421) (FB) ** AIR 1962 Andh Pra 249 (251) (DB) ** AIR 1960 Punj 500 (506): 62 Pun LR 624 (DB).

(2) A disobedience of an order for production under R. 14 would not empower the Court to take action under this rule. AIR 1957 Raj 367 (370, 371): ILR (1957) 7 Raj 460 ** AIR 1922 All 235 (237): 44 All 565 (DB) ** (1944) 48 Cal WN 677 (679, 680) (DB) ** AIR 1966 Tripura 16 (17).

[But see (1922) 65 Ind Cas 661 (664) (Lah.]

(3) This rule empowers a Court to strike out the written statement of a defendant and to place the defendant in the same position as if he had not defended the suit, if the defendant fails to comply with an order to answer interrogatories or for discovery or inspection of document. AIR 1957 All 400 (401).

(4) The Court cannot strike out the defendant's defence for his failure to file a written statement as directed by the Court. (1892) 1892 Pun Re No. 59, p. 216 (221) (DB).

(5) The Court cannot strike out the defence for the defendant's failure to appear for examination as witness for the opposite side. (1911) 12 Ind Cas 719 (719) (Mad).

(6) Defence cannot be struck off for failure of the legal representative of a deceased defendant to comply with an order against the said defendant. AIR 1925 Bom 386 (387) (DB).

(7) An application by the plaintiff upon the failure of the defendant to comply with the directions contained in a writ of summons, served on him in a commercial cause, to file an affidavit of documents within the prescribed time, is an application made clearly falling within the terms of this rule. AIR 1952 Cal 614 (616).

(8) The Court cannot, under this rule, act of its own motion. but can only do so on the application of the parties. ILR (1953) 2 Cal 309 (313) ** AIR 1957 All 400 (401) ** 1892 Pun Re No. 59, p. 216 (221) (DB) ** AIR 1968 All 119 (124) (DB).

(9) It is highly objectionable on the part of the Court to suggest to the defendant to file an application for the dismissal of the suit under this rule, such an application being a matter of choice with the defendant. AIR 1958 Andh Pra 450 (451) (DB).

(10) Where the parties apply for an order under this rule the Court should not impose the penalty except in extreme cases and as a last resort. AIR 1951 Madh B 65 (65): ILR (1953) Madh B 293 (DB) ** AIR 1958 Him Pra 11 (13) ** AIR 1920 Pat 131 (135): 5 Pat LJ 550 (DB).

(11) This rule enacts a highly penal provision and so the conditions pre-requisite to its application must be clearly fulfilled before a party can be punished under it. AIR 1957 Raj 367 (370): ILR (1957) 7 Raj 460.

(12) The plaintiff's failure to comply with an order for inspection does not automatically entitle the defendant to an order of dismissal under this rule and whether to pass an order to that effect or not is entirely in the discretion of the Court. ILR (1953) 2 Cal 309 (313).

(13) Dismissal should be ordered where the Court is satisfied that the party is avoiding a fair discovery. AIR 1925 Cal 166 (168) (DB).

(14) Dismissal should be ordered where the party is guilty of wilful default. AIR 1954 Madh B 65 (65): ILR (1953) Madh B 293 (DB) ** AIR 1958 Him Pra 11 (13) ** 1957 Jab LJ 259 (259, 260) (DB).

(15) The word "wilfully" means that the act is done deliberately and intentionally and not by "accident or inadvertence." AIR 1954 Madh B 65 (65): ILR (1953) Madh B 293 (DB) ** AIR 1929 Lah 750 (753): 11 Lah 209 (DB).

(16) An order for giving inspection "forthwith" must be complied with within a reasonable time after the order. AIR 1938 Cal 353 (356): ILR (1938) 2 Cal 14.

(17) On an application made for taking action under this rule, the Court should give an opportunity to the other side to put in his reply; an order dismissing the suit or striking off the defence without giving such opportunity is improper. ILR

Order 11, Rule 21 — Note 1 (contd.)
(1954) 2 All 153 (162) ** AIR 1925 Bom 386 (387) (DB) ** AIR 1924 Cal 806 (808) (DB).

(18) The terms of the rule contemplate two orders, first an order under Rr. 11, 12 or 18, and secondly, upon the failure to comply therewith, a further order dismissing the suit or striking off the defence. AIR 1925 Cal 166 (168) (DB).

(19) A conditional order for dismissal of the suit or for striking off the defence, on failure to comply with the orders for interrogatories, discovery or inspection cannot be said to be without jurisdiction. (1883) 9 Cal 923 (925) ** AIR 1938 Cal 353 (355): ILR (1938) 2 Cal 14.

[But see (1964) 2 Mad LJ 131: 77 Mad LW 488.]

(20) Where the defendant fails to comply with an order for discovery, an order allowing him to defend the suit but shutting out all his evidence is not a proper order; the case should be dealt with under this rule and the defence struck out. AIR 1931 Pat 114 (122) (DB).

(21) The Registrar of the High Court or the Master has power to strike out the defence and transfer a suit from the list of defended suits to undefended ones. AIR 1952 Cal 614 (616) (DB).

(22) The provisions of this rule are by no means exhaustive, and therefore the Court can, in the absence of express provision forbidding it, strike off the defence for non-compliance with an interlocutory order. AIR 1956 Sau 58 (62).

(23) Occasion may arise where an order under this rule may be passed after issuing notice to the party. But notice is not in every case necessary as the rule does not specifically provide for one. AIR 1957 All 400 (401).

(24) Insufficiency of answers — Particulars as to how insufficient not indicated by party or court — Action under R. 21 improper. 1960 Raj LW 621: ILR (1961) 11 Raj 47 (DB).

(25) There being no inconsistency at all between O. 11. R. 21 and the rules framed under Orissa Development of Industries, Irrigation, Agriculture, Capital Construction and Resettlement of Displaced Persons (Land Acquisition) Act (18 of 1948), the provisions of O. 11, R. 21 dealing with interrogatories would apply with a full force. (1964) 30 Cut LT 133 (135) (DB).

(26) A witness summoned by defendant to produce documents deliberately avoiding service the Court went on burdening the defendant with adjournment costs ultimately struck off defence for non-payment of the costs:

Held, that the order was not justified either under O. 17, R. 3 or under O. 11, R. 21. AIR 1960 Punj 500 (506): 62 Pun LR 624 (DB).

(27) Section 11A of Bihar Buildings (Lease, Rent and Eviction) Control Act 1947 is practically identical with that of O. 11, R. 21 where defence of the defendant is struck off under this rule, held suit could be fixed for ex parte hearing and tenant would not be entitled to cross-examine any witness produced by plaintiff. 1964 BLJR 197 (DB).

(28) An order striking out defence and proceeding ex parte should not be made merely because of an accidental default, but only in interest of justice if Court were satisfied that defaulting party acted deliberately or was reticent. 1963 All LJ 505: ILR (1963) 2 All 230 (248) (DB).

2. Committal for contempt. — (1) The Chartered High Courts have, under the Letters Patent, power to commit a party to a suit filed who has failed to obey an order for discovery or inspection, for contempt of Court. AIR 1929 Cal 117 (118): 55 Cal 1110 ** (1883) 7 Bom 5 (13) (DB).

(2) An appeal lies from an order of committal for contempt. (1883) 7 Bom 5 (12, 15) (DB).

[But see (1905) 27 All 380 (381) (DB).]

(3) Compromise forming basis of decree is not undertaking given to Court — No contempt in case of breach of terms of compromise. AIR 1960 Madh Pra 280 (282): 1960 MPLJ 642.

3. Appeal. — (1) Under O. 43, R. 1 (f) an order under this rule is appcalable as an order. AIR 1958 Andh Pra 450 (451) (DB) ** AIR 1932 Mad 316 (316, 317).

(2) An order under this rule includes an order dismissing a suit or striking off a defence as well as an order refusing to dismiss the suit or to strike off the defence in either case it is open to appeal. (1945) 49 Cal WN 132 (133) (DB) ** AIR 1930 Cal 426 (427) (DB).

(3) Where an order, though purporting to be passed under this rule, is really and in substance, one under O. 6, R. 5, no appeal lies therefrom. AIR 1932 Mad 316 (318) ** AIR 1957 Raj 367 (371): ILR (1957) 7 Raj 460.

(4) Orders striking off defence for failure of defendants to answer interrogatories passed under this rule. Appeal against decree eventually passed in the suit is not incompetent. AIR 1968 Punj 298 (299, 301): ILR (1967) 2 Punj 352.

4. Review.—(1) Where a suit is dismissed for want of prosecution under this rule, the remedy of the aggrieved party is by appeal or by review under the provisions of Order 47. AIR 1925 Rang 218 (218): 3 Rang 63.

(2) Where the provisions of Order 47 do not apply to the particular order in question the Court cannot review it under its inherent powers under Section 151 of the Code. AIR 1947 All 343 (344): ILR (1947) All 389 ** AIR 1947 Nag 236 (237): ILR (1947) Nag 190.

5. Order, if can be set aside under Order 9, Rule 9 or Rule 13. — (1) An order under this rule cannot be set aside under the provisions of Order 9. AIR 1925 Rang 218 (218): 3 Rang 63 ** (1898) 2 Cal WN 676 (679).

R. 22. Using answers to interrogatories at trial.—Any party may, at the trial of the suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in.

[R.S.C., O. 31, R. 24.]

R. 23. Order to apply to minors.—This Order shall apply to minor plaintiffs and defendants and to the next friends and guardians for the suit of persons under disability.

[R.S.C., O. 31, R. 29.]

HIGH COURT AMENDMENT

Rr. 24, 25, 26 (Mysore)

Add the following rules after Rule 23:—

"24. If where inspection has been ordered out of Court or is to be given out of Court, it is found that a satisfactory inspection cannot be obtained, or if it is shown that the documents are being or are likely to be tampered with, an application may be made to Court for an order for the deposit and inspection of the documents in Court. Such application shall be supported by affidavit. Notice of such application shall be given to the party affected thereby and orders passed only after hearing both sides, if they appear on the date fixed for hearing in the notice, or on any other date to which the hearing of the same may be adjourned thereafter.

25. A defendant upon whom summons to appear and answer the plaint has been served, shall on entering appearance before filing his written statement be entitled along with his pleader, if any, to inspect all documents produced with the plaint and lying in the custody of the Court.

26. A plaintiff as well as every defendant on whom summons has been served and who has entered appearance shall be entitled along with his pleader, if any, to inspect all documents produced into Court by any party to the suit." (30-3-1967.)

ORDER XII

ADMISSIONS

[See S. 30.]

R. 1. Notice of admission of case.—Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

[R.S.C., Order 32, R. 1.]

Order 11, Rule 22 — Note 1

(1) The answers to interrogatories are only affidavits and are not by themselves evidence. (1879) 4 Cal 836 (837).

(2) The party wishing to use the answers must put them in evidence in the ordinary way. (1886) 10 Bom 167 (171).

(3) The answers are, when put in evidence, evidence against the party answering them, though great caution should be exercised in using them as such. AIR 1918 Mad 1103 (1107) (DB).

(4) Vague answers to interrogatories served on railway in suit for damages for negligence in handling consignment, may be open to adverse inference. 1964 All WR (HC) 41.

Order 11, Rule 23 — Note 1

(1) Where the guardian of a minor defendant fails to compy with an order for discovery, the Court is competent to pass an order under Rule 21 against the minor defendant by virtue of this rule. (1935) 39 Cal WN 1029 (1030).

Order 12, Rule 1

1. Scope.— (1) Admissions are the strongest evidence possible and even a wrong construction of a document will be assumed to be correct in view of the admission. AIR 1914 PC 220 (223).

(2) An admission in pleadings means the admission of an averment by the opposite

R. 2. Notice to admit documents.—Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may

Order 12, Rule 1 — Note 1 (contd.)

party. AIR 1946 Sind 117 (119): ILR (1946) Ker 207 (DB).

[See also AIR 1951 Trav-Co 109 (113): ILR (1951) Trav-Co 209 (FB).]

(3) When a party to a civil suit makes an admission in pleadings or in his evidence at the hearing of the suit, those admissions are conclusive and cannot be challenged. (1966) 7 Guj LR 1123.

(4) Admissions must be taken as a whole or not at all. AIR 1955 Cal 465 (468) (DB) ** AIR 1937 Pat 418 (421) (DB) ** AIR 1935 All 946 (948): 58 All 261 (FB).

(5) Admission made subject to a condition, must be accepted with that condition. AIR 1954 Trav-Co 152 (156, 157) ** **AIR 1915 PC 2 (4): 39 Bom 399: 42 Ind App 103.**

(6) Where one portion of a claim is admitted and the other portion denied, the plaintiff is entitled to ask for a judgment on the admitted portion and proceed to trial on other. AIR 1918 Cal 467 (468): 45 Cal 138 (DB).

(7) Where it was contended that specific averment made in certain paragraph of plaint and denied in written statement should be treated as admission — **Held,** pleadings should not be construed so strictly. AIR 1968 Delhi 68 (73) (DB).

(8) An admission by defendant that he had executed a document relied on by plaintiff, accompanied by a pleading that the document is of no effect is no admission at all of defendant's liability. AIR 1941 Rang 117 (118) (DB).

(9) Value of admission is limited by its relevancy under the Evidence Act, and a judgment based upon irrelevant material will not be upheld. **AIR 1914 PC 164 (165).**

(10) What weight should be given to an admission is entirely within the discretion of the lower Court. If the court minimises its importance no question of law can arise. But the Court should be cautious in assessing the legal effect of an alleged admission made in cross-examination. 1965 All WR (HC) 489.

(11) Where lower Court in its judgment makes a statement that certain admissions were made, Appellate Court will not lightly doubt the statement. AIR 1921 Cal 584 (591) (DB).

(12) The question whether there is a cause of action does not depend upon admission of defendant, but when plaint discloses a cause of action, plaintiff is entitled to get a decree on admissions of the defence. AIR 1921 Pat 280 (280).

(13) Value of admissions depends upon circumstances in which they were made. Possible motives for incorrect statements by interested parties should not be ignored. The nature of the facts admitted is an important consideration. AIR 1939 All 626 (631) (DB).

(14) A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. (1953) 32 Pat 983 (997) ** AIR 1941 Bom 144 (145) (DB).

(15) Documents are either proved by witnesses or marked on admission. When they are marked on admission without reservation, the contents are not only evidence but are taken as admitted, the result being the contents cannot be challenged either by way of cross-examination or otherwise. In respect of documents marked on admission dispensing with formal proof, the contents are evidence, although the party admitting does not thereby accept the truth of the contents and is free to challenge the contents by way of cross-examination or otherwise. AIR 1967 Cal 191 (194): 70 Cal WN 452.

(16) Where in suit for partnership accounts, a preliminary decree is passed against major and minor defendants in terms of statement of parties recorded by Court, statement amounts to compromise and not mere admission of liability by defendants. 1961 MPC 187. (Compromise in absence of leave of Court held void against minors.)

2. Admission by minor.— (1) A minor defendant cannot make a valid admission where a guardian ad litem has been appointed for him in the suit. (1916) 32 Ind Cas 368 (368) (UPBR).

(2) A minor and his father were made co-defendants to a suit and an admission was made by the father on a matter on which the father was best qualified to speak and the minor who was represented by a pleader did not deny the admission. It was held that the minor was bound by the admission. AIR 1936 Pat 428 (429).

3. Withdrawal of admissions.— (1) An admission made under a mistake may be allowed to be withdrawn and the plaint amended. AIR 1940 Bom 281 (282): ILR (1940) Bom 480.

(2) Except under special circumstances an admission forming the foundation of a judgment should not be allowed to be withdrawn in appeal. **AIR 1925 PC 150 (154).**

(3) An admission on a mixed question of law and fact cannot be allowed to be withdrawn in second appeal. AIR 1935 Oudh 163 (164).

Order 12, Rule 2 — Note 1

(1) Admission of documents means admission of facts contained in the documents. **AIR 1966 SC 1697 (1703): (1966) 3 SCR 527.**

be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

[1882, S. 128; R.S.C., O. 32, R. 2.]

HIGH COURT AMENDMENT

Allahabad

In Rule 2—

(a) Insert the words "without sufficient cause" between the words "neglect to admit" and the words "after such notice";

(b) substitute the words "such special" for the word "the" occurring between the words "after such notice" and the words "costs of proving";

(c) insert a comma and after that the words "as may be fixed by the Court not exceeding fifty rupees for each document" between the words 'any such document" and the words "shall be paid by the party"; and

(d) delete the comma and the words "unless the Court otherwise directs" and the semicolon thereafter occurring between the words "whatever the result of the suit may be" and "and no costs of proving any document". (1-6-1957.)

R. 3. Form of notice.—A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.

[R.S.C., O. 32, R. 3.]

[a]**R. 3A. Power of Court to record admission.**—Notwithstanding that no notice to admit documents has been given under Rule 2, the Court may, at any stage of the proceedings before it, of its own motion, call upon any party to admit any document and shall, in such a case, record whether the party admits or refuses or neglects to admit such document.

[a] Inserted by Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 14 [1-1-1957].

R. 4. Notice to admit facts.—Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

[R.S.C., O. 32, R. 4.]

Order 12, Rule 2 — Note 1 (contd.)

(2) Where a document was admitted by the counsel of the maker of the document subject to 'all just exceptions' within the meaning of Order 12, Rule 2, a statement contained in the document cannot be relied upon in order to contradict the maker in a suit in which the maker has entered the witness box but the statement was not put to him. The admission of the counsel did away with the formal proof of the document but not with the requirements of Section 145 of the Evidence Act. AIR 1964 All 345 (345): 1963 All LJ 680 (DB). (AIR 1957 All 1 (FB), **Dist.**)

Order 12, Rule 4 — Note 1

(1) The Court has discretion to disallow the costs of proving a document not admitted by opposite party under the Rule notwithstanding a direction to that effect in the Rule. AIR 1964 Madh Pra 1 (8): 1963 MPLJ 867 (DB).

R. 5. Form of admissions.—A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11 in Appendix C, with such variations as circumstances may require.

[R.S.C., O. 32, R. 5.]

R. 6. Judgment on admissions.—Any party may, at any stage of the suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.

[R.S.C., O. 32, R. 6.]

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras (9-6-1959): Reg. 8 of 1965, S. 3.

Madras and Pondicherry

Re-number the existing Rule 6 as sub-rule 6(1) and insert the following as sub-rules (2) and (3):—

"(2) The Court may also of its own motion make such order or give such judgment as it may consider just, having due regard to the admissions made by the parties.

(3) Whenever an order or judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such order or judgment and bearing the same date as the day on which the order or judgment was pronounced." (R.O.C. No. 1729 of 1926); Act 26 of 1968, S. 3 and Sch. Pt. II (w.e.f. 5-9-1968).

ORDER 12, RULE 6 — SYNOPSIS

1. Scope.
2. Court may make such order as it may think just.
3. Admissions made otherwise than on pleadings.
4. Judgment, if should be followed by a decree.
5. Appeal.

1. Scope.— (1) A party can, under this rule, move for a judgment upon admissions made by opposite party and thus get rid of the portion of the action in which there is no dispute. AIR 1953 Trav-Co 220 (222): ILR (1953) Trav-Co 89 (FB) ** AIR 1942 Mad 507 (508) (DB).

(2) Object of Rule is to enable a party to obtain speedy judgment, at least to the extent of the relief, which, according to the admissions of the opposite party, he is entitled to. AIR 1951 Nag 259 (261): ILR (1950) Nag 160 (DB).

(3) In moving for a judgment under this rule, the party applying need not relinquish the rest of his claim. AIR 1926 Sind 119 (120): 20 Sind LR 216.

(4) Admission on which a judgment can be claimed must be a clear and unequivocal one. 1956 Madh BLJ 143 (144) ** AIR 1920 Cal 163 (165) (DB) ** AIR 1962 J and K 66 (67-68): 1962 Kash LJ 144 (DB). (Admission that plaintiff was entitled to certain security deposits subject to plaintiff's furnishing no demand certificate as per condition of agreement between the parties — Condition held could not be ignored as being void under Section 28 of the Contract Act — Admission held was not unconditional.)

(5) An admission of a defendant will not necessarily entitle plaintiff to a judgment, where right asserted by plaintiff has, in fact, no existence in law. AIR 1951 Hyd 63 (63): ILR (1951) Hyd 77 (DB).

(6) The rule refers only to admissions on points of fact and not on points of law. AIR 1951 Hyd 63(64): ILR (1951) Hyd 77 (DB) ** (1900) 27 Cal 156 (163): 26 Ind App 216 (PC).

(7) Calcutta High Court Original Side Rules, Chapter 13-A — Decree under — Principles of Order 12, Rule 6, Civil P. C. are applicable — Exercise of discretion — No hard and fast rules can be laid down. (1963) 67 Cal WN 533 (540, 541).

(8) Application for judgment on admission in suit — Application by defendant for extension of time to file affidavit in opposition — **Held,** filing written statement and filing an affidavit in opposition to an application for judgment on admission stand on same footing — Defendant precluded from making an application under Section 34 Arbitration Act as his actions

Mysore

Renumber Rule 6 as 6(1) and add the following as sub-rules (2) and (3):—

"(2) The Court may also of its own motion make such order or give such judgment as it may consider just, having due regard to the admissions made by the parties.

(3) Whenever an order or judgment is pronounced under the provisions of this rule, a decree may be drawn up in accordance with such order or judgment bearing the same date as the date on which the order or judgment was pronounced." (30-3-1967).

Orissa

Same as that of Patna.

Patna

Substitute the following for Rule 6 in Order 12:—

"6. Where admissions of fact have been made, either on the pleadings or otherwise, the Court may, at any stage of a suit, on the application of any party, or, of its own motion, without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think just."

Order 12, Rule 6 — Note 1 (contd.)

amounted to taking steps in the proceedings. AIR 1960 Cal 206 (208, 209).

(9) Rule is permissive and does not preclude a party, who does not avail himself of it and proceeds to trial in that ordinary way from relying at trial on admissions made by opposite party. 1968 Lab IC 1487 (1491) (Pat). (Per Ramratna Singh, J.)

(10) Proceedings under Payment of Wages Act — Order 12, Rule 6, C. P. Code not applicable. 1965 Raj LW 210 (213): ILR (1965) 15 Raj 848.

2. Court may make such order as it may think just.— (1) The Rule being discretionary and not mandatory, it is not incumbent on Courts in all cases to pass a judgment upon admission. AIR 1931 Oudh 321 (322) (DB) ** AIR 1929 Lah 569 (572) (DB) ** AIR 1924 Cal 190 (192) (DB).

[See however AIR 1951 Nag 259 (261): ILR (1950) Nag 160 (DB).]

(2) Court may, in exercise of its discretion, refuse to pass judgment on admission in appropriate cases. (1946) 50 Cal WN 439 (441) ** AIR 1918 Cal 467 (470, 471): 45 Cal 138 (DB).

(3) Court will not ordinarily pass a decree for dissolution of marriage on mere admissions of parties in view of possible collusion between parties. (1893) 17 Bom 624 (625) (FB).

(4) Suit should not be dismissed but a decree should be passed on strength of defendant's admission even if plaintiff is absent. AIR 1929 Lah 830 (831). (AIR 1925 Pat 712 (2), Relied on.)

(5) Where no application had been made by plaintiff for passing judgment on admission and both parties were absent at the hearing, a judgment on admissions could not be passed in plaintiff's favour. ILR (1948) 1 Cal 141 (145) (DB).

(6) Order 12, R. 6 has to be read along with Order 8, Rule 5 with particular reference to the proviso to that rule so that a Court is not bound to grant a declaratory relief on basis of admission in pleading especially when the plaintiff did not invite the Court to exercise its powers under Order 12, Rule 6. AIR 1958 SC 886 (892).

(7) Court may refuse to pass a decree in a case of constructive admission if, in the circumstances of the case, it is of opinion that the defendant must not be held to have admitted facts not specifically denied in the written statement. (1885) 11 Cal 111 (118): 11 Ind App 186 (PC).

(8) In a suit for maintenance Court cannot award under this rule, an interim maintenance for an amount larger than that admitted by defendant. AIR 1954 Trav-Co 123 (123).

3. Admissions made otherwise than on pleadings.— (1) A judgment may be given even upon verbal admission. AIR 1918 Cal 467 (468): 45 Cal 138 (DB).

(2) Caution is required in acting upon verbal admissions. (1884) 6 All 406 (415, 416) (DB).

(3) The rule is wide enough to afford relief not only in cases of admissions made in pleadings, but also in case of admissions de hors pleadings. AIR 1926 Sind 119 (120): 20 Sind LR 216.

4. Judgment, if should be followed by a decree.— (1) There is nothing objectionable to a decree being drawn up on a judgment under this rule and later on to another decree being drawn up after investigation of the claim not admitted. AIR 1918 Cal 467 (470): 45 Cal 138 (DB).

(2) It is not necessary to have a decree drawn up on a judgment passed under this rule, it being open to the plaintiff to enforce payment of the amount awarded as an order in execution proceedings by virtue of Section 36. AIR 1926 Sind 119 (120): 20 Sind LR 216.

(3) Interim decree for partition under Order 12, Rule 6 (3) (Madras Amendment)

R. 7. Affidavit of signature.—An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required.

[R. S. C., O. 32, R. 7.]

R. 8. Notice to produce documents.—Notice to produce documents shall be in Form No. 12 in Appendix C with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

[R. S. C., O. 32, R. 8.]

R. 9. Costs.—If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

[R. S. C., O. 32, R. 9.]

ORDER XIII

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS

R. 1. Documentary evidence to be produced at first hearing.—(1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

Order 12, Rule 6 — Note 4 (contd.)

— Amendment of pleadings sought after decree to provide for relief in case there was change in case law — The decree in question was held to be partly preliminary and partly final because so far as it affected the particular items in question, it was in the nature of final decree subject only to its being varied, if necessary, by way of re-allotment of the items by consent of the parties. AIR 1946 Mad 151 (153).

5. Appeal.— (1) An order rejecting an application for a judgment on admission is a "judgment" within Clause 15 of the Letters Patent and is appealable. AIR 1920 Cal 163 (164) (DB).

Order 12, Rule 8

1. Notice to produce documents.— (1) Order 12, Rule 8 refers to a notice to produce documents "at the time of the hearing" so that if they are not produced, the party calling for them may give secondary evidence of the same. AIR 1953 All 689 (691) (DB) ** AIR 1962 Andh Pra 249.

(2) No adverse inference can be drawn against a party for its failure to produce document in its possession, if the opposite party has not called upon it to produce them. AIR 1954 Cal 480 (482): ILR (1955) Cal 102 (DB).

ORDER 13, RULE 1 — SYNOPSIS

1. Scope and object.
2. "Shall produce at the first hearing."
3. "First hearing."

1. Scope and object.— (1) This rule enjoins on the parties to produce their documents at the earliest possible opportunity. (1898) 22 Bom 173 (175) (DB) ** AIR 1931 Pat 275 (281): 10 Pat 388 (DB).

(2) Documents not in the possession or power of the party cannot and therefore need not be produced at the first hearing. (1875) 23 Suth WR 29 (30) ** 1930 Mad WN 511 (513) ** AIR 1964 J and K 59 (59, 60): 1963 Kash LJ 97 ** AIR 1961 Raj 21 (23): 1960 Raj LW 321 (DB).

(3) The rule is peremptory and all documents on which a party intends to rely must be produced at the first hearing. AIR 1956 Bom 129 (134) (DB) ** ILR (1954) 4 Raj 950 (954) ** AIR 1966 Cal 591 (592, 593): 70 Cal WN 729.

(4) The Court is given discretion, under Rule 2, to receive any documents at later stages of the suit if there is no suspicion about their genuineness. **AIR 1918 PC 11 (14): 45 Cal 878: 45 Ind App 73 **** AIR 1956 Bom 129 (134) (DB) ** AIR 1928 Pat 555 (556): 7 Pat 589 (DB).

[See ILR (1954) 4 Raj 950 (954) (DB).]

(5) While it is the duty of a private party to a litigation to place all the rele-

(2) The Court shall receive the documents so produced: Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

[1882 and 1877, Ss. 138, 140; 1859, Ss. 128, 129.]

HIGH COURT AMENDMENTS

Bombay: Dadra and Nagar Haveli[a]

For R. 1 substitute the following:

"1. Documentary evidence to be produced at or before the settlement of issues.— (1) The parties or their pleaders shall produce at or before the settlement of issues all the documentary evidence of every description in their possession or power on which they intend to rely and which has not already been filed in the Court, and all the documents which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced:

Provided that they are accompained by an accurate list thereof prepared in such form as the High Court directs." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Orissa

Same as that of Patna.

Patna

After the words "at the first hearing of the suit" add the words:

"or, where issues are framed, on the day when issues are framed, or within such further time as the Court may permit."

Order 13, Rule 1 — Note 1 (contd.)

vant matters before the Court, a higher responsibility rests upon the Government not to withhold such documents from the Court. **AIR 1964 SC 1714 (1717): 1964-6 SCR 984.**

(6) The examination of witnesses, exhibition of documents is entirely in the hands of the parties and their lawyers. The duty of the Court is merely to shut out inadmissible evidence and to prevent abuse of process during hearing. It is no part of the duty of the Court or Judge to suggest beforehand whether the pleadings need or need not be supported by evidence. (1961) 65 Cal WN 1064.

(7) Production of documents in evidence — Particular care should be taken for proper custody of such records. 1961 BLJR 770.

(8) In a suit against the Railway Administration for compensation for non-delivery of jute bales, the Court is in error in rejecting documents tendered on behalf of the defence to show that Risk Note C must have been executed on behalf of the plaintiff, as such rejection is likely to cause considerable prejudice to the case of the defence. AIR 1960 Pat 489 (493): 1960 BLJR 669 (DB).

2. "Shall produce at the first hearing". — (1) On the first day of hearing both the parties shall bring in all the documents on which they rely, and the Court is bound to receive them, if they duly put them in. **AIR 1956 Bom 129 (134) (DB) ** ('55) Madh BLJ 1955 HCR 570 (571) ** ILR (1954) 4 Raj 950 (954) (DB).**

(2) In a small cause suit, the date of first hearing is the date which the Court appoints for the trial to begin after the pleadings have been completed. **AIR 1943 Mad 286 (287).**

(3) Documents of the kind specified in Order 7, Rule 18, sub-rule (2) or documents which are not in the possession or power of the plaintiff do not come under this rule. AIR 1922 Pat 569 (571) (DB) ** AIR 1929 PC 99 (103): 56 Cal 1003: 56 Ind App 119.

(4) Where the Court does not want the production of documents till a particular stage in the suit is reached, it may pass an order requiring parties to produce their documents within a specified time. **AIR 1926 Mad 347 (349).**

(5) Where additional documentary evidence produced by plaintiff is admitted after the conclusion of hearing, defendant must be afforded an opportunity to adduce evidence in rebuttal and also other evidence to support his defence. **AIR 1957 Pat 688 (689) (DB).**

3. "First hearing". — (1) See Order 8, Rule 1.

(2) 'First hearing of the suit' — Mean that hearing after the pleadings are completed and before issues are framed upto that stage, production of document is permissible without cause being shown. **AIR 1966 Cal 591 (594): 70 Cal WN 729.**

R. 2. Effect of non-production of documents.—No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of Rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

[1882, S. 139; 1877, Ss. 138, 139; 1859, S. 128.]

HIGH COURT AMENDMENT

Bombay: Dadra and Nagar Havelia

For R. 2, substitute the following:—

"2. **Effect of non-production of documents.**—(1) No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of Rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.'

(2) Nothing in the rule applies to documents to be used for cross-examining witnesses or to be handed over to witnesses merely to refresh their memory." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

ORDER 13, RULE 2 — SYNOPSIS

1. Effect of non-production of documents.
2. "Unless good cause is shown".
3. Appeal.

1. Effect of non-production of documents. — (1) Where the genuineness of a document is beyond doubt, there can be no reasonable objection to its reception even at a later stage. AIR 1946 Nag 377 (381, 382): ILR (1946) Nag 433 (DB) ** AIR 1918 PC 11 (13): 45 Cal 878: 45 Ind App 73.

(2) The rule must be liberally construed so as to advance the cause of justice. AIR 1954 Him Pra 36 (38) ** AIR 1951 Cal 246 (248) (DB) ** (1898) 22 Bom 173 (176) (DB) ** AIR 1961 Pat 242 (244): 1961 BLJR 308.

[But see AIR 1924 Pat 517 (518, 519).]

(3) No documents whether public or private which are above suspicion should be excluded if they are necessary for the proper decision of the case. AIR 1954 Ajmer 50 (51) ** AIR 1940 Mad 540 (542) (DB) ** AIR 1929 PC 99 (103): 56 Cal 1003: 56 Ind App 119 ** AIR 1924 Pat 517 (518) (DB) ** AIR 1961 Raj 21 (23): 1960 Raj LW 321 (DB).

(4) Instead of giving a liberal construction to this rule the same result may be arrived at by granting the application under its inherent powers under Section 151 of the Code. AIR 1923 Oudh 59 (60): 25 Oudh Cas 286.

[But see AIR 1954 Him Pra 36 (37).]

(5) Once a document is received no adverse inference can be drawn against the party on the ground of late production. AIR 1928 Pat 294 (299) (DB).

(6) If the party considers a particular document irrelevant and does not produce it, no adverse inference can be drawn against him unless the other party asks him to produce it and he fails to do so. AIR 1958 Madh Pra 129 (131) (DB).

(7) No leniency on ground of sex or age should be shown. Court must consider if prima facie document is genuine. AIR 1956 Bhopal 1 (2). (Document appearing to be forged cannot be admitted.)

(8) Documents not promptly rejected or ordered merely to be kept on the file will be deemed to have been received. AIR 1928 Pat 537 (538) (DB) ** AIR 1929 Pat 254 (257): 8 Pat 766 (DB).

(9) When the documents are in the custody of another Court and are produced after the first hearing, they cannot be rejected under this rule. AIR 1936 Pat 631 (634).

(10) Where the document bore the endorsement of the Office Superintendent instead of the Presiding Judge but the appellate Court after due consideration allowed the party to adduce his rebuttal evidence and remanded the case for that purpose, the procedural defect pales into insignificance. AIR 1956 Hyd 114 (116): ILR (1956) Hyd 328 (DB).

(11) Documents relied on by the plaintiff and in his possession or ordered to be produced should be produced on the first hearing itself — Late production of documents — Court has discretion to accept for purposes of fair trial. AIR 1966 Cal 591 (592, 593): 70 Cal WN 729.

(12) The words 'possession or power' in Rules 1 and 2 imply that the document in question must be in actual physical possession and control of the plaintiff. A document which can only be produced by calling a witness and asking him to produce cannot come within the purview of Rr. 1 and 2. Hence, refusal to receive a document in possession of witness under Rule 2, held, erroneous. AIR 1964 J & K 59 (59, 60): 1963 Kash LJ 97.

R. 3. Rejection of irrelevant or inadmissible documents.—The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

[1882 and 1877, S. 140; 1859, S. 129.]

Order 13, Rule 2 — Note 1 (contd.)

(13) Court acting suo motu has wide powers to permit production of documents. AIR 1961 Madh Pra 348: 1960 Jab LJ 1184.

(14) A subsequent order reconsidering a previous order and allowing the plaintiff to produce certain documents on an application made by him under Order 13, R. 2 and Section 151 is not without the jurisdiction of the Judge even though the previous order had been made by his predecessor in title. AIR 1961 Mys 101 (102): 39 Mys L Jour 26.

(15) It is incumbent on the defendant who takes the plea that the suit is barred by Order 2, Rule 2 to place before the Court for consideration the plaint in the previous suit. Where he does not, he ought not to be permitted to raise the plea of bar of suit under Order 2, Rule 2. AIR 1959 Mys 227 (232): 37 Mys LJ 412 (DB). (**Overruled** on another point in AIR 1963 Mys 1.)

2. "Unless good cause is shown".— (1) Vexatious and dilatory applications for reception of documents cannot be granted. AIR 1928 Nag 223 (225) (DB) ** 1956 Raj LW 95 (97).

(2) It is not a good cause for non-production that on the day fixed for the production of documents the hearing only resulted in an adjournment. AIR 1919 Cal 800 (801) (DB).

(3) Admission of papers after long delay without recording any reasons is wrong. AIR 1951 Cal 246 (248) (DB) ** AIR 1931 Pat 275 (281): 10 Pat 388 (DB).

(4) The fact that the documents were in the custody of another Court and that the delay in their production was not due to any fault of the party is sufficient reason. AIR 1936 Pat 631 (633).

3. Appeal.— (1) Trial Court's discretion to admit or reject documents at late stage ought not to be interfered with in appeal unless it has been exercised capriciously or improperly. ILR (1954) 4 Raj 950 (956, 957) (DB) ** AIR 1928 Pat 555 (556): 7 Pat 589 (DB) ** AIR 1931 Mad 512 (513) ** (1938) 67 Cal L Jour 133 (134).

(2) In a case where the trial Court in its discretion received documents produced at a late stage, it was held that the late production could not be a ground of appeal from the decision in the suit. (1869) 12 Suth WR 32 (32): 13 Moo Ind App 77 (PC).

ORDER 13, RULE 3 — SYNOPSIS

1. Scope.
2. Objection to admissibility.
3. Appeal.

1. Scope.— (1) The Court is expected and empowered under this rule to reject documents considered irrelevant or otherwise inadmissible. (1863) Suth WR 41 (44, 45) (FB) ** AIR 1928 Pat 537 (538) (DB).

(2) Rejection under this rule may be at any stage. (1869) 11 Suth WR 350 (352) (DB).

(3) The order holding a particular document inadmissible should be as brief as possible. AIR 1950 Mad 62 (63).

2. Objection to admissibility.— (1) Relevancy is different from admissibility. Whether an objection is raised or not, every Court is bound to reject irrelevant documents. AIR 1921 Pat 61 (63) (DB).

[See (1897) 19 All 76 (92): 23 Ind App 106 (PC). (The decision of their Lordships turned on the admissibility of oral evidence.)]

(2) Objections to the admissibility of documents must be taken at the trial and should be decided as they arise. AIR 1954 Trav-Co 209 (217): ILR (1953) Trav-Co 1090 (FB) ** AIR 1958 Orissa 26 (41) (DB). (Absence of objection to admissibility does not preclude party from challenging genuineness of document later on.) ** AIR 1957 Andh Pra 1022 (1023) ** AIR 1957 Andh Pra 60 (60). (Question of admissibility should not be reserved for arguments at final stage.) ** AIR 1956 Him Pra 22 (24) ** AIR 1956 Cal 205 (208) (DB).

(3) In a case of doubt on a question of admissibility, the safer course, in appealable cases, is to admit the document. (1890) 12 All 1 (26) (FB).

[See also (1891) 18 Cal 201 (203): 17 Ind App 159 (PC).]

(4) No objection can be taken in appeal to the admissibility of a document which was admitted in evidence without objection at the trial. (1907) 34 Cal 1059 (1074): 34 Ind App 194 (PC) ** AIR 1955 Raj 45 (49): ILR (1955) 5 Raj 191 (DB) ** AIR 1950 Pepsu 56 (57): 2 Pepsu LR 431 (DB) ** AIR 1954 Trav-Co 209 (217): ILR (1953) Trav-Co 1090 (FB) ** AIR 1966 All 570 (575, 576): ILR (1965) 1 All 483 (DB) ** (1966) 2 Mys LJ 61 (62) ** (1966) 32 Cut LT 478 (492): ILR (1966) Cut 284 ** AIR 1965 Orissa 113 (114): 31 Cut LT 889.

[See however AIR 1966 Cal 504 (509): (1967) 1 Lab LJ 483 (DB). (No opportunity in lower Courts for taking objection of admissibility of evidence — Objection can be raised in appeal.)]

(5) In the case of a document which the law forbids to be received in evidence, failure to raise objection to its admissibility in the trial will not bar a party from raising the objection in the appellate Court. AIR 1955 Raj 45 (49): ILR (1955) 5 Raj 191 (DB).

R. 4. Endorsements on documents admitted in evidence.—(1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:—

(a) the number and title of the suit,
(b) the name of the person producing the document,
(c) the date on which it was produced, and
(d) a statement of its having been so admitted;

and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

[1882 and 1877, S. 141; 1859, S. 132.]

HIGH COURT AMENDMENT

Bombay: Dadra and Nagar Haveli[a]

Add the following proviso, to sub-rule (1):

"Provided that in proceedings in Bombay City Civil Court, the endorsement may be signed or initialled by such officer as the Principal Judge may authorise in this behalf." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Order 13, Rule 3 — Note 2 (contd.)

(6) In the case of a document which is compulsorily registrable, the failure to object to the admission of the document in the trial Court is no bar to raising the objection before a superior Court. AIR 1936 Pat 634 (635).

(7) As to objections on the score of insufficient stamp duty, see the undermentioned cases. AIR 1956 Mad 250 (253): ILR (1956) Mad 449 ** (1889) 13 Bom 493 (496) (DB) ** AIR 1939 Nag 220 (221): ILR (1940) Nag 671.

3. Appeal.— There is no appeal from an order rejecting a document under this rule, though the order may be challenged in an appeal from the decree in the suit. (1872) 18 Suth WR 511 (511) (DB).

[See (1958) 7 Moo Ind App 148 (168) (PC). (The Privy Council scarcely interferes in question of admissibility.)]

Order 13, Rule 4

1. Endorsements on admitted documentary evidence.— (1) The endorsement is intended to be a record of the fact that the document has been admitted in evidence after the necessary legal formalities have been complied with. **AIR 1943 PC 83 (87):** ILR (1943) Kar PC 69.

(2) An endorsement, made before the documents are proved, or the practice of putting seal on the documents immediately on their production, is not proper. AIR 1928 Lah 432 (434): 9 Lah 224 (DB) ** AIR 1931 Lah 546 (550): 13 Lah 126 (DB) ** AIR 1959 Raj 156 (160): ILR (1959) 9 Raj 362 (DB).

(3) An objection to the mode of proof of a document must be taken at the trial before the document is marked as an exhibit. **AIR 1943 PC 83 (87):** ILR (1943) Kar (PC) 69 ** AIR 1954 Trav-Co 209 (217): ILR (1953) Trav-Co 1090 (FB) ** ILR (1966) Cut 816 (820, 821): 33 Cut LT 960 ** AIR 1960 Raj 92 (95): 1960 Raj LW 44 (DB).

(4) Where documents are admitted by both parties to be correct it is not necessary to formally tender them in evidence. AIR 1942 Lah 179 (182) ** AIR 1956 All 124 (127): 1955 All WR (HC) 593.

(5) The rule as to the endorsement of the documents must be strictly followed. **AIR 1916 PC 27 (41):** 38 All 627: 43 Ind App 212 ** AIR 1924 Lah 548 (549): 5 Lah 227 (DB). (Provisions of rule completely ignored — Documents cannot be regarded as having been legally brought on record.) ** AIR 1928 Lah 142 (142, 143): 9 Lah 4. (Absence of endorsement — Controversy whether document was admitted or not — Case remanded for retrial.)

(6) There is no provision in the Civil P. C. which requires the Court to pass a formal order to the effect that it was admitting a certain document in evidence. A document becomes a piece of evidence in the legal sense "admitted in evidence" as soon as the other party has proved it or admitted it. Order 13, Rule 4 merely provides for an endorsement to be made on the document which has been admitted in evidence in the suit which will be done by the office and subsequently signed by the Judge. AIR 1960 All 359 (360): 1959 All LJ 719 (DB).

(7) Where there is no doubt as to the documents having been admitted, as a fact, the mere absence of the endorsements does not make the documents inadmissible in evidence. AIR 1957 Him Pra 23 (24, 25). (Some particulars not noted.) ** AIR 1937 Pat 222 (222) (DB) ** 1963 Ker LT 592: ILR (1963) 2 Ker 639.

R. 5. Endorsements on copies of admitted entries in books, accounts and records.—(1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

(a) where the record, book or account is produced on behalf of a party, then by that party, or

(b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in Rule 17 of Order VII, mark the entry and

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Order 13, Rule 4 — Note 1 (contd.)

(8) If there is an order admitting the document, the endorsement under Rule 4 is merely the following up of that order. AIR 1954 Raj 173 (177): ILR (1953) 3 Raj 833 (DB). (AIR 1916 PC 27: 38 All 627: 43 Ind App 212: 19 Oudh Cas 192, **Explained.**)

(9) Failure to exhibit a document which has been proved does not take away from its probative value, especially when the document is a certified copy of a public record. AIR 1950 Pepsu 55 (56): 2 Pepsu LR 168 (DB).

(10) Where a document exhibited was merely marked "Exhibit P" and signed by the Court without endorsing the particulars required by R. 4 it was held that the document was not admitted in accordance with law and hence no inference could be drawn that it was admitted after proof of its execution. AIR 1969 Punj 256 (257): 71 Pun LR 177.

(11) The marking of documents for mere identification or a mechanical endorsement without the Judge applying his mind to a consideration as to the admissibility of the document, does not amount to an admission in evidence. AIR 1957 Ker 105 (106): ILR (1957) Ker 556. (Endorsement without proper application of mind.) ** ('57) AIR 1957 Trav-Co 272 (273): ILR (1956) Trav-Co 514. (Marking document merely for the purpose of facilitating reference.) ** AIR 1957 Tripura 28 (31). (Mere endorsement has no effect.) ** (1912) 16 Ind Cas 834 (834, 835) (DB) (Lah) ** AIR 1956 Mad 250 (253, 254): ILR (1956) Mad 449 ** AIR 1929 Mad 522 (522): 53 Mad 137 (DB). (Endorsement mechanically stamped by clerk — Judge's initials also in rubber stamp.) ** AIR 1919 Nag 141 (143). (Tentatively marked.) ** AIR 1927 Lah 679 (679) (DB).

[See however AIR 1957 Andh Pra 1022 (1024). (Court not applying its mind while completing all formalities under Order 13, Rule 4 — Rejection at time of judgment — Decision not legal — Document held admitted.)]

(12) Where no objection is taken to the admissibility of a document at the time it is let in the evidence the admissibility on the ground of insufficiency of stamp cannot be raised at any subsequent stage. AIR 1956 Mad 250 (253, 254): ILR (1956) Mad 449 ** AIR 1933 All 821 (821, 822): 56 All 131 ** (1968) 10 OJD 112 (117, 118): 34 Cut LT 805.

(13) Admitting instrument in evidence — Express order not necessary — Endorsement under Rule 4 is sufficient. AIR 1966 All 392 (395, 396): 1966 All LJ 237 (FB).

(14) Endorsement and initials on document as required by Order 13, Rule 4, C. P. Code — Document held admitted in evidence and such admission could not be questioned at a subsequent stage. AIR 1962 Andh Pra 398 (399, 400): (1962) 1 Andh WR 156.

(15) It is only when all the formalities as contained in Rule 4 are complied with that the document is said to be 'Admitted into evidence'. AIR 1966 Andh Pra 184 (186): (1965) 2 Andh WR 276 ** AIR 1961 Madh Pra 6 (7): 1960 MPLJ 1346.

(16) Postal acknowledgments which are not exhibited and which do not bear the required endorsement on them cannot be relied upon by the Court. AIR 1967 Tripura 19 (21, 22).

Order 13, Rule 5

1. Stamps, if necessary.— (1) Copies furnished under this rule need not bear any stamp. AIR 1952 Hyd 151 (152): ILR (1952) Hyd 319 (DB) ** (1903) 27 Bom 150 (154) (SB) ** (1902) 26 Bom 522 (526) (SB).

cause the book, account or record in which it occurs to be returned to the person producing it.

[1882, S. 141-A; 1877, S. 141; 1859, S. 132.]

HIGH COURT AMENDMENTS

Bombay: Dadra and Nagar Haveli[a]

The following proviso shall be added at the end of sub-rule (3) of Rule 5:

"Provided that where the entry referred to in this rule is in a language other than English or the language of the Court, the provision contained in the Proviso to sub-rule (2) of Rule 17 of Order 7 shall apply mutatis mutandis to such an entry" [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Gujarat

Same as that of Bombay without the words "English or" [17-8-1961].

R. 6. Endorsements on documents rejected as inadmissible in evidence.—Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of Rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

[1882 and 1877, S. 142; 1859, S. 134.]

HIGH COURT AMENDMENT

Bombay: Dadra and Nagar Haveli[a]

Add the following proviso at the end of the rule:—

"Provided that in proceedings filed in the Bombay City Civil Court the endorsement may be signed by such officer as the Principal Judge may authorise in this behalf" [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

R. 7. Recording of admitted and return of rejected documents.—(1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under Rule 5, shall form part of the record of the suit.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

[1882, S. 142-A; 1877, S. 142; 1859, S. 134.]

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Bombay: Dadra and Nagar Haveli[a]

Add the following sub-rule (3) to R. 7:—

Order 13, Rule 5 — Note 1 (contd.)

(2) Order 13, Rule 5 relates only to account books in current use. If the original account book produced is not in current use, the Court should not return it. AIR 1961 Bom 169 (177): 62 Bom LR 322 (DB).

Order 13, Rule 6 — Note 1

(1) If a document is not rejected with an endorsement or the particulars required under Order 13, Rule 6 and on the other hand, the document bears all the particulars of the endorsement required to be made by Order 13, Rule 4 and the endorsement of the particulars is initialled by the Judge it has to be taken that there was admission of the document in evidence. AIR 1957 Andh Pra 1022 (1024). (Case under Section 36 of the Stamp Act.)

(2) Pronote not bearing particulars to be endorsed either under Rule 4 or Rule 6 — **Held,** in absence of any endorsement to the contrary, only logical inference was that document was admitted in evidence and was marked as exhibit — **Held,** further that in view of provisions of Section 36, Stamp Act (1899), admission could not be questioned at subsequent stage. (1968) 10 OJD 112 (117, 118): 34 Cut LT 805.

Order 13, Rule 7 — Note 1

(1) Documents admitted in evidence are the only documents that can legally be on record. (1892) 14 All 356 (357, 358) (DB).

"(3) Documents in language other than English or Court language, or in script other than Devanagari :

Every document produced in evidence which is not written in the Court language or in English shall be accompanied by a correct translation into English or the Court language and every document which is written in the Court language or in a script other than Devanagari shall be accompanied by a correct transliteration into Devanagari script. If the document is admitted in evidence the opposite party shall either admit the correctness of the translation or transliteration or submit his own translation or transliteration of the document" [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras [9-6-1959]. See Act 37 of 1956, S. 60 and Reg. 8 of 1945, S. 3 (w.e.f. 5-9-1968).

Madhya Pradesh

The following shall be added as sub-rule (3) :

"(3) Every document produced in evidence, which is not written in the Court language or in English, shall be accompanied by a correct translation into English; and every document which is written in the Court language but in a script other than Devanagri shall be accompanied by a correct transliteration into Devanagri script. If the document is admitted in evidence the opposite party shall either admit the correctness of the translation or transliteration or submit his own translation or transliteration of the document." (16-9-1960)

Madras and Pondicherry

Add the following proviso to sub-rule (2):

"Provided that no document shall be returned which by force of the decree has become wholly void or useless" [Dis. No. 434 of 1916].

For application to Pondicherry, see Act 26 of 1968, S. 3 and Sch., Pt. II (w.e.f. 5-9-1968).

R. 8. Court may order any document to be impounded.—Notwithstanding anything contained in Rule 5 or Rule 7 of this Order or in Rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

[1882, S. 143.]

R. 9. Return of admitted documents.—(1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the

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Order 13, Rule 7 — Note 1 (contd.)

(2) Where after admitting a document the Court considers that it is a forged document or that its genuineness has not been satisfactority established, the document should not be "rejected" but must still form part of the record with a suitable remark. AIR 1936 Oudh 298 (301, 302): 12 Luck 568 (DB).

(3) When an objection that the person who originally authorised the Advocate to act on behalf of the decree-holder had no authority to do so is raised and the decision turns on the legality and propriety of a power-of-attorney given, the parties must produce before the Court proof in favour of their submissions. AIR 1951 Punj 371 (373).

(4) Documents not forming part of record under this rule should not be used in evidence. They should be returned to the persons producing them. (1880) 5 Cal 317 (320) (DB) ** 1872 Bom PJ 275 (275) ** AIR 1931 Lah 546 (550): 13 Lah 126 (DB).

(5) 'Record of suit' — Rule 7 gives a restricted meaning to the expression 'Record of the suit' but Rule 10 of Patna High Court General Rules and Circulars Orders (Civil) 1954 with its Note 2 of G. R. and C. O. gives a wider meaning inasmuch as Rule 10 read with Note 2 includes not only documents envisaged by Rule 7 (1) of Order 13 of the Code but also documents produced along with the plaint even though such documents have not been admitted — Pleader Commissioner's private report filed — No right to have copy of the report. AIR 1961 Pat 242 (244): 1961 BLJR 308.

Order 13, Rule 9

1. Scope.— (1) The act of returning documents under this rule is merely ministerial and no evidence on oath is required, if there is a proper application for return. AIR 1921 Cal 433 (433) (DB).

(2) Where a suit has been allowed to be withdrawn, the document on which the plaintiff sued does not become void or

suit and placed on the record shall, unless the document is impounded under R. 8, be entitled to receive back the same,—

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of:

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so:

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it.

[1882 and 1877, S. 144; 1859, Ss. 135, 136, 137.]

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Bombay: Dadra and Nagar Haveli

In Order XIII, for the existing Rule 9 and its marginal note, substitute the following as Rule 9 and marginal note :—

"9. **Return of admitted documents.**—(1) Any person whether party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under Rule 8, be entitled to receive back the same—

(a) Where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) Where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of:

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original, if required to do so:

Provided further that where the document has been produced by a person who is not a party to the suit, the Court may order, and at the request of the person applying for the return of the document, shall order the party at whose instance the document was produced to pay the cost of preparing a certified copy:

Provided also that a copy of the decree and of the judgment filed with the memorandum of appeal under Order XLI, Rule 1, may be returned after the appeal has been disposed of by the Court:

Order 13, Rule 9 — Note 1 (contd.)

useless and must be returned. 1893 Bom PJ 123 (123) (DB).

(3) Even if a document produced is rejected on the ground that it is not admissible in evidence, it has to be returned under Order 13, Rule 9 by following the procedure laid down therein. When the procedure has not been followed it is a case of material irregularity in the exercise of jurisdiction. AIR 1969 Guj 149 (150): 10 Guj LR 535.

2. Stamp duty.— (1) There is a distinction between a copy substituted under Rule 5 and that substituted under this rule. The latter is liable to stamp duty if required by law. (1902) 26 Bom 522 (525) (SB). (The copy under Rule 5 is not, when furnished, certified.)

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it" (1-11-1966).

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Delhi and Himachal Pradesh

Same as that of Punjab—see Act 26 of 1966, Ss. 7 and 17.

Gujarat

(i) Add between first and second proviso to sub-rule (1), the following proviso:—

"Provided also that a copy of the decree and of the judgment filed with the memorandum of appeal under Order 41, Rule 1, may be returned after the appeal has been disposed of by the Court";

(ii) Renumber the existing sub-rule (2) as sub-rule (3), and insert the following as sub-rule (2) :—

"(2) Where the document has been produced by a person who is not a party to the suit, the Court may order and at the request of the person applying for the return of the document shall order, the party at whose instance the document was produced to pay the cost of preparing a certified copy." (17-8-1961.)

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras (9-6-1959); Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3.

Madhya Pradesh

Insert the following as sub-rule (2) and renumber the present sub-rule (2) as sub-rule (3) :

"(2) Where the document has been produced by a person who is not a party to the suit, the Court may order and at the request of the person applying for the return of the document, shall order, the party at whose instance the document was produced to pay the costs of preparing a certified copy" [16-9-1960].

Madras and Pondicherry

Add the following as sub-rules (3), (4) and (5) :

"(3) Every application for return of a document under the first proviso to sub-rule (1) shall be made by a verified petition and shall set forth facts justifying the immediate return of the original.

(4) The Court may make such order as it thinks fit for the costs of any or all the parties to any application under sub-rule (1). The Court may further direct that any costs incurred in complying with or paid on application under sub-rule (1) or incurred in complying with the provisions of Rule 5 of this Order, shall be included as costs in the cause.

(5) Subject to the provisions of Rule 8 above, where a document is produced by a person who is not a party to the suit and such person applies for the return of the document as hereinbefore provided and undertakes to produce it whenever required to do so, the Court shall, except for reasons to be recorded in writing, require the party on whose behalf the document was produced, to substitute with the least possible delay a certified copy for the original, and shall thereupon cause the original document to be returned to the applicant and may further make such order as to costs and charges in this behalf as it thinks fit. If the copy is not so provided within the time fixed by the Court, the original document shall be returned to the applicant without further delay";

For Pondicherry, see Act 26 of 1968, S. 3 and Sch., Part II (w.e.f. 5-9-1968).

Mysore

Add the following sub-rules to Rule 9:—

(3) Every application for return of a document under the first proviso to sub-rule (1) shall be verified in the manner prescribed for verification of plaints and shall set forth facts justifying the immediate return of the original.

(4) The Court may make such order as it thinks fit for costs of any or all the parties to any application under sub-rule (1). The Court may further direct that any costs

incurred in complying with or paid on application under sub-rule (1) or incurred in complying with the provisions of Rule 5 of this Order shall be included as costs in the cause.

(5) Subject to the provisions of Rule 8 above, where a document is produced by a person who is not a party to the suit and such person applies for the return of that document, as hereinbefore provided and undertakes to produce it whenever required to do so, the Court shall, except for reasons to be recorded by it in writing, require the party on whose behalf the document was produced, to substitute with the least possible delay a certified copy of the original and shall thereupon cause the original document to be returned to the applicant and may further make such order as to costs and charges in this behalf as it thinks fit. If the copy is not so provided within the time fixed by the Court the original document shall be returned to the applicant without further delay [30-3-1967].

Orissa

Same as that of Patna.

Patna

Add the following as sub-rule (1a):

"(1a) Where a document is produced by a person who is not a party in the proceeding the Court may require the party on whose behalf the document is produced, to substitute a certified copy for the original as hereinbefore provided."

Punjab, Haryana and Chandigarh

To sub-rule (1), the following further proviso was added:

"Provided further that the cost of such certified copy shall be recoverable as a fine from the party at whose instance the original document has been produced" [24-11-1927]; Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

R. 10. Court may send for papers from its own records or from other Courts.—(1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the

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ORDER 13, RULE 10 — SYNOPSIS

1. Scope and object.
2. Discretion of Court.
3. "From any other Court".
4. Affidavit in support of application.

1. Scope and object.— (1) The power given under this rule may be exercised also by an Appellate Court. (1871) 15 Suth WR 173 (174) (SB) ** 1894 All WN 3 (3) (DB).

(2) A Court is not bound to send for the whole of the records but only such documents will be sent for as are specifically mentioned in the application. 1864-1 Suth WR 272 (273) (DB).

(3) Documents do not become evidence in the case by the mere fact of being received into the Court under this rule. They must be admitted in evidence by the Court like any other document. AIR 1941 Oudh 341 (343) (DB) ** (1913) 9 Nag LR 11 (14) ** (1930) 31 Pun LR 250 (257) (DB).

(4) Court cannot use any document from the record without putting it to the party against whom it is to be used or without getting it proved formally. (1956) Madh BLJ 663 (664) ** AIR 1951 Raj 167 (168).

(5) Failure to prove does not necessarily imply that the record is not material to the suit. 1956 Madh BLJ 663 (664).

(6) Where the Court rejects the application of the plaintiff asking the Court to send for a file of a certain case, and sends for the file on its own motion, the Court can use the judgments on the file even though the plaintiff relying on the same had not independently mentioned them in his list of documents. AIR 1945 Pesh 9 (11, 12) (DB).

(7) No party has a right to summon the original record unless it be for the purpose of proving certain certified copies of some papers on that record which the opposite party denies and which require proof. 1956 Raj LW 95 (97).

(8) Proceeding relating to issue of search warrant under Section 19 (3), Foreign Exchange Regulation Act is judicial proceeding — Even if it is not, the proceeding would still come within the scope of

suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

[1882 and 1877, S. 137; 1859, S. 138.]

R. 11. Provisions as to documents applied to material objects.—The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

[1882, S. 145.]

HIGH COURT AMENDMENTS

Rules 12 and 13 (Allahabad)

Add the following to the end of Order 13:

"12. Every document not written in the Court vernacular or in English, which is produced (a) with a plaint, or (b) at the first hearing, or (c) at any other time tendered

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Order 13, Rule 10 — Note 1 (contd.)

Order 13, Rule 10 as it does not require a judicial proceeding — Hence, the contention that as the Chief Presidency Magistrate merely issues the warrant there is no proceeding before him and, therefore, the letter of request issued to him for custody of the seized documents is invalid is untenable. (1961) 42 ITR 753 (759, 760) (Cal).

(9) Petition by Income-tax Officers purporting to be under Section 131, Income-tax Act, 1961, for inspection and custody of documents — Power of Magistrate to grant — Order granting custody, held passed under Section 172 and not under Order 13, Rule 10, Civil P. C. (1908). AIR 1964 Cal 391 (394, 395): 1964 (2) Cri LJ 285.

[See (1969) 71 ITR 269 (Cal).]

(10) Dasti-process should not be issued to party to bring judicial record himself — Private persons or parties to a litigation cannot be allowed to bring or handle judicial records in this manner. AIR 1969 Punj 197 (200).

2. Discretion of Court.— (1) The Court has a discretion to grant or refuse an application under this rule. 1864-1 Suth WR 177 (178, 180) (FB).

(2) Court should not refuse to send for necessary documents on a proper application, nor, having ordered them to be sent for, omit to actually send for them to be used by the party as evidence. (1872) 18 Suth WR 127 (128) (DB) ** (1872) 7 Cal 560 (565) ** (1908) 8 Cal L Jour 43 (46, 47) (DB).

(3) Court cannot reject an application which is in order, on the ground that the previous application which did not conform with the rule was rejected, without being considered on merits. 1956 Madh BLJ 663 (664).

(4) Court is not bound to send for a document when the party neglects or fails to make an application. (1883) 9 Cal 260 (264, 265) (PC).

(5) An omission to exercise the discretion in favour of a party in a proper case is a good ground in an appeal or revision provided the party has been prejudiced thereby. (1909) 2 Ind Cas 953 (953) (DB) (Cal) ** AIR 1918 All 375 (376) (DB).

(6) Original records filed in another Court — Application to call for — Question of validity of transfer of shares by alleged resolution of Board of Directors — Copies of proceedings of Board's meeting already accepted by Court — Court rejecting application to call for original records and deciding against applicant — Application, held, was not unreasonable and should have been allowed, especially when transfer of shares was not void on face of it. AIR 1966 Assam 48 (51): ILR (1965) 17 Assam 275.

3. "From any other Court."— (1) The Court from which a document is sent for need not necessarily be a Civil Court. But it must be a Court. 1874 Pun Re No. 32, p. 147 (148) ** (1971) 15 Suth WR 150 (151) (SB). (A Court of Wards is not Court.)

(2) A Court from which records are sent for under this rule has no discretion to refuse to send them. (1879) 4 Cal L Rep 36 (37) ** (1961) 42 ITR 753 (758) (Cal).

[See (1969) 71 ITR 269 (Cal).]

4. Affidavit in support of application.— (1) An application without setting forth the necessary grounds satisfactorily in the affidavit will be rejected. 1956 Madh BLJ 663 (664) ** AIR 1931 Lah 119 (120) (DB).

(2) The affidavit has to show the connection between the record sent for and the suit under consideration. (1956) Madh BLJ 663 (664).

(3) An application to summon any record from any Court must be supported by an application. The action of the Court was held against law where it summoned the record on the request made by a party on a plain piece of paper without any Court-fee. 1964 Kash LJ 121 (128, 129).

in evidence in any suit, appeal or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character.

The person making the translation or transliteration shall give his name and address and verify that the translation or transliteration is correct. In case of a document written in a script or language not known to the translator or to the person making the transliteration, the person who reads out the original document for the benefit of the translator or the person making the transliteration shall also verify the translation and transliteration by giving his name and address and stating that he has correctly read out the original document.

13. When a document included in the list prescribed by Rule 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in Rule 4 (1), mark such document with serial figures in the case of documents admitted as evidence for a plaintiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants, the documents of the first party defendant may be marked A-1, A-2, A-3, etc., and those of the second party B-1, B-2, B-3, etc. When a number of documents of the same nature is admitted, as for example, a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series."

Rule 12 (Mysore)

Add the following as R. 12:—

12. Where any document not written in the language of the Court is produced either with the plaint or with the written statement or at the first hearing or is at any other time tendered in evidence in any suit the Court may require that it shall be accompanied by a correct translation of the document into the language of the Court. Such translation shall be made either by the translator or interpreter of the Court, if any, or by any other competent person, and in the latter case the translation shall be verified by an affidavit of the person making the same declaring that he is acquainted with the character and language of the document and with the language of the Court and that the translation is true and correct to the best of his knowledge [30-3-1967].

Rule 12 (Orissa)

Insert the following as a new Rule 12:

"12. Every document not written in Oriya or English which is produced (a) with a plaint or (b) at the first hearing or (c) at any other time tendered in evidence in any suit, appeal or proceeding, shall be accompanied by a correct translation of the document into English. The person making the translation shall give his name and address and verify that the translation is correct. If the document is admitted in evidence the opposite party shall either admit the correctness of the translation or submit his own translation of the document" [19-12-1961].

ORDER XIV

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON

R. 1. Framing of issues.—(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

ORDER 14, RULE 1 — SYNOPSIS

1. Scope and object.
1-A. Preliminary issue.
2. Issues between co-defendants.
3. Omission to frame issues.
4. Wrong issues.
5. Issues by consent.
6. Abandonment of issue.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds: (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

[1882 and 1877, S. 146; 1859, S. 139.]

Order 14, Rule 1 — Synopsis (contd.)

7. Delay in raising issue.
8. Issue not raised in the pleadings but in evidence.
9. Illustrative cases.

1. Scope and object.— (1) Though pleadings in a case mark the first stage at which the differences between the parties are placed before Court, the Court itself may also at the first hearing examine parties in order to ascertain with precision the proposition of law or fact on which parties are at variance. (1885) 11 Cal 407 (410) (DB) ** (1888) 15 Cal 533 (537): 15 Ind App 119 (PC) ** AIR 1925 Mad 169 (169) (DB).

(2) The first hearing of the suit would clearly extend at least up to the period of the first hearing referred to in Order 13, Rule 1. AIR 1935 Mad 261 (261) ** 1967 BLJR 960 (961) ** AIR 1961 Pat 152 (155): 1961 BLJR 478.

(3) The issues fixed and not the pleadings that guide the parties in the matter of adducing evidence. (1944) 48 Cal WN 635 (638) (DB) ** AIR 1943 Sind 242 (243, 244): ILR (1943) Kar 315 (DB) ** (1895) 22 Cal 324 (331): 22 Ind App 4 (PC) ** AIR 1959 Manipur 27 (27).

(4) When a point has been the subject of an issue, the parties will not be heard to say that the point was not disputed and so required no proof. (1889) 11 All 396 (398) (PC) ** 1968 Ker LJ 123 (125) (DB).

(5) Court cannot refuse to decide a point on which an issue has been framed and evidence given by parties. (1892) 16 Bom 545 (547) (DB).

(6) Court should not decide a suit on a matter on which no issue has been raised. AIR 1943 All 184 (185): ILR (1943) All 295 (DB) ** (1912) 15 Ind Cas 185 (186) (DB) (Mad) ** AIR 1925 Lah 571 (572) ** 1968 Ker LJ 123 (125) (DB).

(7) Case must be dealt with by the Appellate Court on issues settled for trial. (1885) 7 All 1 (11): 11 Ind App 149 (PC) ** (1886) 12 Cal 239 (245, 246): 12 Ind App 166 (PC).

(8) It is essential to the right decision of a case, that appropriate issues should be framed and tried. AIR 1956 Bom 254 (255, 256) ** (1906) 30 Bom 173 (188) (DB) ** AIR 1960 Punj 62 (64) (DB). (Court cannot disregard pleadings.)

(9) Sub-rule (1) declares that an issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. AIR 1943 All 184 (185): ILR (1943) All 295 (DB) ** AIR 1936 Nag 177 (179) (DB) ** (1963) 1 Andh WR 246 (247): (1963) 1 Andh LT 97.

(10) Issues should be confined only to points necessary for proper trial and disposal of case. AIR 1943 Nag 170 (171) ** (1944) 48 Cal WN 635 (639) (DB) ** (1911) 35 Bom 425 (427).

(11) It is the duty of a Court to frame relevant issues. An irrelevant or unnecessary issue does not become relevant or necessary because parties want it decided upon. 1966 All LJ 285 (286): 1966 All WR (HC) 196.

(12) Court not bound to grant an issue on a point not arising on the pleadings. (1902) 25 Mad 367 (378): 29 Ind App 76 (PC) ** AIR 1919 Pat 196 (198) (DB) ** AIR 1923 All 167 (167) ** AIR 1961 Cal 166 (168).

(13) When pleadings raise points with sufficient clearness, issues should be framed on them though they may not have been put in pleadings in any particular form. AIR 1915 Mad 519 (526) (DB).

(14) There must be a distinct issue for each material proposition of law or fact affirmed by one party and denied by the other. AIR 1954 Pepsu 65 (65): ILR (1952) Patiala 87 (DB) ** AIR 1964 Cal 209 (212).

(15) Issues should be so framed as to cover only the points in dispute and to cover each point once only. AIR 1924 Nag 156 (157).

(16) It is primarily the duty of the Judge to frame the issues in the case. AIR 1950 Mys 33 (42): 55 Mys HCR 67 (FB) ** AIR 1958 Manipur 22 (25) ** ILR (1957) 7 Raj 101 (110).

Order 14, Rule 1 — Note 1 (contd.)

(17) Where the defendant acknowledges the execution of the letters, guarantee for payment, but does not admit the plaintiff's claim for the amount, more than one issue would arise on the pleadings and although the defendant does not take part in framing them, it is the duty of the Court to frame and settle them. The refusal by the counsel for the defendant to help in the framing of the issues does not absolve the Court from framing the issues unless it is satisfied that the defendant does not want to make any defence. AIR 1965 Cal 369 (370, 371) (DB).

(18) Judge must apply his mind and understand facts before framing issues. AIR 1950 Mys 33 (42): 55 Mys HCR 67 (FB) ** AIR 1930 Mad 78 (79) (DB).

(19) Duty to frame issues is one of the duties of the Court itself and not of the parties. Even in the absence of a plea a statutory duty is cast upon the Court disposing of any proceeding, to apply its mind to the applicability of the provisions of law. This duty is to be performed even in an undefended action. That no specific issue had been framed is no ground for declining to perform a statutory duty. 1966 Cur LJ 825 (831) (Punj (DB).

(20) If proper issues are not framed in case, it is up to parties to move the Court to get issues framed. AIR 1953 Trav-Co 118 (119): ILR (1952) Trav-Co 651 (DB).

(21) In framing issues, Courts of law should exert themselves so as to make them sufficiently expressive of the matters which they desire to consider under them. AIR 1942 Cal 338 (340) (DB).

(22) Issues have to be framed in affirmative terms and not in a manner calling upon a party to prove negative. Madh LJ 1954 HCR 396 (397).

(23) Where after the filing of a written statement, Court passes a consent decree on agreement of parties, there is no obligation on Court to frame issues before passing decree. AIR 1933 Sind 304 (304).

(24) Court is not bound to frame and record issues when defendant is ex parte and no written statement has been put in. (1907) 11 Cal WN 871 (872) (DB).

(25) Even in ex parte cases, if there is any room for doubt about any matter, Court is bound to inform plaintiff specifically what points he has to prove. AIR 1923 Nag 83 (84) (DB).

(26) A Court should not raise an issue between the parties in regard to a matter upon which they are in agreement. AIR 1958 Andh Pra 638 (641, 642)..

(27) A point alleged by plaintiff and admitted by defendant cannot be said to be in issue and a decision can be given on basis of such admission without an issue. (1898) 11 Mad 367 (370) (DB).

(28) Averments contained in plaint which are not traversed in written statement and as to which no issue has been asked for will be deemed to be admitted. (1902) 26 Bom 735 (737) (DB).

(29) The provisions of the Civil Procedure Code regarding formal framing of issues or their formal determination separately is not enjoined as compulsory in an arbitration proceeding. AIR 1956 Cal 470 (476).

(30) Whether the second defendant becoming direct tenant under the first defendant and if so in collusion of one with the other was affirmed by the plaintiff and denied by the defendants is a material proposition mixed one of law and fact and an issue therefore arose. (1964) 68 Cal WN 786 (790): 1963 Cal LJ 75.

(31) Where plea taken by defendant is not denied by the plaintiff and though plaint and written statement were amended the plea taken by defendant was not denied the admission will continue to bind the plaintiff. AIR 1967 Delhi 22 (23, 24): 69 Punj LR (D) 88 (DB).

(32) Remand order made after framing an issue not arising on the pleadings is illegal. AIR 1969 Pat 107 (108).

(33) Trial of a suit is to be confined to the pleas on which the parties are at variance; if the parties agree to a factual position then it can hardly be open to the Court to come to a finding different from such agreed facts. AIR 1960 Punj 62 (64) (DB).

[See also AIR 1969 All 248 (254) (DB). (Where the pleadings were not sufficiently clear the parties were asked to clarify their pleading in order to enable the framing of issues.)]

1.-A. Preliminary issue.— (1) Where knowledge of parties regarding the points in issue was clear from the pleadings, an issue of limitation can be decided first without going into evidence. (1966) 1 Andh WR 218 (223): (1966) 1 Andh LT 297.

(2) Suit against firm — Preliminary issue — Whether partnership was dissolved due to insolvency of partner, not being issue of law cannot be framed. AIR 1964 Guj 101 (102).

(3) Where issues such as jurisdiction and limitation, as question of pure law, are involved, the right to raise an issue cannot be treated as having been waived. Objections regarding limitation cannot be waived and even if they are waived they can be taken up again by the parties waiving them or by the Courts themselves. That apart, when such issue cuts at the very root of a litigation and if the Court's attention is drawn to it, it must take cognizance of the same and give its decision thereon. AIR 1960 Orissa 146 (149).

2. Issues between co-defendants.— (1) It is contrary to practice to frame and try issues between co-defendants. AIR 1953 Hyd 170 (173): ILR (1953) Hyd 178 (DB) ** (1869) 11 Suth WR 462 (463, 464) (DB).

Order 14, Rule 1 — Note 2 (contd.)

(2) Suit for declaration of title to half share in properties — Defendants contesting claim and pleading for dismissal of suit — Defendants having disputes inter se but not seeking adjudication thereon — Issue as to shares of parties in property should not be framed and tried against wishes of defendants. AIR 1958 Mad 496 (496, 497).

3. Omission to frame issues.— (1) A Court commits a grave irregularity in proceeding to the final hearing of a case without setting issues therein. (1883) 6 Mad 1 (9): 9 Ind App 128 (PC) ** AIR 1951 Raj 56 (57) (DB).

[See also 1957 Jab L 271 (272).]

(2) Mere omission to frame issue is not necessarily fatal to trial of the suit. But if such omission has affected the disposal of the case on the merits it will be a ground for remanding case for a new trial. AIR 1951 Raj 56 (57) (DB) ** 1903 Pun Re No. 77, p. 321 (330) (DB) ** AIR 1925 Oudh 383 (384).

[See also 1957 Jab LJ 869 (873).]

(3) If substantial justice has been done in the case notwithstanding the omission to frame issues, the decision will not be set aside or remanded for a new trial. AIR 1953 Cal 657 (659): ILR (1955) 1 Cal 109 (DB) ** AIR 1951 Raj 56 (57) (DB) ** (1870) 13 Moo Ind App 573 (582, 583 and 584) (PC) ** AIR 1959 All 586 (589): 1958 All LJ 652.

(4) A decision will not be interfered with if the issue omitted relates to a point not necessary for right determination of case. AIR 1915 Cal 648 (648) (DB).

(5) Where the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings. The suit could not be dismissed on this narrow ground, and also there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion and neither party claimed that it had any further evidence to offer. **AIR 1963 SC 884 (886): (1963) 2 SCR 208 **** AIR 1958 Mad 527 (528, 529) ** AIR 1958 Raj 269 (272): ILR (1958) 8 Raj 233 ** 1956 Madh BLJ 484 (486, 487) ** **AIR 1964 SC 164 (169): 1964-3 SCR 634 **** (1966) 70 Cal WN 324 (328)

(6) Where no specific issue was raised on a point but it was treated as if it arose in the suit and it had been put in issue in another suit between the same parties, it was held that evidence in that suit could be considered to determine the question where no surprise would be caused thereby. **AIR 1921 PC 84 (86), 87): 44 Mad 283: 48 Ind App 1 **** AIR 1962 Pat 168 (173). **(1956 SCJ 655: AIR 1956 SC 593,** Relied on.)

(7) A complaint that no separate issue on a point of limitation was framed has no substance where the issue framed is comprehensive enough to cover the same. AIR 1960 Andh Pra 222 (228): (1960) 1 Andh WR 340 (DB).

(8) Omission to frame issue. Party affected had notice of the point and had opportunity to adduce evidence to meet it. Decision will not be interfered with. AIR 1950 Nag 78 (80): ILR (1950) Nag 397 ** (1897) 24 Cal 306 (309) (DB) ** AIR 1967 Orissa 99 (100): 33 Cut LT 995.

[See AIR 1958 Madh Pra 209 (211) (DB).)]

(9) A decision will not be interfered with if omission was due to deliberate conduct of party affected. AIR 1938 Mad 329 (329, 330) ** 1968 Ker LJ 123 (125) (DB).

[See also **AIR 1954 SC 263 (266).**]

(10) Where there has been no trial at all or only an imperfect trial on the point as a consequence of omission of an issue on it, the decision will be set aside. AIR 1953 Pepsu 120 (121): ILR (1952) Patiala 685 (DB) ** AIR 1943 All 17 (17, 18) (DB) ** (1887) 9 All 147 (153) (FB).

(11) Where trial Court has omitted to frame issues Appellate Court should frame proper issues and remand the case for retrial on them. AIR 1953 Pepsu 120 (121, 122): ILR (1952) Patiala 685 (DB) ** 1955 Raj LW 549 (550) ** Madh BLJ 1954 HCR 961 (962) (DB) ** 1968 Ker LJ 123 (125) (DB).

(12) Failure to decide questions raised upon pleadings is material irregularity in exercise of jurisdiction. (1963) 4 Guj LR 432 (435).

(13) A contracting purchase of cotton from B — On failure of B suit against him was filed by A — Breach of Clauses 4 and 5 not pleaded by B in his defence — **Held** per Newaskar, J. — Court should not consider grounds not raised in pleadings — Per S. B. Sen, J. — Failure to plead breach of Cls. 4 and 5 is not fatal — Even mention of wrong clause is not fatal — It is difficult to pin-point any particular clause of the order for contravention — Overall effect of all clauses needs to be considered — Failure to mention Cls. 4 and 5 does not deprive party of plea. 1968 MPLJ 438 (440, 442) (DB).

(14) An issue can arise only on pleadings, only if the trial Court has omitted to frame an issue and determine it, and the lower appellate Court feels that the issue is essential for decision. On merits, then it will frame an issue and remand a case. Remand after framing an issue not arising on pleadings is illegal. AIR 1969 Pat 107 (108).

(15) Where no specific issue was framed in trial Court but the question was considered at length while deciding other issues and parties were aware that the

Order 14, Rule 1 — Note 3 (contd.)

question was essential in the controversy, the consideration cannot be left out in second appeal on the ground that it was not covered by a specific issue. AIR 1968 Raj 94 (98): 1967 Raj LW 532.

4. Wrong issues.— (1) Suit disposed of on finding on wrong issues — Decision will be set aside in appeal and suit remanded for re-trial after framing proper issues, ILR (1953) 3 Raj 27 (35) ** (1911) 12 Ind Cas 137 (138) (DB) (Mad) ** AIR 1921 Mad 701 (702, 703) (SB).

(2) Where in spite of wrong issues, points have been correctly understood by all the parties the decision will not be interfered with. AIR 1942 Cal 338 (340) (DB) ** AIR 1921 Sind 159 (164): 16 Sind LR 207 (FB).

(3) Omission to frame proper issues — All available evidence adduced on necessary points and discussed — Decision will not be set aside. (1897) 21 Bom 325 (327) (DB) ** AIR 1966 All 39 (40): 1965 All LJ 339.

(4) Suit for specific performance of contract against subsequent purchaser — Onus to prove that purchase was for good faith and without notice of earlier contract lies upon subsequent purchaser — Issues framed so as to cast the burden on the plaintiff to prove that the defendant was not a bona fide purchaser and was not without notice — Order framing issues is illegal as made contrary to law laid down by Privy Council — Order liable to be set aside in revision. (1967) 1 Andh LT 251 (253): (1967) 1 Andh WR 378.

5. Issues by consent.— (1) Issues raised by consent of party — Decision cannot be objected to by him on ground that issues are wrong or defective or unnecessary (1873) Ind App Supp Vol. 212 (216) (PC) ** AIR 1926 Nag 164 (167).

(2) Where parties affected by wrong issue have waived their objections thereto, the decision will not be interfered with AIR 1958 Punj 190 (200): ILR (1958) Punj 481 (DB) ** (1901) 3 Bom LR 535 (537, 538) (DB).

6. Abandonment of issue.— (1) Courts are not bound to raise issues suo motu on question of fact where parties do not ask for them. The omission to raise such issues implies an abandonment of such questions by the party interested, but where the question is one of law, it is incumbent on the Court to frame proper issues on such questions. AIR 1919 Mad 698 (699) (DB) ** AIR 1943 Oudh 17 (23): 18 Luck 327 (DB).

(2) It would be unsafe to presume, from the failure of the Court to raise the necessary issues, an intention on the part of the party to admit the fact which the other party was bound to prove. (1902) 26 Bom 360 (362) (DB).

(3) Even on points raised in the pleadings, the conduct of a party may, in certain circumstances amount to abandonment. AIR 1925 Mad 427 (429).

(4) A pleader duly appointed to conduct a case on behalf of his client has full authority to abandon 'an issue raised on behalf of his client and the latter will be bound by such abandonment. AIR 1917 Oudh 375 (377): 20 Oudh Cas 49 (DB) ** (1902) 25 Mad 367 (377): 29 Ind App 76 (PC).

[See however AIR 1958 Mad 144 (146) (DB) ** AIR 1941 Oudh 203 (205).]

(5) Defence of bona fide purchase for value without notice raised in written statement but no issue framed nor was it raised in two lower Courts — Issue not raised — Point must be held to have been given up — High Court would not exercise its power under Order 41, Rule 25 and call for a finding after raising necessary issue. AIR 1960 Mys 249 (252): 38 Mys LJ 347.

(6) If a defendant after taking a plea in written statement goes to trial without asking for an issue on it and does not raise it before the lower appellate Court, the High Court in second appeal will presume that plea was not taken up. 1966 All WR (HC) 615 (617): 1966 All LJ 1016.

(7) The statements of parties on counsel recorded before the framing of issues for purposes of clarifying points in dispute are just as much part of the pleadings and the plaint as the written statement, and a counsel can give up a plea raised in plaint in course of such statement. AIR 1960 Punj 209 (211): 62 Pun LR 110 (DB).

7. Delay in raising issue.— (1) The mere fact that a particular issue was raised at a late stage of the suit will be immaterial if the parties had sufficient opportunity to adduce evidence and the Court was in a position to pronounce judgment on it. (1895) 22 Cal 324 (331): 22 Ind App 4 (PC).

(2) Issue on question of locus standi of objector must be framed before trial and tried and determined as preliminary proceeding. AIR 1938 Cal 290 (293) (DB).

8. Issue not raised in the pleadings but in evidence.— (1) A relief not founded on pleadings should not ordinarily be granted. But there is nothing irregular in a Court granting relief on matters not set forth in the pleadings where they are comprised in the issues and have been put into evidence. (1899) 21 All 53 (69): 25 Ind App 195 (PC).

[See AIR 1957 Cal 360 (363) (DB).]

(2) Where a material point has not been raised in pleadings and is not comprised in issues originally framed, but appears for the first time in evidence the Court may frame an issue on it and decide it. AIR 1953 Cal 657 (659): ILR (1955) 1 Cal 109 (DB) ** (1896) 20 Bom 569 (570) (DB). (Opportunity to meet it should be given to party affected.)

9. Illustrative cases.— (1) In small cause suits framing of issues is not prohibited. AIR 1956 Bhopal 9 (10).

R. 2. Issues of law and of fact.—Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

[1882 and 1877, S. 146, Clause 6; 1859, S. 139, Cf. R. S. C., O. 25, R. 2.]

Order 14, Rule 1 — Note 9 (contd.)

(2) Issues are not necessarily framed when objections in execution proceedings are decided. AIR 1956 Raj 1 (2): ILR (1956) 6 Raj 23 (DB).

(3) Although in an ordinary mortgage suit title paramount to and independent of the mortgagor is not a necessary issue and should as far as possible be excluded from the trial of a mortgage suit, it is not an absolute principle which should apply to the circumstances of each case. AIR 1958 Pat 110 (112): 36 Pat 1086. (Issue of paramount title when becomes necessary indicated.)

(4) Suit for rent — Defendant alleged to be tenant under oral lease — Defendant alleging previous partition and possession as a result of land falling to his share — Issue on question of partition — Duty to consider. 1960 MPLJ 388 (391): 1959 Jab LJ 591.

(5) Suit against Government for arrears of salary — Court should decide if plaintiff is entitled to arrears or not — It should not abdicate its jurisdiction by holding that the matter should be investigated in another proceedings. '1968 Lab IC 1384 (1385) (Mysore).

(6) 'Is the alleged deed of gift genuine and valid', is wide enough to include plea whether the deed was executed under undue influence. AIR 1962 Pat 168 (173) (DB).

(7) Material facts in connection with fraud must be stated in plaint — Issues arise only on pleadings — Issue involving allegation of fraud will not be allowed to be raised, if not found in pleadings. AIR 1965 Pat 279 (283) (DB).

(8) Framing of issues is obligatory in Probate proceedings. Order 14 is applicable to such proceedings by virtue of Section 268, Succession Act. 1968 Ker LJ 123 (125) (DB). (AIR 1927 Cal 281, Rel. on.)

(2) In appealable cases, Court should as far as possible decide on all the issues joined, inasmuch as a piecemeal trial might lead to protracted litigation and repeated appeals in same suit. AIR 1957 Pat 59 (60) (DB) ** ILR (1955) Hyd 46 (48) ** AIR 1950 Mad 596 (598) ** AIR 1943 Bom 83 (88): ILR (1943) Bom 441 (DB).

(3) Where issues of law going to root of the case and capable of being decided without evidence arise, the Court is bound to try those issues first under this rule. AIR 1956 Hyd 62 (62): ILR (1956) Hyd 274 ** AIR 1957 Raj 112 (113): ILR (1957) 7 Raj 418 (DB). (Preliminary issue of jurisdiction.) ** 1956 Madh BLJ 25 (26, 27).

(4) Court may in its discretion postpone settlement of issues of fact until after issues of law have been determined. (1909) 3 Ind Cas 304 (306) (DB) (Cal) ** AIR 1933 All 753 (754).

[See also AIR 1958 Punj 409 (416) (DB).]

(5) The rule casts on Court the duty of determining whether circumstances exist in each particular case for the exercise of the power conferred therein. AIR 1950 Mad 213 (213) ** AIR 1933 All 753 (753) ** AIR 1936 Pat 250 (252).

(6) If a decision on a question of law depends upon a question of fact the question of fact must be decided first in order to avoid remand by appellate or revisional Court. AIR 1955 Bom 55 (57) ** AIR 1954 Cal 588 (589) (DB).

(7) Even where decision of legal issues will obviate necessity of the parties adducing evidence to establish or to rebut a part of case, Court has to try legal issues first. AIR 1954 Pepsu 9 (10): ILR (1953) Patiala 263 ** AIR 1958 Punj 409 (411, 412) (DB).

(8) Where facts are clear and question to be decided by Court is a pure question of law, it will not uphold any technical objection on pleadings detrimental to such a decision. AIR 1957 Cal 571 (573).

(9) Where all the issues are issues of fact, Court has no power to try only some of them and postpone trial of others, save on ground of embarrassment. AIR 1956 Bom 721 (723) ** AIR 1925 Pat 674 (676) (DB).

(10) Plea of jurisdiction should be decided at an early stage. AIR 1962 All 572 (573) ** (1963) 2 Lab LJ 473: (1963) 7 Fac LR 193 (Cal) ** AIR 1960 Raj 208 (209). (Plea of jurisdiction raised along with other defences — Defendant not deprived of his right to agitate question of jurisdiction first.)

ORDER 14, RULE 2 — SYNOPSIS

1. Scope and applicability.

1-A. Preliminary issue.

2. Revision.

1. Scope and applicability.— (1) Ordinarily, a Court is not under any obligation as to the order in which it is to try the issues raised before it, and has the right to dispose of the issues in any way which it considers most likely to be conducive to the ascertainment of truth. Madh BLJ 1955 HCR 1103 (1104, 1105) ** AIR 1950 Mad 596 (598).

Order 14, Rule 2 — Note 1 (contd.)

(11) If the Court reaches a decision that both the conditions in Rule 2 have been fulfilled, it is obligatory upon the Court and the Court has no option but to determine such issue or issues of law first as preliminary issues. If the Court comes to the conclusion that there is no issue before it which is purely as to law, or even if some of the issues be of mixed fact and law, the provision of Order 14, would not apply but the Court would yet have a discretion to try one or more of such issues as preliminary issues. In such latter case it would be desirable for the Court to dispose of the case on a preliminary issue if prima facie there are strong probabilities that such preliminary issue would dispose of the case, and that piecemeal trial of suits be avoided. (1961) 63 Bom LR 702 (708): 1961 Nag LJ 579.

(12) Order 14, R. 2 contemplates that the suit should be capable of being disposed of an issue of law only. But in a suit under O. 23, R. 3, where facts have to be enquired into and evidence has to be taken or where there are mixed questions of law and fact they shall not be tried as preliminary issues. When an appealable case is tried by a Court and when issues of fact are involved, the proper procedure is that evidence on all issues should be taken in order to obviate the necessity of piecemeal trial of cases, and where an issue which is primarily an issue of fact is involved in a case, it should not as a rule be tried as a preliminary issue. AIR 1968 J & K 71 (75): 1967 Kash LJ 356 (DB) ** 1962 MPLJ 445 (447): 1962 Jab LJ 403 (DB).

(13) Issue as to whether plaintiff being son of sister, could be validly adopted under custom — Court first considering the question of factum of adoption and relegating question of custom to the background — This procedure held vitiated the judgment — Fact of adoption would come in only after custom was established, as otherwise even if factum of adoption was proved, it would be invalid in the absence of custom. AIR 1964 Manipur 14 (15).

(14) Order by subordinate Court in violation of directions of Superior Court to dispose of an issue first — Though conduct of lower Court is improper, it is mere irregularity and adjudication — Order of lower court cannot be treated as nullity on that account. AIR 1967 Kerala 1 (8): 1966 Ker LT 454 (FB).

1-A. Preliminary issue.— (1) Where a party suggests that suit can be disposed of on hearing of a preliminary issue, proper procedure is to set down the case for settlement of issues and on that day decide which, if any, of the issues can be decided in the above manner. AIR 1923 Bom 249 (251) : 47 Bom 509 (DB).

(2) At the hearing of a case on a preliminary issue, the party by whom it is raised has the right to begin. (1888) 12 Bom 454 (459).

(3) Court has inherent power to fix any one of the issue involving questions of law and facts for hearing and to decide it as preliminary issue. 1957 Jab LJ 243 (247).

(4) An issue requiring evidence is not a preliminary issue which can be dealt with under this rule. AIR 1923 Pat 344 (345) (DB) ** 1957 Jab LJ 243 (246). (Issue of jurisdiction.)

(5) The decision on a preliminary issue cannot be re-opened in trial Court. AIR 1938 All 113 (114): ILR (1938) All 198 (DB).

(6) Where defendant asks Court to decide a preliminary issue on the very allegations of plaint he must be taken to admit plaint allegations as true. If the preliminary point is overruled he can show at further stage of suit that allegations of the plaintiff are false. AIR 1948 Nag 334 (336): ILR (1947) Nag 477 (DB).

(7) Court to which application for leave to sue as a pauper has been made cannot go into question of valuation of property so as to determine preliminary issue of jurisdiction. AIR 1950 Pat 309 (311): 29 Pat 381 (DB).

(8) An issue whether the plaintiff as assignee of the claim for damages due to his assignor can maintain the action can be tried as a preliminary issue of law before dealing with rest of the case. 1957 Jab LJ 243 (245).

(9) Plea that Court-fee paid was insufficient — It being a preliminary issue should be decided before deciding the whole suit. AIR 1962 All 549 (550).

(10) Application under Section 56, Madras Estates (Abolition and Conversion into Ryotwari) Act — Respondent raising objection as to res judicata — Even if Sec. 11, Civil P. C. (1908), does not apply to such proceedings, principles underlying the provisions are applicable — Objection should be disposed of as preliminary issue and not reserved to be tried with other issues. AIR 1965 Andh Pra 12 (13).

(11) Suit against firm — Preliminary issue — Whether partnership was dissolved due to insolvency of partner not being issue of law cannot be framed and determined first. AIR 1964 Guj 101 (102).

(12) Industrial dispute posted for hearing preliminary issue of law — Employees absent on such date of hearing — Tribunal deciding what it thought to be preliminary issues of law and fixing dispute to another date for hearing of other issues — On such subsequent date, employers cannot insist that yet another issue should be decided as preliminary issue. AIR 1962 Mys 108 (110, 112): 1963 Mys LJ (Supp) 20 (DB).

(13) Industrial dispute — Party to dispute has no absolute right to insist upon tribunal deciding in first instance a mixed question of law and fact, although the question relates to its own jurisdiction — No writ will issue — AIR 1958 Mad 108, Disting. — If the Tribunal decides the

R. 3. Materials from which issues may be framed.—The Court may frame the issues from all or any of the following materials:

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(c) the contents of documents produced by either party.

[1882 and 1877, S. 147; 1859, S. 139.]

Order 14, Rule 2 — Note 1-A (contd.)

jurisdictional fact wrongly that decision is justiciable in a superior Court which has power to issue a writ of Prohibition in a case where the defect of jurisdiction is clear. AIR 1962 Mys 108 (110, 111): 1963 Mys LJ (Sup) 20 (DB).

(14) Suit for damages against Magistrate for illegal and malicious detention in jail custody — Claim of protection under Judicial Officers Protection Act — Can be tried as preliminary issue of law. ILR (1960) Cut 342 (347).

(15) Labour Court — Can decide preliminary issues and issues on merits together. (1963) 65 Punj LR 901 (907).

(16) Whether a preliminary issue should be tried first or along with other issues will depend on facts and circumstances of each case and no uniform rule can be laid down. Normally a Court whose orders are subject to appeal or control by a superior Court should not split up the several issues and try separately a preliminary issue regarding maintainability of a petition. 1966 BLJR 225 (226) (DB).

(17) When questions of law going to the root of a case and capable of being decided without evidence, arise the authority, has to decide those questions first. (1963) 14 STC 574 (577) (Madh Pra) (DB).

(18) Suit for declaration and permanent injunction — Parties leading complete evidence and there was full trial — Trial Court deciding suit on preliminary issues of law leaving issues of fact untouched — Such a course at final stage of suit is not permissible. 1968 MPWR 748 (755) (DB).

2. Revision.— (1) Where the trial Court fails to consider whether a case or a part thereof may be disposed of on issues of law only, but merely says that it is not desirable that the case be decided piecemeal, the order is open to revision by the High Court. AIR 1936 Pat 250 (253).

(2) Court refusing to decide preliminary issue on mere ground that the Court does not favour disposal of suits on preliminary point — Order is not justified and is liable to be interfered with in revision. AIR 1952 Pat 281 (281).

[See also AIR 1958 Punj 409 (416) (DB).]

(3) Where lower Court determines certain issues under this rule as preliminary issues it cannot be said to have decided any case within meaning of Section 115. AIR 1955 All 307 (309) (DB).

(4) Court giving finding on issue treated as preliminary, but not deciding suit in accordance with that finding — Material irregularity in procedure — Revision competent. AIR 1963 Andh Pra 232 (234): (1962) 2 Andh WR 462.

ORDER 14, RULE 3 — SYNOPSIS

1. Scope and applicability.
2. Issue not to be inconsistent with the pleadings.
3. Appeal.

1. Scope and applicability.— (1) "The determinations in a case should be founded upon a case either to be found in the pleadings or involved in or consistent with, the case thereby made." (1866) 11 Moo Ind App 7 (20, 23) (PC).

(2) In order to provide against failure of justice upon technical rules of pleadings and to enable Court to frame issues on correct points of dispute, this rule prescribes that Courts are to base the issues not on pleadings only but on other materials referred to in the rule as well. (1887) 10 Mad 375 (502) (DB).

(3) Even if the pleadings are bad, it is the duty of the Judge to ascertain the points clearly and frame issues accordingly. (1879) 3 Bom 210 (213).

(4) These "materials" mentioned in the rule are only intended to enable the Court to ascertain the contentions of parties with precision, i.e., to elucidate points which are ambiguous or obscure. AIR 1953 Bilaspur 25 (25).

(5) The materials mentioned in rule cannot enlarge the scope of pleadings so as to enable Court to raise an issue on a point not at all raised in pleadings. AIR 1956 Cal 138 (143) ** AIR 1954 Pepsu 65 (65): ILR (1952) Patiala 87 (DB) ** AIR 1950 PC 68 (69): Pak LR (1950) Lah 192: 77 Ind App 15.

(6) Trial Judge should not determine an issue not arising on pleadings of parties. **AIR 1968 SC 534 (536, 537): (1968) 1 SCR 805.**

(7) First issue as to partnership — Question of 'holding over' as partner involved — Second issue on holding over can be framed — Order 14, Rule 3 applies to ordinary Original Side of High Court. AIR 1964 Cal 209 (212).

2. Issue not to be inconsistent with the pleadings.— (1) The issue raised by the Court should not be inconsistent with the

R. 4. Court may examine witnesses or documents before framing issues.— Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

[1882 and 1877, S. 148; 1859, S. 140.]

R. 5. Power to amend, and strike out, issues.—(1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

[1882 and 1877, S. 149; 1859, S. 141.]

Order 14, Rule 3 — Note 2 (contd.)
allegations contained in the pleadings. (1888) 15 Cal 684 (692): 15 Ind App 81 (PC) ** (1890) 13 Mad 549 (551) (DB) ** (1966) Cur LJ 817 (819): 31 FJR 131 (Punj).

(2) On a plea of forgery of a document no issue can be raised as to whether it was executed under coercion or undue influence. (1888) 15 Cal 684 (692): 15 Ind App 81 (PC).

(3) An issue as to undue influence is not inconsistent with a plea of fraud. AIR 1917 Lah 168 (169): 1917 Pun Re No. 90 (DB).

3. Appeal.— (1) An order refusing to frame an issue asked for by a party is not appealable either under the Code or under Clause 15 of the Letters Patent as a "judgment." (1879) 4 Cal 531 (535) (DB) ** (1910) 35 Mad 1 (3) (FB). (Letters Patent, Clause 15.)

Order 14, Rule 4

1. Scope and applicability.— (1) Section 163 of the Evidence Act does not apply to a document produced under this rule by one party at the instance of the other party. AIR 1926 Nag 60 (61).

(2) Suit on basis of adjustment of accounts. Plea by defendants that they had signed the accounts without understanding them and on faith of certain representation made by plaintiff. Before framing an issue it is the duty of Judge to examine parties and to find out the precise nature of the pleas involved within these facts : in other words whether the defendants wished to plead in defence fraud, coercion, undue influence or a mistake of fact entitling them to reopen the accounts. **AIR 1953 SC 225 (226): 1953 SCR 758.**

ORDER 14, RULE 5 — SYNOPSIS

1. Scope and object.
2. Where amendment of issues and framing of new issues is obligatory.
3. Where amendment of issues and framing of additional issues is discretionary.
4. "At any time before passing a decree."
5. On such terms as it thinks fit.
6. Sub-rule (2).

1. Scope and object.— (1) Court trying a civil action has inherent jurisdiction to take cognizance of questions going to the root of the subject-matter in controversy between the parties at any stage of the trial. (1912) 35 Mad 607 (612): 39 Ind App 218 (PC).

(2) Before taking cognizance of questions going to root of subject-matter in controversy Court should frame and record issues on such questions. AIR 1919 Mad 471 (471) (DB) ** AIR 1934 All 273 (278): 56 All 428 (DB).

(3) This rule is subject to Rule 3 and so, a Court cannot frame an issue on a point which does not arise out of the three classes of materials mentioned in Rule 3. AIR 1940 Nag 94 (95).

(4) Court should give opportunity to the parties to adduce additional evidence on the amended issues. AIR 1952 Him Pra and B 51 (54).

(5) A permission to raise an additional issue will not empower the party to let in additional evidence on issues already closed. AIR 1915 Mad 1196 (1198): 39 Mad 456 (DB).

(6) Where a counsel appearing for a party in a suit applies for any issue framed in the suit to be deleted or to be recast in a particular manner, it is the duty of the Court to hear the argument from the counsel on the question. No doubt, it is open to the Court to accept or reject the contentions. But to say that it does not want any argument from the Bar is an attitude which cannot be encouraged. 1960 Ker LT 560 (560): (1960) 1 Ker LR 717.

2. Where amendment of issues and framing of new issues is obligatory.— (1) Where amendment of an issue or framing of an additional issue is necessary for determining matter in controversy between parties, it is obligatory on Court under the

R. 6. Questions of fact or law may by agreement be stated in form of issues.—Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,—

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by

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Order 14, Rule 5 — Note 2 (contd.)
second portion of sub-rule (1) to make such amendment of issue or to frame such additional issue. AIR 1957 Him Pra 59 (61) ** AIR 1953 Bilaspur 33 (34) ** AIR 1947 Pat 45 (47).

(2) If the issues already framed do not clearly bring out the points in controversy between the parties, or do not enable the Court to try the whole case on the merits, the issues should be amended or new issues framed in order to be able to give a decision on the real points in dispute. 1956 Andh WR 28 ** (1895) 19 Bom 374 (386) (DB) ** (1854-1857) 6 Moo Ind App 393 (410, 411) (PC).

(3) Where a suit has been adjusted by a valid compromise and it is brought to the notice of the Court it is bound to raise an issue in respect of the compromise and proceed to determine it. AIR 1937 Mad 200 (207, 208).

3. Where amendment of issues and framing of additional issues is discretionary.— (1) Where no injustice would be done to either party, the Court, in the exercise of its discretion, under special circumstances, may allow issues to be raised upon matters which do not come within the proper scope of the pleadings. (1880) 5 Cal 64 (70) (DB) ** (1881) 5 Bom 609 (614) (DB) ** (1902) 25 Mad 367 (378): 29 Ind App 76 (PC) ** AIR 1925 Cal 1157 (1160) (DB). (Same discretion applies in matter of amendment of issues.)

(2) A party, having set up one case and failed in it, will not be allowed to ask for issues to be raised to suit the proof. (1864) 2 Hyd 263 (265).

(3) A Judge should not take the case altogether out of the hands of the parties and make for them a case which they had no intention of making for themselves. AIR 1926 Bom 33 (37) (DB).

(4) No amendment should be made and no new issues raised on points which are inconsistent with the original pleas, or are wholly different from them or which will change the nature of the suit. (1883) 7 Bom 155 (160, 161). (Inconsistent points.)** (1892) 14 All 366 (371) (PC). (Do.) ** (1905) 27 All 1 (10): 31 Ind App 235: 7 Oudh Cas 287 (PC). (Wholly different points.) ** (1889) 13 Bom 664 (668) (DB). (Changing nature of suit.)

(5) A new issue should not be framed which would reopen the whole case. (1903) 27 Bom 485 (491): 30 Ind App 127 (PC).

(6) The exercise of the power under this part of the sub-rule being discretionary, it is doubtful whether a revision would lie from an order declining to amend issues or frame additional issues. AIR 1956 Bom 608 (608).

[See however AIR 1969 J & K 50 (51): 1969 Kash LJ 176.]

(7) The exercise of the discretion under this sub-rule will not be interfered with unless the discretion is shown to have been abused or perversely exercised. AIR 1956 Bom 608 (609) ** ILR (1952) 2 Raj 83 (85).

[See also AIR 1956 Mys 36 (37): ILR (1956) Mys 18 ** AIR 1958 Mad 496 (496, 497). (Framing of additional issue as between co-defendants against their wishes — Material irregularity.)]

4. "At any time before passing a decree." — (1) The Court may amend issues or frame additional issues at any time before passing a decree. ILR (1952) 2 Raj 83 (85) ** AIR 1930 Nag 225 (228): 27 Nag LR 75 (DB).

(2) Power under the rule can be exercised even after close of arguments. (1912) 35 Mad 607 (612): 39 Ind App 218 (PC).

(3) Power under the rule will not be exercised if it is likely to prejudice the fair trial of the case. (1911) 10 Ind Cas 230 (231) (DB) (All) ** AIR 1919 Cal 805 (806).

5. On such terms as it thinks fit.— (1) The words "on such terms as it thinks fit" in this rule would cover a request made by the defendant to cross-examine the plaintiff's witnesses in the light of the amended issues. 1957 Jab LJ 61 (62).

6. Sub-rule (2).— (1) Though sub-rule (2) empowers the Court to strike out any issue wrongly framed if the issues have been framed by consent of both the parties they should not be struck out without the consent of both. AIR 1928 Mad 764 (770, 771) (DB).

(2) Where the lower Appellate Court framed a wrong issue, but it appeared from its judgment that there was a finding on the point which would have been raised if the correct issue had been framed, the High Court refused to remand the case for a new finding on the point. (1897) 21 Bom 325 (327) (DB).

Order 14, Rule 6

1. Scope and applicability.— (1) Rules 6 and 7 deal with stating by consent, of special issues in a suit, and provide for what may be called an adjustment or compromise of a suit, not absolutely as under

one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

[1882 and 1877, S. 150; 1859, S. 142. Cf. O. 36, R. 1.]

R. 7. Court, if satisfied that agreement was executed in good faith, may pronounce judgment.—Where the Court is satisfied, after making such inquiry as it deems proper,—

(a) that the agreement was duly executed by the parties,

(b) that they have a substantial interest in the decision of such question as aforesaid, and

(c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court;

and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow.

[1882 and 1877, S. 151; 1859, S. 143.]

ORDER XV

DISPOSAL OF THE SUIT AT THE FIRST HEARING

R. 1. Parties not at issue.—Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.

[1882 and 1877, S. 152; 1859, S. 144.]

Order 14, Rule 6 — Note 1 (contd.)

Order 23, Rule 3 but contingently on the opinion of the Court on certain issues of fact or law submitted to it. Upon the finding on those issues being given, the adjustment or compromise becomes absolute. (1892) 16 Bom 202 (216) (DB).

(2) The special provisions laid down in this rule cannot in view of their express terms be made applicable to proceedings under Section 153 of the Companies Act. AIR 1950 East Punj 111 (118): ILR (1949) East Punj 421 (FB).

2. Appeal.— (1) A decree passed under Rules 6 and 7 is appealable. 1886 All WN 233 (233) (DB).

(2) Where the parties agreed to refer issues of fact to a commissioner and to abide by his findings, it was held that no appeal would lie against a decree passed on the report of the commissioner. (1902) 29 Cal 306 (309, 310) (DB).

Order 14, Rule 7

1. Scope.— (1) Upon the findings on issues submitted under Rule 6 being given, the adjustment becomes absolute and the Court is bound to pronounce judgment according to the terms of the agreement. (1892) 16 Bom 202 (216) (DB).

Order 15, Rule 1 — Note 1

(1) Where the statement of party's pleader making certain admission is sufficient to decide the case, the Court can at once proceed to pronounce its judgment. AIR 1947 Sind 105 (107) (DB).

(2) A Court is not justified in disposing of a case before the date fixed for hearing and the decree so passed will be set aside. AIR 1945 All 352 (353): ILR (1945) All 499 (DB) ** AIR 1924 Lah 459 (460) (DB).

(3) Where the defendant is not compelled by the Court to file a written statement and does not file one the Court is not entitled to assume that the parties are not at issue on any question without complying with the provisions of Order 10, Rule 1. AIR 1953 Trav-Co 220 (222): ILR (1953) Trav-Co 89 (FB) ** AIR 1945 All 352 (353): ILR (1945) All 499 (DB).

(4) Suit dismissed for default — Appeal — Death of sole plaintiff during pendency of appeal — Legal representatives substituted — Appeal allowed and suit restored to file — Case posted to 22-9-64 for hearing

R. 2. One of several defendants not at issue.—Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

[1882 and 1877, S. 153.]

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras (9-6-1959); Reg. 8 of 1965 (w.e.f. 1-10-1967).

Madras and Pondicherry

Renumber Rule 2 as sub-rule (1) of Rule 2 and insert the following as sub-rule (2):

"(2) Whenever a judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such judgment bearing the same date as the day on which the judgment was pronounced" [R. O. C. No. 1729 of 1926]; and Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-68].

Mysore

Same as that of Madras (30-3-1967).

R. 3. Parties at issue.—(1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit:

Order 15, Rule 1 — Note 1 (contd.)

— Application by plaintiffs for correction of cause title in plaint — Application heard on 21-9-64 — **Held,** application should not have been heard without opportunity to the defendants to file objection and without the matter being heard in their presence. AIR 1966 Orissa 55 (56): (1965) 7 Orissa JD 229.

Order 15, Rule 2 — Note 1

(1) Where one of several defendants appears and confesses judgment, and judgment is pronounced against him, it does not bar further prosecution of the suit as against the other defendants. (1901) 25 Bom 378 (386).

(2) Where the defendant does not make any admission the Court is not entitled to assume that the defendant is not at issue with the plaintiff on any question of fact or law without complying with the provisions of Order 10, Rule 1. This rule does not apply to such a case. AIR 1953 Trav-Co 220 (222): ILR (1953) Trav-Co 89 (FB).

Order 15, Rule 3 — Note 1

(1) This rule gives power to the Courts to proceed to determine issue of law at a stage subsequent to the issue stage. AIR 1922 Mad 321 (322) ** AIR 1921 Pat 467 (467) (DB).

[But see AIR 1915 Cal 87 (90) (DB) ** AIR 1933 Cal 559 (559, 560) (DB).]

(2) This rule only applies where the practice of certain Courts is to fix a day for the settlement of issues and then if issues are settled the Court may proceed to hear certain of the issues forthwith. AIR 1956 Bom 721 (723) ** 1957 Jab LJ 243 (247).

(3) Though this rule empowers a Court to dispose of a suit on preliminary issues, it should not ordinarily do so but should pronounce its opinion on all important issues. AIR 1952 Kutch 32 (33) ** AIR 1922 PC 405 (408): 50 Cal 243: 50 Ind App 247 ** AIR 1947 Pat 185 (187) (SB).

(4) Where the suit is sought to be disposed of on a preliminary point of law, it must be done only on the assumption that the facts pleaded can be and are proved. 1947 Nag L Jour 533 (537, 538) (DB) ** (1866) 10 Moo Ind App 546 (553) (PC).

(5) The Court trying a suit has no doubt ample powers to fix any one of the issues involving questions of law and facts for hearing and to decide it as preliminary issue. The power of the Court, in this

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence or for such further argument as the case requires.

[1882 and 1877, S. 154; 1859, S. 145.]

R. 4. Failure to produce evidence.—Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

[1882 and 1877, S. 155; 1859, S. 145.]

ORDER XVI

SUMMONING AND ATTENDANCE OF WITNESSES

[See Sections 30 to 32]

R. 1. Summons to attend to give evidence or produce documents.—At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose atten-

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Order 15, Rule 3 — Note 1 (contd.)

behalf, is not derived under any specific provision of the Code but is inherent in it. 1957 Jab LJ 243 (247).

(6) No action under this rule can be taken if further evidence than what the parties can at once furnish, is necessary for the decision of the suit. AIR 1952 Kutch 32 (33).

(7) Where summons has been issued for the settlement of issues only, the Court cannot proceed to hear and dispose of the case if one of the parties objects to the adoption of such a procedure. AIR 1915 Mad 319 (319) (DB) ** (1892) 16 Mad 198 (200) (DB).

(8) The adjournment of a case under sub-rule (2) does not amount to the granting of time of production of evidence under Order 17, Rule 3 and hence if the plaintiff does not appear on the adjourned date the Court cannot proceed under Order 17, Rule 3. AIR 1943 Bom 321 (324): ILR (1944) Bom 1 (FB) ** AIR 1941 Bom 83 (85): ILR 1941 Bom 150.

(9) Where the finding of the trial Court does not show that he was satisfied that one of the issues could be disposed of at once or without recording evidence, the same not being erroneous cannot be interfered in revision. 1957 Jab LJ 243 (247).

(10) Trial, when closes — Right of party to examine additional witness after close of evidence and when case is posted for argument — Hearing of suit includes both production of evidence as well as arguments — Hearing of suit comes to end only when judgment is delivered or when suit is posted for judgment where it is reserved — Hearing is not concluded when suit is posted for argument though recording of evidence has been finalised — In such case, party can request for examination of additional witnesses or making document. AIR 1966 Andh Pra 295 (297): (1966) 1 Andh WR 22.

(11) Where a decision on particular issue would not dispose of the case, the decision of the Court not to decide that issue as a preliminary issue is correct and not open to any challenge. (1963) 65 Pun LR 324 (328).

(12) Labour Court — Can decide preliminary issues and issues on merit together. (1963) 65 Punj LR 901.

Order 15, Rule 4 — Note 1

(1) If, after the written statement is filed, the suit is found to involve issues of a less simple character than might have been anticipated at the outset, it is desirable, in the interests of justice, that the discretion given to the Court by this rule should be so exercised as to ensure a fair trial and not to deny, in effect, the trial to the parties. AIR 1914 Bom 46 (47): 38 Bom 377 (DB) ** (1867) 7 Suth WR 84 (84) (DB).

(2) Where a party fails, without sufficient cause, to produce his evidence on the date fixed for final disposal, and an adjournment is refused, the Court can at once pronounce judgment. But it cannot dismiss the suit for non-prosecution. AIR 1929 All 543 (543).

(3) A pronouncement of judgment under this rule is a decree and is appealable as such. (1904) 31 Cal 150 (154) ** 1883 All WN 171 (171) (DB).

Order 16, Rule 1 — Note 1

(1) It is ordinarily for the parties to move the Court to take the necessary steps for enforcing the attendance of persons

dance is required either to give evidence or to produce documents.

[1882 and 1877, S. 159; 1859, S. 149.]

HIGH COURT AMENDMENTS

Allahabad

The following proviso shall be added:

"Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to call any witness not named in a list, which must be filed in Court before the hearing of evidence on his behalf has commenced, without an order of the Judge made in writing and stating the reasons therefor."

Delhi and Himachal Pradesh

Same as that of Punjab, See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Punjab, Haryana and Chandigarh

Add the following proviso:

"Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to produce any witness not named in a list, which must be filed in Court on or before the date on which the hearing of evidence on his behalf commences and before the actual commencement of the hearing of such evidence without an order of the Court made in writing and stating the reasons therefor" [15-10-1932] and Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

Rajasthan

The following shall be substituted for Rule 1:—

"1. (i) On such date as the Court may appoint and not later than thirty days after the settlement of issues, each party shall present in Court a list of witnesses whom it proposes to produce.

Order 16, Rule 1 — Note 1 (contd.)

either to give evidence or to produce documents. (1875) 23 Suth WR 83 (84) ** AIR 1927 Lah 845 (846).

(2) The party is under no obligation to accompany the process-server for having the summons served on the witnesses and therefore, if by the negligence of the process-server service is not effected in time the party cannot be saddled with the costs of the opposite side. AIR 1953 Madh B 48 (49) ** 1958 Jab LJ 266 (267) ** AIR 1965 J and K 10 (11): 1964 Kash LJ 72.

(3) The issue of summons under Section 36 of the Presidency Towns Insolvency Act to persons capable of giving evidence of the insolvent's dealing with his property is governed by the provisions of this Order. AIR 1948 Mad 496 (496). (O. S. Appeal No. 30 of 1917, Foll.; AIR 1928 Mad 856, Disting.)

(4) The procedure to examine a party is to take steps under this Order and not to apply under Order 3, Rule 1. AIR 1933 Mad 821 (822).

(5) In summoning witnesses the Court must strictly follow the provisions of Order 16. There is no provision in the Code to support an order stopping a party from examining his witnesses on the ground that, in spite of orders given to him to have the summons served on the his witnesses by means of personal identification, the defendant has failed to do so. 1958 Jab LJ 266 (268) ** (1963) 49 ITR 561 (All).

(6) The Court is bound to issue summons where application is made at any time after the institution of the suit and before its final disposal. AIR 1958 Andh Pra 254 (255) ** AIR 1958 Pat 458 (460): 37 Pat 780 (DB) ** 1958 Jab LJ 266 (267) ** 1957 Jab LJ 253 (255) ** AIR 1950 Cal 326 (327) (DB) ** AIR 1925 Bom 368 (368) (DB).

(7) An application cannot be refused on the ground that such an application is too late, though it is within the discretion of the Court to refuse an adjournment of the hearing on the ground of want of diligence of the party. AIR 1958 Pat 458 (460): 37 Pat 780 (DB) ** 1957 Jab LJ 253 (255) ** AIR 1950 Cal 326 (327) (DB) ** AIR 1929 All 449 (451): 51 All 341 (DB) ** AIR 1933 Nag 336 (337).

(8) The application required by this rule is a written application and in the absence of such an application the Court could not be bound to issue summonses to the witnesses of the plaintiffs. Even assuming that there can be an oral application for the purpose such an application cannot be deemed to have been made by implication from the fact of the plaintiff having filed

[Provided that a party giving evidence in rebuttal may file a supplementary list of witnesses with the permission of the Court not later than fifteen days from the date of closure of the evidence of his opponent] [23-3-61].

[(ii) No party shall produce or obtain process to enforce the attendance of witnesses other than those contained in the list referred to in sub-rule (i), except with the permission of the Court and after showing good cause for the same, and the Court granting or refusing such permission shall record reasons for so doing] [23-3-61].

(iii) On the application to Court or to such officer as it appoints in this behalf, the parties may obtain summonses for persons whose attendance is required in Court.

(iv) Where in accordance with the Proviso to Rule 8 of Order XVI a party has obtained summonses for any witnesses for service by himself or through his agent summonses for any such witnesses shall not unless specially ordered by the Court for reasons to be recorded in writing, be re-issued for service in the manner provided for the service of summons to a defendant" [25-7-57 and 23-3-1961].

Order 16, Rule 1 — Note 1 (contd.)

process fees and processes. AIR 1958 Pat 458 (462): 37 Pat 780 (DB).

(9) Summons cannot be refused on the ground that the evidence of a witness may not be beneficial to the party. AIR 1925 Lah 572 (572) ** (1871) 15 Suth WR 447 (448) (DB).

(10) Court cannot refuse to issue summons because the witness had not been summoned before. AIR 1927 Lah 281 (281) ** (1910) 5 Ind Cas 184 (186) (DB) (Cal) ** AIR 1923 Nag 58 (59) (DB).

(11) Summons cannot be refused on the ground that the party had undertaken to bring his witnesses. Madh BLJ 1955 HCR 570 (572) ** (1882) 6 Bom 742 (743).

(12) This rule does not take away the inherent power of the Court to refuse to summon witnesses in order to prevent an abuse of the process of the Court. AIR 1958 Pat 458 (460): 37 Pat 780 (DB) ** (1870) 14 Suth WR 66 (67, 68) (DB) ** (1905) 28 Mad 28 (33, 34, 36) ** AIR 1969 Punj 197 (200).

(13) An order refusing an application for witness summons is not open to appeal; but its correctness can be questioned in an appeal from the decree in the suit but subject to the limitations prescribed in Sections 99 and 105 of the Code. AIR 1943 Oudh 91 (96): 18 Luck 346 ** 16 All 218 (220) (DB) ** 1896 All WN 120 (120, 121) (DB).

(14) An order wrongly refusing an application may be a material irregularity in the exercise of jurisdiction and in that case will be open to revision. AIR 1953 Pat 8 (8) ** 1957 Jab LJ 253 (255) ** Madh BLJ 1954 HCR 464 (466) ** (1885) 9 Bom 308 (310) (DB) ** AIR 1967 Mys 37 (39): (1965) 2 Mys LJ 788.

(15) Whether or not to adduce evidence should be left entirely to parties — Untimely suggestion by Court that it is not necessary to adduce evidence may dissuade lawyers from adducing evidence. (1961) 65 Cal WN 1064 (1066).

(16) Requirement about filing list of witnesses — Object is to give opportunity to opposite party to know the witnesses to be examined by other side — Party not mentioning particular witness in list of witnesses — Application for examination of the witness cannot be treated as 'list of witnesses'. (1964) 30 Cut LT 63: ILR (1963) Cut 957.

(17) A party is entitled to examine witnesses, mentioned in the list filed before the hearing or before the examination of the witnesses starts, even though they are not summoned. (1963) 65 Punj LR 176.

(18) List of witnesses to be summoned filed by plaintiff — Court restricting evidence to the examination of only two witnesses acts illegally. 67 Pun LR 1001: ILR (1965) 2 Punj 504.

(19) Industrial Dispute — Procedure before Tribunal — Application by party for summoning Labour Commissioner as witness rejected as being filed late — Evidence of party closed and case adjourned for fortnight for arguments — Application for summoning witnesses on adjourned date also rejected — Principles of natural justice held violated — Industrial Tribunal has the same powers as are vested in a Civil Court and the procedure adopted has to be of the same pattern as followed by Civil Courts under Order 16. 1968 Lab IC 763 (765) (Punj).

(20) Section 110-C, Motor Vehicles Act does not clothe — Tribunal with all powers of Civil Court so as to attract provisions of Order 16. AIR 1965 Punj 477 (478): 68 Pun LR 161.

(21) Burden of proving issue on plaintiff — Witnesses summoned by defendants only in rebuttal — List filed by defendants within 15 days from date of closure of plaintiff's evidence — Proviso held was applicable — Trial Court held was bound to examine defendant's witnesses. 1963 Raj LW 509: ILR (1963) 13 Raj 1094 ** 1965 Raj LW 111 (112, 113): ILR (1965) 15 Raj 440.

[a]**R. 1A. Production of witnesses without summons through Court.**—Where any party to the suit has, at any time on or before the day fixed for the hearing of evidence, filed in the Court a list of persons either for giving evidence or for producing documents, the party may, without applying for summons under R. 1, bring any such person, whose name appears in the list, to give evidence or to produce documents.

[a] Inserted by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), Section 14 [1-1-1957].

HIGH COURT AMENDMENTS

Rajasthan

Rule 1A of Order XVI shall be deleted [23-3-1961].

Bombay: Dadra and Nagar Haveli

Rule 1B

The following shall be added as Rule 1B:

"1B. Court may permit service of summons by party applying for summons.—(1) The Court may, on the application of any party for a summons for the attendance of any person, permit the service of such summons to be effected by such party.

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected, the Court may, if it is satisfied that reasonable diligence has been used by such party to effect such service, permit service to be effected by an officer of the Court" [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Gujarat

Same as that of Bombay without the marginal note [17-8-1961].

Order 16, Rule 1 — Note 1 (contd.)

(22) The Court has inherent power to direct a party to go with the process server to identify his witnesses in a proper case. In the absence of any rule framed by the Rajasthan High Court as to when it would be proper for the Court to direct a party to identify witnesses, the inherent power should be exercised in the light of the principle contained in the rules framed by other High Courts. 1965 Raj LW 148: ILR (1965) 15 Raj 448.

(23) There is on the one hand Order 16, Rule 1 as amended by the Rajasthan High Court in 1957, and on the other hand Order 16, Rule 1-A as enacted by the Code of Civil Procedure (Amendment) Act, 1956. So far as Order 16, Rule 1-A is in conflict with Order 16, Rule 1, as amended by the Rajasthan High Court, the former must give way to the latter by necessary implication. AIR 1964 Raj 243 (248): 1964 Raj LW 253.

(24) Where no list of witness has been filed the Court has no power to summon the witnesses. Provision of this rule is mandatory. AIR 1964 Raj 243 (246, 248): 1964 Raj LW 253 (DB). (AIR 1963 Raj 225, **Overruled.**)

(25) Service of summonses by the mode, known as Dasti process is not prohibited by Civil P. C. Dasti process can be issued for witnesses also. However, it is to be issued and if the party requests for the issue of such process. AIR 1969 Punj 197 (199).

(26) Omission to deposit process-fee due to negligence — Deposit can be allowed if that can be done without injustice to other side. AIR 1969 Punj 197 (200).

(27) Production of documents — Dasti-process should not be issued to party to bring judicial record himself — Private persons or parties to a litigation cannot be allowed to bring or handle judicial records in this manner. AIR 1969 Punj 197 (200).

(28) There is nothing in Order 16, R. 1, positively to prohibit a defendant summoning the plaintiff on his employer. However the preponderance of authority is against this procedure. ILR (1965) 2 Mad 650.

(29) An Industrial Tribunal has the same powers as are vested in a Civil Court under Civil P. C. when trying a suit in respect of enforcing the attendance of any person and examining him on oath for compelling the productions of documents and material objects and for issuing commissions for examination of witnesses. 1968 Lab IC 763: 1967 Cur L Jour 649.

Order 16, Rule 1-A — Note 1

(1) Where there is a conflict between Order 16, Rule 1-A and Order 16, Rule 1 as amended by the Rajasthan High Court, the former must give way to the latter by necessary implication. Rule 1-A of Order XVI, deleted by High Court Amendment dt. 23-3-1961. AIR 1964 Raj 243 (248): 1964 Raj LW 253 (DB).

R. 2. Expenses of witness to be paid into Court on applying for summons.—(1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend. and for one day's attendance.

(2) **Experts.**—In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

(3) **Scale of expenses.**—Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

[1882 and 1877, S. 160; 1859, S. 151.]

HIGH COURT AMENDMENTS

Allahabad

To Rule 2, add:

"(4) This rule shall not apply, in cases to which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs. 10 per mensem and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their headquarters."

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta — See Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 [w. e. f. 1-12-1963].

Bombay: Dadra and Nagar Haveli

Insert as proviso to sub-rule (1):

"Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation, applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge, or of matters which he has had to deal, as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness" [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Calcutta: Andaman and Nicobar Islands

Cancel Clauses (1) and (2) and substitute the following:

"(1) The Court shall fix in respect of each summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses

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Order 16, Rule 2 — Note 1

(1) Except as provided for in sub-rule (2) no witness is entitled to any compensation for loss of time. (1911) 12 Ind Cas 190 (190).

(2) A witness is not entitled to any special amount on the ground of status. AIR 1922 Bom 116 (117): 46 Bom 89 (DB).

(3) The right to claim expenses is not lost by the fact of the witness having attended and given evidence before making the claim. (1880) 4 Bom 619 (621) ** (1904) 28 Bom 647 (648).

(4) The Court must give the party a reasonable time for payment of the amount of expenses into Court. AIR 1924 Nag 271 (275): 20 Nag LR 131.

(5) A dismissal of the plaintiff's suit by reason of the plaintiff's witnesses not appearing owing to the default of the process-server in serving the summons on them, is illegal. It is otherwise if the fees are not duly paid. AIR 1925 Lah 296 (296).

(6) No party is entitled to demand that a document should be examined by an expert and the costs realised from the other party. 1966 All LJ 285: 1966 All WR (HC) 196.

of the persons summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(2) In fixing such an amount the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case" [25-7-1928].

Delhi and Himachal Pradesh

Same as in Punjab — See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Gujarat

Same as that of Bombay (17-8-1961).

Kerala: Laccadive, Minicoy and Amindivi Islands

Sub-rule (4) — Same as that of Madras [9-6-1959]; Reg. 8 of 1965, S. 3.

Madhya Pradesh

Add the following as an exception to Rule 2 (1):

"Exception.—When applying for a summons for any of its own officers, Government and State Railway administrations will be exempt from the operation of sub-rule (1)" [16-9-1960].

Madras and Pondicherry

Add after Rule 2 (3):

"(4) Where the summons is served on the witnesses by the party directly, the expenses mentioned in clause (1) shall be paid to the witnesses by the party or his agent" [1-11-1951]; Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 1-7-65].

Mysore

Add the following as sub-rule (4):—

"(4) Where the summons is served on the witness by the party himself, if so authorised under Rule 8 of this Order, the expenses mentioned in sub-rule (1) shall be paid by the witness to the party or his agent making the service" [30-3-1967].

Orissa

Same as that of Patna.

Patna

Add the following proviso to Rule 2 (1):

"Provided that the Government shall not be required to pay any expenses into Court under this rule when it is the party applying for the summons, and the person to be summoned is an officer serving under Government, who is summoned to give evidence of facts which have come to his knowledge, or of matters with which he has to deal, in his public capacity" [As amended: 13-2-1952].

Punjab, Haryana and Chandigarh

Add the following exception to Rule 2 (1):

"Exception.—When applying for a summons for any of its own officers, Government will be exempt from the operation of Clause (1)" [9-1-1919]; see Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

R. 3. Tender of expenses to witness.—The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

[1882 and 1877, S. 161; 1859, S. 151.]

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta—See Act 27 of 1962, Ss. 13 and 15 [w. e. f. 1-12-1963].

Bombay: Dadra and Nagar Haveli[a]

Insert the proviso :

"Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice or of facts which he has had to deal, in his official capacity, or to produce a document from public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him. Such officer shall, however, be required to produce a certificate duly signed by the Head of his office showing the rates of travelling and other allowances admissible to him as for a journey on tour" [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Calcutta: Andaman and Nicobar Islands

(a) Substitute the following for Rule 3 :

"3. The sum so fixed shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally" [25-7-1928].

(b) Add the following to Rule 3—

"Provided—

(i) that where the person summoned is a servant of any State Government whose pay exceeds Rs. 10 per mensem or whose headquarters are situated more than five miles from the Court, and he has been summoned to appear as a witness in his official capacity in a civil case to which Government is a party, the sum so fixed shall be credited to the Treasury;

(ii) that where the person summoned is a Finger Print Expert of the Criminal Investigation Department and he is summoned to give evidence in private cases the sum so fixed, other than his travelling allowance, shall be credited to the Treasury;

(iii) that where the person summoned is the Government Examiner of Questioned Documents or his Assistant and is summoned to give evidence or his opinion is sought in private cases the sum so fixed shall be credited to the Treasury;

(iv) that where the person summoned is a servant of the Central Government or a State Railway or any other Commercial Department of Government and he is summoned to give evidence in his public capacity in a civil case, whether Government is or is not a party, the sum so fixed shall be credited in the Treasury to the Government or the State Railway, as the case may be, to which the employee belongs; and

(v) that where the person summoned is a State Railway employee and he is summoned to give evidence in his private capacity in a civil Court in Assam, the sum so fixed shall be credited to the Railway to which he belongs" [8-3-1948].

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Gujarat

Same as that of Bombay, except for the last sentence which is omitted. [17-8-1961].

Kerala : Laccadive, Minicoy and Amindivi Islands

In Rule 3 the following shall be added as para. (2), namely :—

"In the case of employees of the Central Government or the State Government or Railway Administration, sums paid into Court as subsistence allowance or compensation shall be credited in the Treasury to the credit of the Central Government or the State Government or the Railway Administration as the case may be [9-6-1959]; Reg. 8 of 1965, S. 3.

Madhya Pradesh

For Rule 3, substitute the following:

"3. (1) The sum so paid into Court shall, except in case of a Government servant or a State Railway employee, be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

(2) Where a party other than Government in a suit requests the Court to summon a Government servant or a Railway employee as a witness or to produce official documents, the party shall deposit with the Court a sum, which, in the opinion of the Court, will be sufficient to defray the travelling and other allowances of the Government servant or the Railway employee, as the case may be, as for a journey on tour and out of the sum so deposited the Court shall pay to the Government servant or the Railway employee concerned, the amount of travelling and other allowances admissible to him as for a journey on tour" [16-9-1960].

Madras and Pondicherry

The following shall be added as separate paragraph:

"In the case of employees of the Central Government or a State Railway sums paid into Court as subsistence allowance or compensation shall be credited in the Treasury to the credit of the Central Government or State Railway as the case may be" [7-1-1942]; Act 26 of 1968, S. 3 and Sch. Pt. II [w. e. f. 5-9-68].

Orissa

Same as that of Patna.

Patna

Add the following as proviso:

"Provided that when the person summoned is an officer of Government, who has been summoned to give evidence in a case to which Government is a party, of facts which have come to his knowledge, or of matters which he has had to deal, in his public capacity, then—

(i) if the officer's salary does not exceed Rs. 10 a month, the Court shall at the time of the service of the summons make payment to him of his expenses as determined by R. 2 and recover the amount from the Treasury;

(ii) if the officer's salary exceeds Rs. 10 a month, and the Court is situated not more than 5 miles from his headquarters, the Court may, at its discretion on his appearance, pay him the actual travelling expenses incurred;

(iii) if the officer's salary exceeds Rs. 10 a month and the Court is situated more than 5 miles from his headquarters, no payment shall be made to him by the Court. In such cases any expenses paid into Court under R. 2 shall be credited to Government."

Punjab, Haryana and Chandigarh[a]

For Rule 3, substitute:

"3. Tender of expenses to witness.—(1) The sum paid into a Court shall except in the case of a Government servant, be tendered to the person summoned, at the time of serving the summons if it can be served personally.

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government.

Exception.—(1) In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, actual travelling expenses incurred by them may, when the Court considers it necessary, be paid them.

Exception.—(2) A Government servant, whose salary does not exceed Rs. 10 per mensem, may receive his expenses from the Court" [9-1-1919].

[a] see Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

Rajasthan

Substitute for R. 3 the following:—

"3. The sum so paid into Court may, and if so required by the person summoned, shall be tendered to him at the time of serving the summons, if it can be served personally" [24-7-1954].

HIGH COURT AMENDMENTS

Rule 3A

Bombay: Dadra and Nagar Haveli

The following shall be added as R. 3A:

"3A. Special provision for public servants summoned as witnesses in suits in which the Government is not a party.—(1) Notwithstanding anything contained in the foregoing rules, in all suits or other proceedings to which the Government is not a party, where a servant of the Central Government or a Railway employee is summoned to give evidence and/or to produce documents in his public capacity, the Court shall direct the party applying for summons to deposit such sum of money as will, in the opinion of the Court, be sufficient to defray the travelling and other expenses of the Officer concerned as for a journey on tour; and on the deposit of such sum, the Court shall direct the summons to be issued and, out of the sum so deposited or out of any further sum which the Court may subsequently direct the party applying for summons to deposit, the Court shall, on the appearance before the Court of the officer summoned, pay him the amount of travelling and other expenses admissible to him as for a journey on tour under the rules applicable to his service.

(2) The Officer appearing before the Court in accordance with sub-rule (1) shall produce a certificate duly signed by the Head of his Office, showing the rates of travelling and other allowances admissible to him as for a journey on tour, and the amount payable to him by the Court shall be computed on the basis of the rates specified in such certificate" [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Gujarat

Same as that of Bombay [17-8-1961].

R. 4. Procedure where insufficient sum paid in.—(1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned, without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

(2) **Expenses of witnesses detained more than one day.**—Where it is necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for

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Order 16, Rule 4 — Note 1

(1) This rule lays down the procedure for the recovery of the expenses or the remuneration of a witness where an insufficient sum has been paid in or where he is detained for more than one day. (1907) 17 Mad L Jour 435 (436).

(2) If on the day a witness attends Court in pursuance of summons, the case is not reached, the Court may require him to attend on the date of the adjourned hearing. (1901) 24 Mad 200 (201) ** (1912) 15 Ind Cas 367 (368) (DB) (Mad).

(3) The realization of the expenses due to a witness should be by way of execution of the order against the party liable to pay. (1910) 5 Ind Cas 742 (743) (Mad).

(4) The immovable property of the party cannot be proceeded against for realization of the expenses. AIR 1921 Cal 430 (431) (DB).

such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of such party; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

[1882 and 1877, S. 162; 1859, S. 151.]

HIGH COURT AMENDMENTS

Assam and Nagaland

Same as that of Calcutta — See Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 [w. e. f. 1-12-1963].

Calcutta: Andaman and Nicobar Islands

Cancel Clause (1) and substitute therefor the following:

"(1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum so fixed is not sufficient to cover such expenses or reasonable remuneration the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and in case of default in payment may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid" [25-7-1928].

Delhi and Himachal Pradesh

Same as that of Punjab —See Act 26 of 1966, Ss. 7 and 17 [31-10-66 and 1-5-1967].

Madhya Pradesh

Insert the following between the words "summoned" and "as appears" in sub-rule (1):

"or, when such person is a Government servant or a State Railway employee, to be paid into Court" [16-9-1960].

Punjab, Haryana and Chandigarh

After the word "summoned" where it first occurs in Rule 4 (1), insert:

"or, when such person is a Government servant, to be paid into Court" [9-1-1919]; Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

HIGH COURT AMENDMENTS

Rules 4A and 4B

Andhra Pradesh

Same as that of Madras, except that for the words "pay him" the words "remit to the Central Government in the Ministry or department concerned" shall be substituted [10-3-1966].

Kerala : Laccadive, Minicoy and Amindivi Islands

Rules 4A and 4B are the same as those of Madras subject to the following changes:

(1) In Rule 4A—

(a) in sub-rule (1) delete the words "whose salary exceeds Rs. 10 per mensem and";

(b) in sub-rule (2) for the words "also pay any further sum" substitute the words "also pay any other sum;"

(c) renumber sub-rule (3) as sub-rule (4) and insert as sub-rule (3) the following:

"(3) In the case of employees of the Central Government or the Railway Administration sums paid into Court as subsistence or compensation shall be credited in the Treasury to the credit of the Central Government or the Railway Administration as the case may be."

(2) In Rule 4B—

for the words "the Central Government or a Railway employee" substitute the words "the Central Government or a State Government or a Railway employee" [9-6-1959]; Reg. 8 of 1965, S. 3.

Madras and Pondicherry

"4A. Special provision for public servants summoned as witnesses in suits to which the Government is a party,—(1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Government no payment in accordance with R. 2 or Rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs. 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters; and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit.

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed [by the Government under whom the officer is serving] and shall also pay any further sum that may be required under Rule 4 according to the same scale and the money so deposited or paid shall be credited to Government.,

(3) In all cases where a Government servant appears in accordance with this rule, the Court shall grant him a certificate of attendance" [2-3-1942].

4B. Special provision for public servants summoned as witnesses in suits in which the Government is not a party.—(1) Notwithstanding anything contained in the foregoing rules, in all suits or other proceedings to which the Government is not a party, where a servant of the Central Government or a Railway employee is summoned to give evidence and/or to produce documents in his public capacity, the Court shall direct the party applying for summons to deposit such sum of money as will, in the opinion of the Court, be sufficient to defray the travelling and other expenses of the officer concerned as for a journey on tour; and on the deposit of such sum the Court shall direct the summons to be issued and, out of the sum so deposited or out of any further sum which the Court may subsequently direct the party applying for summons to deposit, the Court shall on the appearance before Court of the officer summoned or as soon thereafter as is practicable, pay him the amount of travelling and other expenses admissible to him as for a journey on tour under the rules applicable to his service.

(2) The officer appearing before Court in accordance with sub-rule (1) shall produce a certificate duly signed by the head of his office, showing the rate of travelling and other allowances admissible to him as for a journey on tour and the amount payable to him by the Court shall be computed on the basis of the rates specified in such certificate. [17-12-1952]; Act 26 of 1968, S. 3 and Sch. Pt. II.

Mysore

Add the following after R. 4 and before Rule 5 ;

4-A. (1) In the cases provided for in this rule the provisions of the foregoing rules shall not apply or shall apply only subject to the provisions of this rule.

(2) Where a Government or a Public Officer being a party to a suit or proceeding as such public officer supported by Government in the litigation, applies for a summons to any Government servant whose salary exceeds Rs. 10 per month and whose attendance is required in a Court situate more than 5 miles from his headquarters, no payment in accordance with Rule 2 or with Rule 4 shall be required, and the expenses incurred by the Government or such public officer in respect of the attendance of such witness shall not be taken into consideration in determining the costs incidental to the suit or proceeding.

(3) Where any other party to such a suit as is referred to in sub-rule (2) applies for a summons to such Government servant as is mentioned in the said sub-rule, the party summoning shall deposit in Court along with his application a sum of money for the

travelling and other expenses of the officer determined by the Court under the provisions of Rule 2 of this Order and shall also pay and deposit any further sum that may be required by Court to be paid or deposited under R. 4 of this Order, and the money so deposited or paid shall be credited to the Government in the Treasury. Where the witness summoned under this sub-rule is the employee of the Central Government or the State Railway or other Commercial Department of the Government to whom the provisions of the Payment of Wages Act apply, sums paid into Court shall be credited in the Treasury to the credit of the Central Government, the Railway or the Commercial Department as the case may be.

(4) In all cases where a Government servant appears in accordance with the foregoing sub-rules the Court shall grant him a certificate of attendance containing the prescribed particulars.

(5) Notwithstanding anything contained in the foregoing rules and in this rule, in all suits or other proceedings to which Government is not a party, where a servant of the Central Government or of any Railway or of any other Commercial Department of the Government to whom the provisions of the Payment of Wages Act apply is summoned to give evidence of facts which have come to his knowledge or of matters with which he has had to deal as a public officer or to produce any document from public records in his public capacity, the Court shall direct the party applying for summons to deposit such sum of money as will, in the opinion of the Court, be sufficient to defray the travelling and other expenses of the officer concerned as for a journey on tour; and on the deposit of the said sum the Court shall direct the summons to be issued and out of the sum so deposited or out of any further sum which the Court may subsequently direct the party applying for suumons to deposit, the Court shall on the appearance before Court of the officer concerned or as soon thereafter as practicable pay him the amount of travelling and other expenses admissible to him as for a journey on tour under the rules applicable to his service. The said officer shall be required to produce a certificate duly signed by the Head of his office showing the rules of travelling and other allowances admissible to him as for a journey on tour and the amount payable to him by the Court shall be computed on the basis of the rates specified in the certificate [30-3-1967].

R. 5. Time, place and purpose of attendance to be specified in summons.—Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

[1882 and 1877, S. 163; 1859, S. 152.]

R. 6. Summons to produce document.—Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

[1882 and 1877, S. 164; 1859, S. 153; Cf. R. S. C., O. 37, R. 7.]

Order 16, Rule 5 — Note 1

(1) A summons should contain the necessary particulars of time and place of attendance and of the documents to be produced. (1883) 5 All 7 (8) ** 1864 Suth WR Gap No. 164 (165).

(2) A witness cannot be held liable for non-compliance with the summons where it is defective in particulars of time or place. (1883) 5 All 7 (8).

Order 16, Rule 6 — Note 1

(1) It is open to a witness to produce documents at the hearing though he has not been summoned to produce them. AIR 1925 Cal 1149 (1151) (DB).

(2) Where anything has to be done before a document can be produced under this rule, it must be done by the party and not the Court. AIR 1954 Mad 80 (80).

(3) A person summoned to produce a document need not attend personally. It

R. 7. Power to require persons present in Court to give evidence or produce document.—Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

[1882 and 1877, S. 165.]

HIGH COURT AMENDMENTS

Rule 7A

Assam and Nagaland

Same as that of Calcutta — See Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 [w. e. f. 1-12-1963].

Calcutta: Andaman and Nicobar Islands

Insert the following as Rule 7A:

"7A. (i) Except where it appears to the Court that a summons under this Order should be served by the Court in the same manner as a summons to a defendant, the Court shall make over for service all summonses under this Order to the party applying therefor. The service shall be effected by or on behalf of such party by delivering or tendering to the witness in person a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court.

(ii) Rules 16 and 18 of Order 5 shall apply to summons personally served under this rule, as though the person effecting service were a serving officer.

(iii) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in like manner as a summons to a defendant" [25-7-1928].

Orissa

Same as that of Calcutta [29-12-1961].

R. 8. Summons how served.—Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule.

[1882, S. 166; 1877, S. 167; 1859, S. 154.]

HIGH COURT AMENDMENTS

Allahabad

After "this Order" and before "shall be served," add "may by leave of the Court be served by the party or his agent, applying for the same, by personal service and failing such service."

Andhra Pradesh

Same as that of Madras.

Order 16, Rule 6 — Note 1 (contd.)

is enough if he causes the documents to be produced. AIR 1941 Nag 159 (160).

Order 16, Rule 7 — Note 1

(1) This rule is subject to Sections 130 and 131 of the Evidence Act which provide that under certain circumstances a person cannot be compelled to produce the kinds of documents mentioned therein. (1911) 11 Ind Cas 794 (795) (DB) (Cal).

(2) It is left to the discretion of the Court to act under this rule. (1908) 4 Nag LR 129 (133).

(3) This rule does not apply where the document is not in possession of the witness then and there in the Court. AIR 1947 Mad 58 (59): ILR (1947) Mad 360.

(4) Application for examination of an essential witness present in Court rejected by Court in ignorance of provisions of Order 16, Rule 7 — It amounts to failure to exercise jurisdiction, justifying interference in revision. ILR (1963) Cut 957 (959, 960).

Order 16, Rule 8 — Note 1

(1) Service of summons by the mode, known as Dasti process is not prohibited by Civil P. C. Dasti process can be issued for witnesses also. However it is to be issued only if the party requests for the issue of such process. AIR 1969 Punj 197 (199).

Assam and Nagaland

Same as that of Calcutta — See Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 [1-12-1963].

Calcutta: Andaman and Nicobar Islands

(a) Cancel Rule 8 and substitute therefor the following:

"8. (1) Every summons under this Order, not being a summons made over to a party for service under Rule 7A (i) of this Order, shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order 5 as to proof of service shall apply thereto.

(2) The party applying for a summons to be served under this rule shall, before the summons is granted and within a period to be fixed, pay into Court the sum fixed by the Court under Rule 2 of this Order" [25-7-1928].

(b) Add the following to Rule 8 (2):

"Exception—When applying for a summons for any of its own officers in his official capacity, Government will be exempt from the operation of this rule" [8-3-1948].

Kerala: Laccadive, Minicoy and Amindivi Islands

For Rule 8, the following rule shall be substituted, namely:

"8. Summons how served.—(1) A summons under this order may be delivered by the Court to the party applying for such summons for making service on the witness:

Provided that when the party so desires in the first instance or is unable after due diligence to effect such service, the summons shall be delivered through the proper officer of the Court.

(2) Service of summons on a witness by the party or by the proper officer shall, as nearly as may be, be in the same manner as on a defendant and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule. [9-6-1959]; Reg. 8 of 1965, [w. e. f. 1-10-1967].

Madras and Pondicherry

The following, shall be substituted for Rule 8, namely:

"8. A summons under this Order may be delivered by the Court to the party applying for such summons for making service on the witness, provided that where the service is not effected by the party, or the party is unwilling to do so, the summons shall be delivered through the proper officer of the Court. The rules in Order 5 as to proof of service shall apply in the cases of all summonses served under this rule" [1-11-1951]; Act 21 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-68].

Mysore

For Rule 8 substitute the following:—

8. A summons under this Order may be delivered by the Court to the party applying for such summons for making service on the witness, provided that where the service is not effected by the party or the party is unwilling or unable to do so, the summons shall be delivered through the proper officer of the Court. The rules contained in Order V of this Code as to the mode and proof of service shall apply in the case of all summonses served under this rule [30-3-1967].

Orissa

Same as that of Calcutta (a) [29-12-1961].

Patna

Add the following:

"Provided that a summons under this Order may by leave of the Court be served by the party or his agent, applying for the same, by personal service. If such service is not effected and the Court is satisfied that reasonable diligence has been used by the party or his agent to effect such service, then the summons shall be served by the Court in the usual manner."

Rajasthan

Add the following proviso :

"Provided that any party may by leave of the Court, by himself or through his agent serve any of his witness or witnesses personally" [24-7-1954].

R. 9. Time for serving summons.—Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

[1882, S. 167.]

R. 10. Procedure where witness fails to comply with summons.—(1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under Rule 12 :

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

[1882 and 1877, S. 168; 1859, S. 159; Cf. R. S. C., O. 37, Rule 8.]

Order 16, Rule 9 — Note 1

(1) Order 16, Rule 9 which provides that summonses must be served on the witnesses in sufficient time is only a Rule in favour of the witnesses. It enjoins due diligence on the party. But it does not empower the Court to refuse the issue of summons to a witness on the ground of late application. AIR 1969 Punj 197 (200).

ORDER 16, RULE 10 — SYNOPSIS

1. Scope and applicability.
2. "Without lawful excuse".
3. Issue of warrant of arrest — Sub-rule (3).
4. Order for attachment of property — Sub-rule (3).

1. Scope and applicability.— (1) This rule has no application where there has been no summons. AIR 1916 Cal 421 (422) (DB).

(2) Order 16, Rule 10 is provided to enable the Court to help the parties for compelling the attendance of those recalcitrant witnesses who fail to put in their appearance after service without lawful excuse. ILR (1960) 10 Raj 429: 1960 Raj LW 510.

(3) The rule does not apply where the witness attends or produces the document on the required date though he had refused the summons. AIR 1928 Lah 469 (469).

(4) The rule being of a highly penal nature the procedure laid down in sub-rule (1) must be strictly followed before a Court finds whether the summons was served or not. (1899) 3 Cal WN 307 (310) (DB) ** AIR 1917 Lah 281 (281).

(5) As a general rule, it is for the party to move the Court to issue one or more of the coercive processes under this rule. AIR 1920 Nag 62 (62).

(6) The Court is not precluded from taking action under this rule suo motu. 33 All 690 (694) (DB).

(7) Both the conditions precedent laid down in sub-rule (2) must be satisfied

HIGH COURT AMENDMENTS

Allahabad

In sub-rule (1) substitute a colon for the full stop after the word "summons" and add the proviso :

"Provided that the Court need not examine the serving officer if the person has been summoned only to produce a document and has attended and admitted receipt of the summons but has failed to produce the document".

In sub-rule (2) :

(a) between the word "proclamation" and the word "requiring," insert the words, "or, if he is present, an order in writing to be signed by him";

(b) for the words "and a copy of such proclamation" substitute the words, "and a copy of the proclamation if issued."

In sub-rule (3) between the word "proclamation" and the words "or at any time afterwards" insert the words "or an order in writing."

Kerala : Laccadive, Minicoy and Amindivi Islands

In Rule 10, for the proviso to sub-rule (3) the following shall be substituted, namely :—

"Provided that no Court exercising Small Cause jurisdiction shall make an order for the attachment of immovable property" [9-6-1959]; Reg. 8 of 1965, S. 3.

Order 16, Rule 10 — Note 1 (contd.)

before any coercive action is taken. AIR 1929 All 850 (853, 854).

(8) If the conditions are not satisfied, the party is entitled only to a fresh summons. (1910) 8 Ind Cas 418 (419) (DB) (Oudh) ** AIR 1924 Pat 36 (36) (DB).

(9) Application by defendant under Section 32 and Order 16, Rule 10 for summoning plaintiff as witness — The proper procedure is to issue summons in compliance with the said provisions and to deal with the defaults in the manner provided in that connection. AIR 1959 Andh Pra 645 (646): (1959) 2 Andh WR 532.

(10) Assessee given Dasti summons for the production of witness B — B refusing to accept summons — No steps as provided by Order 16, Rule 10 for appearance of B taken by Income-tax authorities — **Held,** that the Income-tax authorities were not justified in fastening the blame at the door of assessee and disbelieving his version. (1963) 49 ITR 561 (All) (DB).

(11) The coercive measures contemplated by Order 16, Rule 12 are independent of the coercive measures contemplated by Rule 10 or 11 of Order 16. Therefore, a witness who fails to appear on summons is liable to punishment even though no coercive process is issued under Rule 10 of Order 16. 1961 Raj LW 317 (DB).

2. "Without lawful excuse".— (1) The question of lawful excuse depends on the circumstances of each case. AIR 1952 Pat 243 (244): 1952 Cri L Jour 796 (DB).

(2) Absence of witness due to alleged illness — Certificate given by medical practitioner by itself is not evidence — Examination of doctor on oath or at least affidavit by him should be insisted on. AIR 1935 Mad 659 (660).

(3) Non-payment or non-tender of expenses to the witness is a lawful excuse for non-attendance. 17 All 277 (279).

3. Issue of warrant of arrest — Sub-rule (3).— (1) In requiring parties to take out warrants of arrest against recalcitrant witnesses, the Court must have due regard to the practical difficulties felt by litigants in procuring the evidence of an important witness by means of his arrest. AIR 1926 All 103 (107) (DB).

(2) A party which seeks to compel the attendance of his own witnesses by a warrant takes a serious risk of those witnesses turning hostile to it, on account of the process of warrant being issued against them and in such cases it is not proper on the part of the trial Court to refuse its help to that party. 1960 Raj LW 510 (514, 515): ILR (1960) 10 Raj 429.

(3) The issue of a proclamation subsequent to the issue of a warrant of arrest is a contravention of the terms of sub-rule (3). AIR 1920 Mad 1014 (1017).

(4) A panchayatdar is not exempt from the coercive provisions of this rule. AIR 1928 Mad 299 (305): 51 Mad 1 (FB).

4. Order for attachment of property — Sub-rule (3).— (1) Where the properties of a person other than the witness are attached by mistake, the party applying for attachment is not liable for damages. AIR 1937 Mad 811 (813) (DB).

R. 11. If witness appears attachment may be withdrawn.—Where, at any time after the attachment of his property, such person appears and satisfies the Court,—

(a) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and,

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

[1882 and 1877, S. 169; 1859, S. 160.]

R. 12. Procedure if witness fails to appear.—The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under Rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any:

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

[1882, S. 170; 1877, Ss. 170, 174; 1859, S. 160.]

R. 13. Mode of attachment.—The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor.

R. 14. Court may of its own accord summon as witnesses strangers to suit.—Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it

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Order 16, Rule 11 — Note 1

(1) This rule provides for a case where the person in default satisfies the Court that he had not intentionally failed to carry out the order of the Court. AIR 1920 Cal 46 (47).

Order 16, Rule 12 — Note 1

(1) This rule applies to a witness who does not appear or on appearance, fails to show proper cause. AIR 1920 Cal 46 (47).

(2) This rule does not affect the special jurisdiction of a Chartered High Court, to proceed for contempt against a defaulting witness. AIR 1926 Rang 188 (189, 190): 4 Rang 257 (DB).

(3) No fine can be imposed under this rule until the procedure laid down in Rule 10, sub-rule (2) or sub-rule (3) has been followed. AIR 1916 Cal 421 (422) (DB) ** AIR 1929 All 850 (853) (DB) ** (1888) 12 Bom 63 (64) (DB).

(4) This rule deals with all cases of disobedience not covered by Rule 11. AIR 1951 All 415 (417) (DB) ** AIR 1925 Mad 1247 (1247, 1248): 48 Mad 94 (DB) ** AIR 1928 Lah 469 (469).

(5) Where a party is present in Court and is directed to produce a document, the Court can on his failure to comply with the order, impose a fine upon him without going through the procedure laid down in sub-rules (2) and (3) of Rule 10. AIR 1929 All 99 (100).

(6) What is lawful excuse depends upon the circumstances of each case. AIR 1928 Lah 979 (980) ** (1910) 5 Ind Cas 184 (186) (DB) (Cal).

(7) Fine can be imposed under Order 16, Rule 12, on a person who deliberately avoids appearance in Court, in disobedience to the summons issued on him, without first taking recourse to coercive processes under Rule 10 or 11. 'Such person' in Rule 12 may include a person against whom a warrant or an order of attachment or proclamation has been issued for non-appearance in pursuance of summons — Court would not summarily impose fine without giving the person a chance of satisfying the Court that he had not deliberately avoided summons or the process of Court. 1961 Raj LW 317 (318, 319): ILR (1960) 10 Raj 1476.

Order 16, Rule 14 — Note 1

(1) The power of the Court under this rule to examine witnesses on its own

necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

[1882 and 1877, S. 171.]

R. 15. Duty of persons summoned to give evidence or produce document.—Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

[1882 and 1877, S. 172; 1859, S. 167.]

R. 16. When they may depart.—(1) A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of.

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.

[1882, S. 173.]

HIGH COURT AMENDMENTS

Delhi and Himachal Pradesh

Same as that of Punjab — See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Punjab, Haryana and Chandigarh

Add the following sub-rule (3):

"(3) In the absence of the presiding officer the powers conferred by sub-rule (2) may be exercised by the Senior Subordinate Judge of the first class exer-

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Order 16, Rule 14 — Note 1 (contd.)

motion is discretionary. **AIR 1944 PC 100 (103):** 71 Ind App 171.

(2) This rule is only intended to enable the Court to secure suo motu the attendance of a witness whose evidence appears to the Court to be necessary. AIR 1949 Mad 292 (295): ILR (1949) Mad 343 ** ('09) 5 Low Bur Rul 1 (2).

(3) The Court cannot compel a party to summon a witness or penalise him for his refusal to summon him. ('11) 10 Ind Cas 35 (36) (Lah) ** Madh BLJ 1954 HCR 1046 (1048).

(4) The general powers under this rule are, in the case of Appellate Courts, circumscribed by the specific provisions of O. 41, Rule 27. ('95) 18 Mad 94 (98) (DB). (Per Shephard J.).

(5) Though there is no provision in the Code which gives a party to a suit a right to lead further evidence, after the trial Court exercises its powers under Order 16, Rule 14, at the same time the Code does not lay down any express prohibition in that behalf. AIR 1958 J & K 27 (27).

(6) In proceedings like winding of a company where proceedings are initiated by the official liquidator, who is an officer of the Court and the Directors and other officers stay away from the witness box it may become necessary for the Court in exercise of its inherent power to summon even a party against his will to give evidence on oath. AIR 1964 Mys 75 (79, 80): (1963) 33 Com Cas 839 (DB).

(7) Section 75 (4) of the Registration Act attracts all the provisions of the Civil P. C. in respect of summoning and enforcing attendance of witnesses and therefore, the provisions of Order 16, Rule 14 apply with full force to any enquiry before the Sub-Registrar for compulsory registration of documents presented before him. AIR 1960 Mad 401 (402): (1960) 2 Mad LJ 63.

(8) Election Tribunal has power under Order 16, Rule 14, C. P. C. to suo motu summon Court witnesses. **AIR 1969 SC 692 (698, 699): (1969) 1 SCC 27.**

Order 16, Rule 15 — Note 1

(1) Merely summons issued to adversary to appear for giving evidence with the document — Document not produced — Presumption under Section 89 of the Evidence Act cannot be drawn. It is, only after a notice under Rule 15 of Order 16, to produce documents of which discovery was asked for and were so discovered on affidavit that the provisions contained in Section 89 of the Evidence Act and other allied provisions of that Act as well as the Civil P. C. (1908), are attracted. 1964 Jab LJ 315 (318, 319).

cising jurisdiction at the headquarters of the district, or by any Judge or court-official nominated by him for the purpose" [25-7-1938].

Provided that a court-official nominated for the purpose shall not order a person, who fails to furnish such security as may be required under sub-rule (2), to be detained in prison, but shall refer the case immediately to the presiding officer on his return [23-1-1940]; Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

R. 17. Application of Rules 10 to 13.—The provisions of Rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of Rule 16.

[1882 and 1877, Ss. 174, 175; 1859, Ss. 168, 169.]

R. 18. Procedure where witness apprehended cannot give evidence or produce document.—Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison.

[1882 and 1877, S. 174; 1859, S. 169.]

R. 19. No witness to be ordered to attend in person unless resident within certain limits.—No one shall be ordered to attend in person to give evidence unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

[1882, S. 176.]

Order 16, Rule 19 — Note 1

(1) This rule provides an exemption from personal attendance of a witness who resides outside the limits prescribed in the rule. AIR 1923 Cal 427 (428) ** AIR 1932 Nag 135 (136): 28 Nag LR 146.

(2) Under Rule 19, it is mandatory not to compel attendance of a party or a witness on certain conditions. AIR 1958 Orissa 287 (287, 288): ILR (1958) Cut 357.

(3) This rule does not apply to a person who is summoned under Section 36 (1) of the Presidency Towns Insolvency Act he being not in the position of an ordinary witness. AIR 1953 Bom 19 (23).

(4) "The established public conveyance" mentioned in Clause (b) does not mean disconnected bus services belonging to different companies and with no certainty of continuous travel. AIR 1949 Mad 468 (468).

(5) An order in contravention of this rule is not open to revision. AIR 1923 Lah 301 (301).

(6) Where a party to the suit, on his own motion wants to be examined on commission as witness Rules 19 and 21 of Order 16 will not apply. AIR 1962 Andh Pra 435 (437): (1962) 1 Andh WR 218.

(7) The effect of Order 16, Rule 19 and Order 26, Rule 4, Civil P. C. (1908), is that in the case of parties the Court has discretion in issuing a commission. However, the position with regard to the witnesses is different. A witness, residing at a distance of more than 200 miles has a right to be examined on commission whether his evidence is of any benefit to the party examining him or not, subject to two conditions: (1) he is not within the control of the party making the application; and (2) the application is not an abuse of the process of the Court or actuated by mala fides or fraud. AIR 1963 Andh Pra 429 (431): (1963) 1 Andh WR 232.

[See AIR 1963 Pat 213 (214, 215): 1963 BLJR 490.]

(8) Where a witness is not under the control of the party asking for the commission and he resides beyond the limits fixed under Order 16, Rule 19 of the Code, it would be a proper exercise of judicial dis-

HIGH COURT AMENDMENTS

Allahabad

In Order 16, Rule 19 (b):

(i) insert the words "or private conveyances run for hire" between the words "public conveyance" and "for five-sixths", and

(ii) substitute the word "three" for the word "two". [4-4-1959.]

Bombay: Dadra and Nagar Haveli[a]

For Rule 19 substitute the following:—

19. No witness to be ordered to attend in person unless resident within certain limits.—No one shall be ordered to attend in person to give evidence unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than one hundred or (where there is a railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than five hundred kilometres distance from the court-house. (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Gujarat

In O. 16 R. 19 (b), for the words "two hundred", substitute the words "three hundred". (17-8-1961.)

Punjab, Haryana and Chandigarh

Add the following Proviso to R. 19 (b):—

"Provided that any Court situate in the State of Punjab may require the personal attendance of any witness residing in the Punjab or Delhi State". (4-3-1955); Act 31 of 1966, Ss. 29 and 32 (1-11-1966).

R. 20. Consequence of refusal of party to give evidence when called on by Court.—Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document, then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

[1882 and 1877, S. 177; 1859, S. 170.]

Order 16 Rule 19 — Note 1 (contd.)

cretion to issue the commission, if the evidence of that witness is essential for the party seeking to have him examined. Where the witness is the assignor of the negotiable instrument and it seems reasonable for the defendant to contend that his evidence is essential as the defendant disputes the consideration under the document and the factum of assignment for payment made by the holder, the commission can be issued to examine the assignor. (1967) 1 Mad LJ 252 (253): 80 Mad LW 148.

(9) Merely because in the C. P. Code there is no distinction drawn anywhere between a witness and a party to a suit so far as question of issue of commission for examination is concerned, it cannot be said that the plaintiff is as a matter of right entitled to be examined on commission on the ground that he or she is residing beyond the jurisdiction specified in Order 16, Rule 19. 81 Mad LW 430 (432).

(10) Clause (a) of Rule 19 of Order 16, should be read and understood in the light of Clause (b) of the same rule. So read it is clear that though a witness may be residing outside the limits of a Court's jurisdiction, the Court can summon him to attend in person, subject to the conditions of distance mentioned therein. AIR 1963 Mad 148 (148, 149): (1962) 2 Mad LJ 525.

Order 16, Rule 20 — Note 1

(1) The rule applies only when the party is present in Court and refuses to comply with the order. (1911) 12 Ind Cas 719 (719) (Mad).

(2) It is apparent from Rule 20 that the Court can require the examination of a party if he is present in Court. But the same power has not been given to the Court to compel the examination of a party if he is not present in Court. The legislature has thought fit in Rule 14 to impose certain limitations on the powers of the Court in summoning and examining as Court witness a party to the suit. AIR 1967 Mys 37 (39): (1965) 2 Mys LJ 788.

(3) The penalty under this rule is imposed on the party as such and not as a wit-

R. 21. Rules as to witnesses to apply to parties summoned.—Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.

[1882, S. 178, 1877, S. 177; Cf. 1859, S. 126.]

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta; See Act 27 of 1962, Ss. 13 and 15 (1-12-1963).

Calcutta: Andaman and Nicobar Islands

Cancel Rule 21 and substitute therefor the following:—

"21. (1) When any party to a suit is required by any other party thereto to give evidence, or to produce a document, the provisions as to witnesses shall apply to him so far as applicable.

(2) When any party to a suit gives evidence on his own behalf the Court may in its discretion permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing." (11-11-1927.)

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras. (9-6-1959); Reg. 8 of 1965, S. 3.

Madras and Pondicherry

Substitute the following for Rule 21:—

"21. Rules in the case of parties appearing as witnesses.—(1) When a party to a suit is required by any other party thereto to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as applicable.

(2) When a party to a suit gives evidence on his own behalf, the Court may in its discretion, permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing". (4-2-1936); Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-68].

Mysore

For R. 21 substitute the following:—

"21. (1) When a party to a suit is required by any other party thereto to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as applicable.

(2) When a party to a suit gives evidence on his own behalf, the Court may, in its discretion, permit him to include as costs in the suit of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing. (30-3-1967.)

Order 16, Rule 20 — Note 1 (contd.)

ness. Where, therefore, a plaintiff who is sought to be examined on commission at the instance of the defendant refuses to give evidence on oath, the penalty under this rule cannot be imposed on the plaintiff. AIR 1948 Oudh 225 (226).

(4) A presumption against a party can arise only when it fails to produce a relevant document in its possession in spite of notice to produce. But where there is an explanation as to why the document could not be produced and that is plausible no such adverse inference can be raised. AIR 1959 Raj 291 (292): 1959 Raj LW 19.

Order 16, Rule 21 — Note 1

(1) Rule 21 clearly indicates that one party to the suit can examine the other party as his witness or require him to produce documents. AIR 1967 Mys 37 (39): (1965) 2 Mys LJ 788.

(2) This rule applies only to the case where a party to a suit has been called to give evidence by the other party. The Court has, therefore, no power under this Code to order the travelling expenses of a party who has given evidence in support of his own case. AIR 1935 Mad 244 (244).

(3) The words "required to give evidence' in Rule 21 denote not voluntary act

HIGH COURT AMENDMENT

Rules 22 and 23 (Allahabad)

To Order 16, add the following rules:—

"22. (1) Save as provided in this rule and in Rule 2, the Court shall allow travelling and other expenses on the following scale:—

(a) in the case of witnesses of the class of cultivators, labourers, and menials, six annas a day;

(b) in the case of witnesses of a better class, such as zamindars, traders, pleaders, and persons of corresponding rank, from eight annas to two rupees a day, as the Court may direct; and

(c) in the case of witnesses of superior rank, including officers of Government in receipt of a salary of not less than Rs. 200 a month, from three to five rupees a day.

(2) If a witness demands any sum in excess of what has been paid to him, such sum shall be allowed if he satisfies that he has actually and necessarily incurred the additional expense.

Illustration.

A post office or railway employee summoned to give evidence is entitled to demand from the party, on whose behalf or at whose instance he is summoned, the travelling and other expenses allowed to witnesses of the class or rank to which he belongs and in addition the sum for which he is liable as payment to the substitute officiating during his absence from duty. The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip which the witness will present to the Court from which the summons issued.

(3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate, not usually exceeding that payable under clause (1) of this rule, as may seem to the Court to be reasonable and proper:

Provided that the Court may, for reasons stated in writing, allow expenses on a higher scale than that hereinbefore prescribed.

23. In cases to which Government is a party, Government servants whose salary exceeds Rs. 10 per mensem and all police constables whatever their salary may be who are summoned to give evidence in their official capacity at a Court situated more than five miles from their headquarters, shall be given a certificate of attendance by the Court in lieu of travelling and other expenses."

Order 16 Rule 21 — Note 1 (contd.)

of giving evidence by party in his own favour but required to do so by the other side or Court. AIR 1967 Mys 37 (39): (1965) 2 Mys LJ 788.

(4) The practice of a party not examining himself as his witness and forcing the opposite party to summon him, thereby hoping to obtain an opportunity of being cross-examined by his own counsel is objectionable. (1910) 32 All 104 (109): 37 Ind App 1 (PC) ** (1909) 31 All 116 (122): 36 Ind App 9 (PC).

(5) The practice of summoning the opposite party as a witness is objectionable. (1909) 3 Ind Cas 45 (45) (DB) (Bom) ** AIR 1951 J & K 5 (6): 9 J and KLR 95 ** AIR 1959 Mys 194 (195): 37 Mys LJ 261 (DB) ** ILR (1965) 2 Mad 650.

(6) It is the duty of a party who has certain facts within his personal knowledge to appear before the Court at a very early stage of the case as a witness and to give evidence relating to these facts and submit himself to cross-examination by the other side. AIR 1956 Sau 89 (90) (DB) ** AIR 1933 Lah 243 (244) (DB).

(7) Where the question was whether plaintiff was son of one N, and two defendants sought to be examined as witnesses by plaintiff were daughters of N, it was not nccessary that these defendants should be examined as witnesses on plaintiff's side, there being no special circumstance. 1963 Ker LT 537. (From the non-appearance of those defendants to dispute the evidence of the plaintiff when given the Court could draw an adverse presumption.)

ORDER XVII

ADJOURNMENTS

R. 1. Court may grant time and adjourn hearing.—(1) The Court may, if sufficient cause is shown, at any stage of the suit, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

(2) Costs of adjournment.—In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

[1882 and 1877, S. 156; 1859, S. 146.]

HIGH COURT AMENDMENTS

Allahabad

Add the following further Proviso:—

"Provided further that no such adjournment shall be granted for the purpose of calling a witness not previously summoned or named, nor shall any adjournment be utilised by any party for such purpose, unless the Judge has made an order in writing under the proviso to Order 16, Rule 1."

Bombay: Dadra and Nagar Haveli[a]

In Order XVII, for the existing Rule 1 and its marginal notes, substitute the following as Rule 1 and marginal notes:—

Order 16 Rule 21 — Note 1 (contd.)

(8) Though a party has a right to summon the other party to the suit and examine him as a witness, it is open to the Court, acting under its inherent powers under Sec. 151, to disallow his application to do so, if it comes to the conclusion that it is an abuse of the process of the Court. AIR 1967 Mys 37 (39): (1965) 2 Mys LJ 788.

(9) Where a party to the suit on his own motion wants to be examined on commission as witness Rules 19 and 21 of Order 16 will not apply but resort may be had only to the provisions of Rule 1 or Rule 4 of Order 26. AIR 1962 Andh Pra 435 (437): (1962) 1 Andh WR 218 (DB).

Order 17 (General) — Note 1

(1) Per Grover J.—In the absence of any provision in the Representation of the People Act laying down any procedure which is to be followed where the petitioner chooses to commit default either in appearance or in production of evidence or generally in prosecuting the petition the provisions of C. P. C. would be applicable under S. 37 of the Act. AIR 1968 Punj 152 (159): ILR (1967) 2 Punj 830 (FB).

ORDER 17, RULE 1 — SYNOPSIS

1. Scope.
2. "May adjourn" — Discretion of Court.
3. Sufficient cause must be shown.
4. "The Court shall fix a day" — Sub-rule (2).
5. Costs of adjournment—Sub-rule (2).
6. Costs in pauper suits.
7. Proviso.
8. Appeal.
9. Revision.
10. Writ petition.

1. Scope.—(1) The rule vests in Courts a discretion to grant time to a party at any stage of the suit. AIR 1916 Lah 175 (176) ** AIR 1935 Lah 476 (477).

(2) The application of the rule is limited to adjournments granted at the instance of parties and does not extend to those necessitated by rules of the Court. (1898) 2 Cal WN 490 (491).

(3) A Court is not obliged to grant an adjournment suo motu without any application on behalf of the party interested. AIR 1957 SC 232 (236, 237): 1957 SCR 98.

(4) An order made on the settlement of issues fixing a day for the final hearing is not an order under this rule. (1891) 14 Mad 88 (93) (DB).

(5) Orders for adjournment necessitated by delay on the part of Court's officers in the performance of Court's duty are not governed by this rule. AIR 1929 Lah 620 (621) (DB).

[See however AIR 1935 All 210 (211) (DB).]

(6) Neither this rule nor any other rule of this Order applies to execution proceedings. (1893) 15 All 84 (94) (FB) ** AIR 1933 Mad 418 (422): 56 Mad 490 (FB).

1. **Court may grant time and adjourn hearing.**—(1) The Court may, if sufficient cause is shown, at any stage of the suit, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit:

Provided that where a case is fixed for taking evidence, the Court shall record the evidence of all the witnesses present for either party unless the Court hearing the case for reasons to be recorded in writing finds it necessary to adjourn the case.

(2) **Costs of adjournment.**—In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment, ordinarily not exceeding fifty rupees in ordinary suits and one hundred rupees in special suits:

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded. (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17 (31-10-1966 and 1-5-1967).

Punjab, Haryana and Chandigarh

(1) Add the following at the beginning of sub-rule (1):—

"Subject to the provisions of Order 23, Rule 3."

(2) Add the following as sub-rule (3):—

"(3) Where sufficient cause is not shown for the grant of an adjournment under sub-rule (1), the Court shall proceed with the suit forthwith. (As amended on 21-7-1937) and Act 31 of 1966, Ss. 29 and 32 (1-11-1966).

Order 17 Rule 1 — Note 1 (contd.)

(7) An order consigning the record to the record room is not contemplated under this Order. AIR 1947 Sind 1 (3): ILR (1946) Kar 349 (FB).

(8) There is nothing illegal or improper in the chief ministerial officer adjourning a case which stands posted to a particular date, on which the Judge does not attend, to a later date if he is authorised to do so by the presiding officer. AIR 1952 Mad 798 (799).

(9) It is not necessary that the adjournment of a date of hearing can take place only when the case has been taken up for hearing on the date fixed for hearing and then postponed to a future date. ILR (1960) 1 All 546 (551) (DB). (Case fixed for hearing on 13th July — Adjournment application on 8th July — Adjournment allowed was proper.)

(10) The word hearing has not been defined in the Civil Procedure Code but has been used in various provisions and contemplates the taking up of a case for any proceeding. ILR (1960) 1 All 546 (551).

(11) Although the Court must show indulgence in the case of actions commenced on behalf of minors in the matter of granting adjournments in order to enable the next friend to prosecute the suit, there is no obligation on the part of the Courts to adjourn the suit indefinitely. AIR 1961 Andh Pra 446 (448): (1961) 2 Andh WR 15 (DB).

2. **"May adjourn" — Discretion of Court.**—(1) The granting of an adjournment to a party to a suit is, under this rule, left to the discretion of the Court. AIR 1949 Lah 131 (145): Pak LR (1949) Lah 215 (FB) ** AIR 1950 Assam 169 (171) (DB) ** AIR 1914 Sind 105 (106) : 8 Sind LR 275 (DB).

(2) The discretion under this rule should be exercised in a judicial and reasonable manner. AIR 1914 Sind 105 (106): 8 Sind LR 275 (DB) ** AIR 1966 Orissa 41 (43): 31 Cut LT 1092. (Material witness duly summoned but remaining absent — Refusal of adjournment for examination of the witness — Held, refusal amounted to material irregularity.)

(3) The discretion should be exercised upon proper materials. AIR 1916 All 138 (139) (DB) ** AIR 1936 Pat 472 (474) : 15 Pat 561 (SB).

(4) Discretion should be exercised after considering the party's conduct in the case. AIR 1949 Lah 131 (145): Pak LR (1949) Lah 215 (FB) ** AIR 1916 Pat 33 (33): 1 Pat L Jour 173 (DB).

(5) Before exercising the discretion under this rule, the Court should consider what opportunity the party had of getting ready, and the truth and sufficiency of the reason alleged by him for not being ready. AIR 1950 Assam 169 (174) (DB) ** AIR 1927 Lah 879 (879) ** AIR 1928 Cal 102 (102) (DB).

(6) The main object of vesting the discretion in the Court is to enable it to prevent a party from improperly delaying proceedings and abusing the process of the Court. 1956 Madh BLJ 407 (409).

Order 17 Rule 1 — Note 2 (contd.)

(7) Adjournment is improper when it is granted on the intervention of a third party without hearing the plaintiff or his pleader. AIR 1936 Pat 472 (473, 474): 15 Pat 561 (SB).

3. Sufficient cause must be shown.—(1) An adjournment should not be refused where sufficient cause for the adjournment is shown. 1891 All WN 112 (113, 114) (DB) ** AIR 1935 All 476 (477) ** 1959 Raj LW 158.

(2) An adjournment should not be granted even on condition of payment of costs, where no sufficient cause exists. AIR 1924 Cal 774 (776): 51 Cal 70 (DB) ** AIR 1965 Mys 59 (60) : (1964) 1 Mys LJ 325 (DB) ** AIR 1959 J and K 123 (125).

(3) What is sufficient cause will depend upon the circumstances of each case. ILR (1954) 4 Raj 721 (726) ** AIR 1926 Mad 944 (944) ** AIR 1935 All 476 (477).

(4) Where the necessity for the adjournment is not due to anything for which the party applying for it is responsible, an adjournment should not be refused. AIR 1941 Bom 406 (407): ILR (1941) Bom 648 ** AIR 1940 Mad 569 (571) (DB) ** AIR 1929 Pat 609 (612): 9 Pat 408 (DB).

(5) Where the party has been wanting in due diligence, an adjournment can be refused. AIR 1926 Oudh 75 (76) ** AIR 1916 Pat 33 (33): 1 Pat L Jour 173 (DB) ** AIR 1963 Manipur 47 (48) ** ILR (1963) 13 Raj 716 ** (1960) 2 Orissa JD 359.

(6) Where the party is guilty of negligence an adjournment can be refused. (1911) 5 Sind LR 49 (51) (DB) ** AIR 1932 Lah 591 (592): 13 Lah 458 (DB) ** AIR 1926 Nag 486 (487) ** AIR 1965 Mys 59 (60): 1964 (1) Mys LJ 325 (DB).

(7) Where a party is not ready for the hearing by reason of his having been taken by surprise this constitutes sufficient cause for adjournment. AIR 1925 Pat 534 (534, 535) (DB) ** 1959 BLJR 694.

(8) Where the witnesses of a party fail to appear for the hearing owing to non-service of summonses on them when such non-service is not due to the fault of the party, an adjournment should be granted to enable the party to take steps again for their attendance. AIR 1952 Ajmer 29 (2) (29) ** AIR 1920 Oudh 254 (255) (DB) ** AIR 1933 Mad 612 (613) (DB) ** (1964) 66 Pun LR 648: 1964 Cur LJ 230.

(9) Where the absence of witnesses is due to a bona fide mistake on the part of the party, there is sufficient cause for adjournment. (1900) 28 Cal 37 (52, 53) (DB) ** AIR 1925 Bom 105 (108) (DB) ** AIR 1967 Madh Pra 139 (141): 1966 Jab LJ 7 (DB).

(10) Dilatory conduct of plaintiff — Many adjournments granted — On day fixed for plaintiff's evidence telegram received from plaintiff barely stating that he was ill without mentioning disease—**Held** there was no sufficient cause for adjournment. AIR 1954 Raj 238 (239): ILR (1953) 3 Raj 995 (DB).

(11) Absence of advocate owing to his attendance in another case is not a sufficient cause within this rule. AIR 1927 Rang 258 (258).

(12) Convenience of both sides to be seen to — Lawyers for both sides coming from outside — Convenient date to be fixed after consulting parties to enable both lawyers to be present — Adjournment not to be refused merely because lawyer for the other side had already booked his air passage to be present on date fixed for hearing. AIR 1962 Manipur 42 (45).

(13) When during the course of examination of a plaintiff's witness, Court grants permission to plaintiff to cross-examine the witness treating him as hostile, adjournment of a suit on an application by defendant on the ground that he wanted to file a revision is unwarranted. (1968) 1 Andh WR 307.

(14) Small cause suit fixed for final disposal — Adjournment granted at instance of defendant subject to payment of costs — Defendant praying for further adjournment on adjourned date without paying adjournment costs — Court is justified in refusing further adjournment and proceeding ex parte. AIR 1964 Bom 38 (38): 65 Bom LR 584.

(15) The Judges should always endeavour to hear the evidence on the date fixed, as much expenses and inconvenience is caused by postponements ordered on insufficient grounds before the witnesses in attendance have been heard. 67 Pun LR 1001: ILR (1965) 2 Punj 504.

(16) Held on facts, that a short adjournment on payment of substantial costs would have met the ends of justice and the condition should have been imposed that on the next hearing the party must make an arrangement for conduct of the appeal. (1962) 64 Pun LR 139: 1961 Cur LJ 49.

(17) Suit instituted in Small Cause Court — On date of first hearing defendant applying for adjournment without any affidavit — Defendant unwilling to pay adjournment costs also — Provisions of O. 37 held were inapplicable — If he did not pay costs, he would not have been allowed to file written statement—Order refusing adjournment held was erroneous and liable to be set aside. AIR 1959 Manipur 14 (14).

4. "The Court shall fix a day." — Sub-rule (2).—(1) Where a suit is adjourned, the date to which it is adjourned should be fixed by order of Court. 1882 All WN 171 (171) (DB).

(2) The 'day' contemplated by Rules 1 and 2 shall be a day other than the day on which the suit had been taken up before the grant of adjournment. There cannot be adjournment of the suit for hearing to the latter part of the same day. 1965 All LJ 575 (576).

Order 17 Rule 1 — Note 4 (contd.)

(3) The date fixed should be communicated to the parties or their pleaders or to such of them as are present or represented in Court when the adjournment takes place. AIR 1923 All 79 (80) (DB) ** AIR 1957 All 805 (807) ** AIR 1925 Pat 807 (809): 4 Pat 440 (DB).

(4) It is not necessary to communicate the date fixed to an absent party. AIR 1930 Mad 113 (114, 117) (SB) ** AIR 1952 Mad 798 (799).

(5) Where the date fixed for hearing a case happens to be a holiday the Court is not justified in taking up the case on the following day and in passing any order to the prejudice of any of the absent parties without duly serving upon them a fresh notice of the hearing. AIR 1957 Punj 80 (80): ILR (1957) Punj 746.

5. Costs of adjournment—Sub-rule (2).—(1) In granting an adjournment under this rule, the Court may, if it thinks fit, direct the party asking for adjournment to pay costs to the other party. ILR (1954) 4 Raj 721 (726) ** AIR 1950 Assam 169 (171) (DB) ** AIR 1928 Rang 306 (307): 6 Rang 561 (DB).

(2) The sum awarded as costs should not be in the nature of penalty or punishment. AIR 1953 Bhopal 6 (7) ** AIR 1946 Bom 113 (114) (DB) ** AIR 1942 Lah 162 (163) (DB) ** AIR 1964 J and K 58 (59): 1964 Kash LJ 68.

(3) Costs should be such as can reasonably be held to be occasioned by adjournment and should not be restricted to the costs of the day. Costs mean costs of the day including the reasonable fee for the opposite party's pleader. AIR 1959 All 516 (517, 518): 1959 All LJ 136 (DB).

(4) Sufficient opportunity should be given to the party to obey the order awarding costs. (1909) 36 Cal 566 (571) (DB) ** AIR 1926 Cal 1221 (1222) (DB).

(5) The rule gives the Court power to make an order as to costs only in respect of the costs occasioned by the adjournment. AIR 1946 Bom 113 (114) (DB) ** AIR 1938 Mad 711 (711).

(6) The payment of costs may be made a condition precedent to the adjournment. AIR 1941 Mad 437 (438) ** AIR 1928 Rang 306 (307): 6 Rang 561 (DB).

[But see AIR 1958 All 330 (331).]

(7) If a suit or appeal is adjourned on condition that it will stand dismissed if the costs of the adjournment are not paid within a certain date, then on failure of payment of costs within such a date, the suit or appeal will stand dismissed. AIR 1941 Mad 437 (438)**AIR 1940 Nag 158 (159) ** AIR 1925 Oudh 102 (103): 27 Oudh Cas 225 (DB).

(8) If the suit is adjourned on condition that if the defendant does not pay the costs ordered before the adjourned date, the defence will be struck off and the suit proceeded with ex parte, the Court can in case of default strike off the defence. AIR 1954 Mad 267 (268) ** AIR 1958 All 330 (331) ** AIR 1950 Assam 169 (171) (DB).

(9) When the Court orders that payment of adjournment costs by the plaintiff is to be made by the end of a month and the end of such month happens to be a holiday it is no breach of that order for the party to do the act on the very first subsequent day on which the Court reopens after the holiday. AIR 1957 Cal 598 (599, 600).

(10) Suit for benefit of minor — Adjournment — Court is competent to direct payment of costs against minor's estate. AIR 1961 Andh Pra 446 (448): (1961) 2 Andh WR 15 (DB).

6. Costs in pauper suits.—(1) A plaintiff suing in forma pauperis may be ordered to pay costs as a condition precedent to his being granted an adjournment. AIR 1941 Mad 437 (437, 438) ** AIR 1928 Rang 306 (307) : 6 Rang 561 (DB) ** AIR 1959 All 516 (517, 518) : 1959 All LJ 136 (DB).

7. Proviso.—(1) Where the trial of the suit has once begun, it should ordinarily go on from day to day. The Court has, however, a discretion to adjourn the trial of a part heard case to a day beyond the following day, but in such a case the Court should record its reason therefor. (1910) 8 Ind Cas 990 (991) (Low Bur).

(2) In exercising its discretion the Court should act of itself and not ask for orders of the superior Court in the matter. AIR 1915 Mad 78 (78) (DB).

(3) Application under Section 9, Hindu Marriage Act — Petitioner applying for adjournment on ground of his inability to pursue matter diligently as he was transferred to Kashmir—Application held not one under Order 23, Rule 1 — Court ordering that application be closed observing that petitioner could file separate application as and when convenient to him — Order held amounted to adjournment sine die. AIR 1966 Andh Pra 73 (75): (1965) 1 Andh LT 276 (DB).

8. Appeal. — (1) No appeal lies from an order refusing adjournment under this rule. AIR 1917 Nag 48 (49).

(2) An order refusing adjournment is liable to correction by an Appellate Court in an appeal from the decree in the suit. AIR 1920 Nag 221 (222): 16 Nag LR 1.

(3) The exercise of discretion under this rule is not liable to be interfered with in second appeal. AIR 1914 All 230 (232) ** AIR 1935 All 476 (477).

(4) An appeal lies from an order dismissing a suit for non-payment of adjournment costs. No restoration of the suit can be ordered under the inherent power of the Court in such a case. AIR 1943 Nag 149 (150, 151).

[But see AIR 1950 Assam 169 (174) (DB).]

(5) It is a matter within the discretion of the Court to allow an adjournment and such a discretionary order is ordinarily not a matter for the consideration of the

R. 2. Procedure if parties fail to appear on day fixed.—Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

[1882 and 1877, S. 157; 1859, S. 147.]

HIGH COURT AMENDMENTS

Allahabad

Add the following:—

"Where the evidence, or a substantial portion of the evidence, of any party has already been recorded and such party fails to appear on such day, the Court may in its discretion proceed with the case as if such party were present, and may dispose of it on the merits.

Explanation.—No party shall be deemed to have failed to appear if he is either present or is represented in Court by agent or pleader, though engaged only for the purpose of making an application." [28-5-1943.]

Andhra Pradesh

Add at the end of Rule 2, the following explanation:—

"Explanation.—The mere presence in Court of a party or his counsel not duly instructed shall not be considered to be an appearance of the party within the meaning of this rule." (27-4-1961.)

Order 17 Rule 1 — Note 8 (contd.)

Supreme Court in an appeal under Article 136 of the Constitution unless exceptional circumstances demand it. **AIR 1963 SC 146 (150, 151): (1963) 2 SCR 733.** (Order of High Court refusing adjournment set aside looking to the circumstances of the case.)

(6) Leave to sue granted to plaintiff under Letters Patent (Cal.) Cl. 12 — Application by D for revocation of leave — Summons served only on plaintiff — Adjournment prayer at hearing by D to have opportunity to serve summons on other parties — Judge refusing adjournment and dismissing application as defective and possessing no merits — Adjournment though discretionary matter, Appellate Court can examine whether discretion was judicially exercised. AIR 1966 Cal 1 (5, 6) (DB).

9. Revision.—(1) An order of adjournment is not liable to revision. AIR 1924 Nag 417 (418) ** AIR 1914 All 176 (176).

(2) Where an adjournment is refused and the suit is either dismissed for default or decreed ex parte, a revision will lie from an order passed in appeal against an order refusing to set aside the dismissal for default or the ex parte decree as the case may be. AIR 1922 All 72 (73): 44 All 325 ** AIR 1924 Nag 298 (299).

(3) Where refusal to grant time amounts to arbitrary exercise of discretion the High Court will interfere in revision. AIR 1952 Ajmer 29 (2) (29) ** AIR 1949 Lah 131 (145): Pak LR (1949) Lah 215 (FB).

(4) Labour Appellate tribunal wrongly refusing adjournment of hearing — Appellant virtually not represented — Appeal dismissed — Dismissal not on merits, not for non-prosecution — Appellant not enabled to apply under O. 41, R. 19 — High Court will interfere and order rehearing. AIR 1957 Bom 142 (144): ILR (1957) Bom 412 (DB).

10. Writ petition.—(1) Where in a telegram for adjournment of a hearing no ground at all was indicated nor was any referred to in the petition filed, the refusal to adjourn cannot be said to be unjustified — Matters like this are not properly within the sphere of writ petition. AIR 1959 J and K 123 (125).

ORDER 17, RULE 2 — SYNOPSIS

1. Scope and applicability.
1-A. Applicability to other Acts.
2. Execution proceedings.
3. "Any day to which the hearing of the suit is adjourned."
4. Appearance.
5. "Hearing".
6. "One of the modes directed by O. 9."
7. "Or make such other order as it thinks fit."
8. Appeal and revision.

1. Scope and applicability. — (1) The provisions of O. 9 by themselves do not apply to a case in which a plaintiff or defendant has already appeared but has failed to appear at the adjourned hearing of the case. For such a case the procedure is laid down in this Order. AIR 1953 Vindh Pra 10 (11) ** AIR 1945 Sind 98 (102): ILR (1945) Kar 1 ** AIR 1914 Cal 360 (361): 41 Cal 956 (DB).

(2) The provisions of O. 17 apply when there is default of appearance at an adjourned hearing, whereas O. 9 lays down the procedure to be followed on the non-

Order 17 Rule 2 — Note 1 (contd.)
appearance of the parties at the first hearing. AIR 1957 Cal 170 (171).

(3) If, at the hearing of a suit after settlement of issues, the parties or either of them fail to appear, the Court has a discretion neither to proceed under Order 9 or pass such other orders as the Court thinks fit. (1910) 8 Ind Cas 156 (157) (DB) (Mad) ** AIR 1917 Low Bur 77 (78) ** AIR 1939 Nag 213 (214): ILR (1939) Nag 574 (DB).

(4) Suit disposed of under circumstances which make this rule applicable — Such disposal will be referred to this rule. AIR 1941 Bom 83 (84): ILR (1941) Bom 150 (DB) ** AIR 1937 Rang 437 (438) (DB) ** 169 Ind Cas 226 (227) (DB) (Oudh).

(5) Where the Court dismisses the suit purporting to act under O. 11, R. 21 the dismissal is not under this rule. AIR 1958 Andh Pra 450 (451) (DB).

(6) The rule does not apply to proceedings after decree. Hence a suit cannot be dismissed for default after a decree has been passed therein. AIR 1924 PC 198 (200): 4 Pat 61: 51 Ind App 321.

(7) Where after a preliminary decree in a mortgage suit, a final decree for foreclosure has been passed ex parte, it can be set aside under this rule read with Order 9, Rule 13. AIR 1944 Nag 181 (181, 182): ILR (1944) Nag 425.

(8) A decree of the civil Court whether under O. 17, R. 2 or under O. 17, R. 3 has force of a decree unless set aside and is valid. If it is a decree under O. 17, R. 2 party concerned should ask for restoration of the suit. AIR 1963 All 143 (146): 1962 All LJ 786.

(9) Rule 2 is broader in its application than R. 3 because it will apply to all cases, in which date of hearing is adjourned, except those cases covered by R. 3, where the adjourned hearing is fixed at the instance of the defaulting party. AIR 1962 All 515 (517).

(10) Defendant's applying for adjournment on first date of final hearing — Application taken up after recording plaintiff's evidence without cross-examination — Defendants' counsel withdrawing from case — Application for adjournment rejected and suit decreed — Decision held could not be on merits. AIR 1962 All 549 (550).

(11) Where a party who is granted time to perform some act, not only fails to do it but is also absent on that date. it is R. 2 that applies and not R. 3. AIR 1961 Andh Pra 201 (203): 1960 Andh LT 835 (FB) ** AIR 1965 Andh Pra 479 (480): (1965) 2 Andh WR 15 (DB).

(12) On adjourned date plaintiff's counsel applying for adjournment — Application rejected and suit dismissed for default — O. 17, R. 2 held did not apply but O. 17, R. 3 applied. ILR (1960) 1 All 546 (565) (DB).

(13) Party absenting himself from proceedings after refusal of adjournment — Party set ex parte — Court deciding the matter after recording evidence of other party — Order passed falls under O. 17, R. 2 and not R. 3. AIR 1967 Andh Pra 152 (153): (1966) 1 Andh LT 34.

(14) Preliminary decree for accounts passed — It is not competent to Court to dismiss suit subsequently — Preliminary decree can only be reversed on appeal and whatever default there may be in subsequent stages of suit, preliminary decree itself cannot be vacated. AIR 1968 Andh Pra 289 (289): (1967) 2 Andh WR 13.

(15) Defendant not producing evidence on date fixed — Court not deciding suit forthwith but adjourning suit for plaintiff's evidence — Suit decreed ex parte — Order 17, R. 2 and not R. 3, applied. AIR 1964 J and K 63: 1963 Kash LJ 242 (DB).

(16) Where a suit is adjourned on the application of both parties, and on adjourned date the suit is decreed after examining plaintiff but in absence of defendant, the disposal can be both under R. 2 as well as under R. 3. 1963 Ker LT 256 (257): 1963 Ker LJ 218.

(17) Where the facts of the case show that it comes under R. 2 the mere fact that Court remarks while passing orders that it is acting under R. 3 will not make the order one under R. 3 and the appellate Court has to rectify the error. AIR 1964 Ker 99 (100, 101): 1963 Ker LT 320 (DB).

(18) Where a suit was initially dismissed under O. 17 R. 3 and an application for restoration was also dismissed as not maintainable, but later the order dismissing the suit was changed to O. 17, R. 2, the limitatnon for filing second restoration application will commence from the date when the order was changed to O. 17, R. 2, 1968 MPLJ 183 (186): 1968 Jab LJ 361.

(19) Where on a previous date a suit was adjourned for hearing and production of evidence on an application by the defendant, and on the adjourned date defendant not only did not produce evidence but also remained absent the disposal would be under O. 17, R. 2. AIR 1967 Orissa 14 (16): ILR (1965) Cut 846. (AIR 1964 Raj 147 (FB), **Dissented.**)

(20) Time granted to plaintiff to produce evidence — Plaintiff not producing such evidence and also absent on adjourned date— Court dismissing suit under Rule 3 does not act with material irregularity for both R. 3 and R. 2 apply to case. AIR 1964 Raj 147 (151): 1964 Raj LW 155 (FB). (ILR (1953) 3 Raj 798 **Overruled;** AIR 1918 Mad 143 (2) (FB) and AIR 1961 Andh Pra 201 (FB) and AIR 1937 Rang 437 and AIR 1933 Nag 370 and AIR 1952 Bhopal 43, **Dissented.**)

(21) Where the party to whom time has been granted for producing evidence, fails to appear on the adjourned date and

Order 17 Rule 2 — Note 1 (contd.)
there is no material on the record, on the basis of which a decision can be arrived at, the Court has no alternative but to proceed under R. 2 of O. 17; but, in a case where there is material on the record of the suit on which a decision can be arrived at, the Court may proceed either under R. 2 or under R. 3. AIR 1964 Pat 142 (143) ** AIR 1964 Orissa 246 (250): 32 Cut LT 107 ** 1962 Mys LJ (Sup) 553 (554).

(22) In interpreting O. 17, R. 2 the words used should be given full effect. The words are sufficiently wide to enable a Court to decide a case on merits. 1966 Raj LW 81 (83): ILR (1966) 16 Raj 573.

(23) In a case, where on any day to which the hearing of the suit is adjourned (that is, where the adjournment was not granted to any party to the suit), if the parties or any of them fail to appear, and the Court disposes of the case, under O. 17, R. 2 the only remedy of the party is under Order 9. AIR 1960 Raj 245 (247): 1960 Raj LW 217 (DB).

(24) Where in a suit fixed for plaintiff's evidence but on date of hearing plaintiff's counsel though present does not take part in the proceeding and the suit is dismissed for want of proof the dismissal is one for default. AIR 1961 Raj 88 (91): 1961 Raj LW 538.

1A. Applicability to other Acts. — (1) Election Tribunal not competent to dismiss election petition for default — Wrong order of dismissal for default — Subsequent order to proceed with petition valid — No question of restoration can arise. AIR 1964 All 181 (183) (DB). (AIR 1958 MP 260, **Dissented.**)

(2) Dismissal of suit under S. 4 of Provincial Insolvency Act (1920) for default falls under Rule 2 and is not final. AIR 1967 Delhi 115 (117) (DB).

(3) Where a probate suit is adjourned on joint petition filed by both the parties and on the day to which the hearing of the suit is adjourned the defendants file hazri but the plaintiffs who did not compromise the suit fail to take steps in the case, the provisions of O. 17, R. 2 and not of O. 17, R. 3 apply. AIR 1963 Pat 83 (85): 1962 BLJR 854 (DB).

2. Execution proceedings.— (1) This rule does not apply to execution proceedings. AIR 1955 Nag 305 (306): ILR (1956) Nag 390 (DB) ** AIR 1933 Mad 418 (422): 56 Mad 490 (FB) ** (1893) 15 All 84 (94) (FB).

(2) An order dismissing an execution application without going into merits, on refusal of adjournment, without asking the decree-holders' advocate what he wanted to be done in the circumstances is against the principles of natural justice and the Court has inherent power to restore the case. **AIR 1953 SC 23 (27): 1953 SCR 136.**

3. "Any day to which the hearing of the suit is adjourned." — (1) This rule does not apply unless the day to which a suit has been adjourned is a day fixed for the hearing or trial of the case. AIR 1954 Madh B 147 (148) ** AIR 1945 All 352 (353): ILR (1945) All 499 (DB).

(2) Where the day is fixed for the hearing of an application for the appointment of a guardian ad litem of a minor defendant this rule has no application. (1911) 33 All 560 (562) (SB) ** AIR 1922 Pat 252 (254, 255): 6 Pat L Jour 650 (DB) ** AIR 1924 Pat 714 (715) (DB).

(3) The adjournment mentioned in R. 2 may be one which may have been granted at the instance of the party or may have been ordered for other reasons as well. AIR 1954 Raj 129 (130): ILR (1953) 3 Raj 768 (DB) ** AIR 1952 All 198 (200) (DB).

(4) Where a suit was postponed to a fixed day for finding out the whereabouts of an unserved defendant and no other separate day was specifically fixed for hearing, it was held that the date fixed was the date of the hearing of the suit. AIR 1919 Sind 89 (90): 13 Sind LR 149 (DB).

(5) Where a suit is fixed for peremptory hearing and nothing is done by the parties or by the Court which can be regarded as commencement of the hearing of the suit, the date fixed must be held to be the first date of hearing of the suit and if both the parties remain absent on that date the Court exercises its discretion properly on dismissing the suit and in not adjourning it to a future date under O. 17, R. 2. AIR 1957 Cal 170 (171).

(6) Postponement of case cannot be had by parties merely on the ground of convenience of their counsel. AIR 1962 All 407 (411, 412): 1962 All LJ 495 (DB).

(7) "Day" contemplated by Rr. 1 and 2 of O. 17 should be day other than the one on which suit was taken up before being adjourned. There cannot be an "adjournment" to a later part of the same day. 1965 All LJ 575 (576).

(8) Where after issues are settled and date is fixed for final hearing, that date is the date to which hearing is adjourned under Order 17, Rule 2. If the case falls under second Clause of Rule 2 or is covered by the explanation added by Allahabad High Court, the Court can and should dispose of the case on merits on such date. 1968 All WR (HC) 658 (662): 1969 All LJ 264.

4. Appearance. — (1) There is no "appearance" on behalf of a party merely because a pleader who has instructions only to apply for an adjournment and not to conduct the suit, applies for an adjournment on his behalf. AIR 1943 Bom 321 (322): ILR (1944) Bom 1 (FB) ** AIR 1952 Mad 160 (160): ILR (1952) Mad 547 ** AIR 1942 Bom 344 (344) (DB).

Order 17 Rule 2 — Note 4 (contd.)

(2) The mere fact that before the case is called on for hearing a pleader files a list of witnesses, does not amount to the party being "represented" at the hearing within the explanation added to this rule by the Allahabad High Court. AIR 1936 All 619 (620, 621) (DB).

(3) Where on the day of the adjourned hearing the pleader reports that he has no instructions and the party is absent and a decree is passed in the suit, the Explanation added by the Allahabad High Court does not apply and the decree is an ex parte decree. AIR 1933 All 652 (654) (DB) ** 1962 All LJ 495 (498).

(4) In spite of the counsel withdrawing from the case after the application for adjournment was rejected, the plaintiff would be deemed to be present as the case falls under the Explanation to R. 2 added by the Allahabad High Court. AIR 1957 All 107 (109, 110) (DB).

(5) Where the plaintiff though physically present in Court refuses to take part in the proceedings, he cannot be said to have appeared at the hearing. AIR 1955 Mad 258 (259): ILR (1955) Mad 883: (1961) 2 Ker LR 206 (207).

(6) Plaintiff's pleader absent on date fixed for arguments — Plaintiff's request for adjournment not granted — Suit dismissed — Suit held was dismissed for default. AIR 1951 Hyd 69 (1) (69): ILR (1951) Hyd 215 (DB).

[But see 1953 Raj LW 323 (324).]

(7) Where on the day of the adjourned hearing the counsel of a party makes a statement in Court that he has no instructions to proceed with an application made by him, it must be held that he had ceased to represent the party. AIR 1962 All 407 (410): 1962 All LJ 495 (DB).

(8) Where defendant was absent at hearing, but his counsel appeared and moved for stay of suit, but on his application for stay being refused he did not disclose that he was instructed only for obtaining a stay and nothing more defendant cannot be said to have "failed to appear" and decree passed is not an ex parte decree and application to set it aside is not maintainable. 1963 All LJ 450 (455) (DB).

(9) Application by defendant for adjournment on ground that the suit was settled mutually rejected—Suit ordered to be proceeded ex parte and decree passed — Defendant though present not taking part in the suit — Subsequent order for decree was one under Order 17, Rule 2 and not under Order 17, Rule 3 — "Failure to appear" in Order 17, Rule 2 does not necessarily mean the physical absence of the defendant. AIR 1967 Assam 14 (15): ILR (1964) 16 Assam 260.

(10) Plaintiffs ready with witnesses — On adjournment being refused, advocate for defendant withdrew from case as he had no instruction to proceed — Court proceeded to decide matter on materials on record and passed a decree in favour of plaintiff — Decree held was on merits and came under Order 17, Rule 3 and not under Order 17, Rule 2. AIR 1961 Assam 99 (100, 101): ILR (1961) 13 Assam 463. (AIR 1925 All 182 and 34 Mad LJ 24: AIR 1918 Mad 143 (2) (FB) and (1951) 2 Mad LJ 483: AIR 1952 Mad 160, **Dissented from.**) ** AIR 1964 Assam 144 (144): ILR (1964) 16 Assam 579.

(11) Appearance contemplated by O. 17, Rule 2, need not be in person; appearance by a lawyer is also valid and sufficient appearance. AIR 1959 Cal 389 (392): 63 Cal WN 300 (DB).

(12) Where an adjournment was not granted for any of the three things described in Rule 3 and where there was no default in the performance of those things, Order 17, Rule 3 will not apply. 1960 Ker LT 648 (649).

(13) Mere presence of plaintiff in Court when the suit was dismissed for default cannot be treated as default in participating in proceedings or as boycotting the Court. Word "appearance" in Rule 2 means appearance for prosecuting a pending case or suit in Court. AIR 1967 Orissa 152 (153): 31 Cut LT 1131.

5. "Hearing." — (1) The word "hearing" means the taking of evidence or the hearing of arguments or the consideration of questions relating to the suit which would enable the Judge to finally come to an adjudication upon it, and not the consideration of merely interlocutory matters. **AIR 1924 PC 198** (199): 51 Ind App 321 ** AIR 1953 Assam 150 (151): ILR (1952) 4 Assam 372 ** AIR 1936 Lah 280 (281).

(2) The word "hearing" refers, so far as this rule is concerned, to the commencement of the hearing on each day of the hearing. AIR 1927 Mad 799 (800).

(3) Where a suit is stayed and kept pending awaiting the result of an earlier suit it cannot be said that the suit was adjourned for hearing. AIR 1953 Hyd 251 (252): ILR (1953) Hyd 171.

(4) The reader of a Court, when the presiding Judge is on leave, is not competent to pass an order. The non-appearance of the plaintiff on a date so fixed should not entail the dismissal of the suit for default. (1932) 33 Pun LR 804 (805) ** AIR 1934 Lah 984 (984) ** 1968 Kash LJ 1.

[See however AIR 1952 Mad 798 (799).]

(5) "Hearing" does not necessarily mean recording of evidence — Suit already adjourned — Defendant presenting application on the adjourned date that the case should not be taken up that day — Court when considering the application can be said to be "hearing" the case. ILR (1960) 1 All 546 (552).

Order 17 Rule 2 (contd.)

6. "One of the modes directed by Order 9." — (1) Provisions of Order 9 can be applied as nearly as may be — Any attempt to apply them literally would not only make Order 17, Rule 2 unnecessary but would defeat its ends. AIR 1944 Nag 181 (183): ILR (1944) Nag 425.

(2) If the plaintiff fails to appear at an adjourned hearing, the Court may make an order dismissing the suit for default under this rule and Rule 8 of Order 9, and the plaintiff may thereupon apply for restoration of the suit under Order 9, Rule 9. AIR 1952 Assam 33 (33) (FB) ** 1958 All WR (HC) 76 (78) ** 1958-2 Andh WR 294 (295) ** (1907) 34 Cal 403 (417) (FB).

(3) If the defendant fails to appear at an adjourned hearing, the Court may pass an ex parte decree under this rule and Rule 6 of Order 9, and the defendant may thereupon apply under O. 9, Rule 13 to set aside the ex parte decree. AIR 1951 Assam 13 (14): ILR (1950) 2 Assam 527 (DB) ** AIR 1944 Nag 181 (183): ILR (1944) Nag 425 ** (1896) 23 Cal 738 (753, 756, 758, 760, 764, 765) (FB).

(4) If neither party appears at an adjourned hearing, the Court may dismiss the suit under this rule and Rule 3 of Order 9; and the plaintiff may thereupon either file a fresh suit or apply to have the dismissal set aside. AIR 1949 Sind 26 (28): ILR (1948) Kar 87 (DB) ** AIR 1933 Nag 234 (235, 236): 29 Nag LR 148 ** 1966 All WR (HC) 733 (734).

(5) The provisions of this rule will not apply to proceedings after decree. AIR 1924 PC 198 (200): 4 Pat 61 : 51 Ind App 321 ** AIR 1932 Mad 519 (522) (DB).

(6) Suit dismissed for default in appearance by plaintiff on adjourned date — Court not bound to dismiss suit — If dismissed, dismissal order shall be deemed to be one under Order 9 read with Order 17, Rule 2. 1966 All LJ 1078 (1079): 1966 All WR (HC) 399.

(7) In a case coming under Order 17, Rule 2, by reason of the plaintiff's failure to appear on a date of an adjourned hearing of a suit, an application for restoration of suit under Order 9, Rule 9, can lie only when the Judge proceeds under Order 9, Rule 8, to dismiss the suit, instead of deciding the suit on such evidence as there may be before him. AIR 1959 Cal 389 (394): 63 Cal WN 300 (DB).

(8) There is no doubt that the Legislature contemplated that if the other conditions set forth in Rule 3 are satisfied the decision thereunder should be on merits.

If an order is erroneously passed under Order 17, Rule 3 and is relatable to one of the rules of Order 9, an application for the setting aside of the order also lies. AIR 1963 Him Pra 30 (31, 32). (AIR 1924 All 144 and AIR 1944 All 211 and AIR 1954 All 222, Not foll.)

(9) If the suit came to be disposed of on account of the non-appearance of the plaintiff on a hearing day but it was not at the instance of the plaintiff that the suit was adjourned for the day it came to be disposed of, the Court can proceed only under Order 17, Rule 2. An application under Order 9, Rule 9 by the plaintiff would be maintainable. AIR 1962 Ker 17 (18): 1961 Ker LT 178.

(10) Execution application relating to old decree adjourned several times — Judgment-debtors absent on last hearing and pleaders retiring for want of instructions — Court is bound to refuse further adjournment. AIR 1965 Mys 59 (60): (1964) 1 Mys LJ 325 (DB).

7. "Or make such other order as it thinks fit." — (1) Under the rule the Court is given the widest possible discretion either to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit and the Court must exercise that discretion. **AIR 1955 SC 425 (433): (1955) 2 SCR 1** ** AIR 1962 Punj 443 (445): 64 Pun LR 590 (DB).

(2) Under the rule the Court is not bound to dismiss the suit for default in all circumstances. It depends upon the particular circumstances whether an order for dismissal is more appropriate than any order that would advance the case. It is not always necessary to take an extremely strict view of the rule. AIR 1958 Andh Pra 652 (653): ILR (1957) Andh Pra 361 (DB).

(3) The expression "such other order as it thinks fit" only empowers the Court to grant an adjournment and not to decide the case on the merits. AIR 1957 All 344 (346) ** AIR 1925 All 267 (271): 47 All 140 (DB) ** (1908) 18 Mad L Jour 51 (54) (DB) ** AIR 1959 Cal 389 (394): 63 Cal WN 300 (DB).

[But see AIR 1916 Mad 897 (897) ** (1907) 34 Cal 235 (237) (DB) ** (1908) 35 Cal 1023 (1026, 1027) ** AIR 1943 Bom 321 (324): ILR (1944) Bom 1 (FB).]

(4) The Court cannot proceed under this rule when there is no material on record. ILR (1953) Madh B 185 (188).

(5) Consolidated suits — Application for adjournment made in one suit granted — Plaintiff in second suit absent on adjourned date and his suit dismissed — Dismissal is not on merits but for default of appearance — Application under O. 9, Rule 9 is maintainable. AIR 1957 All 238 (238, 239) (DB).

(6) The use of the words "such party" in Rule 2 added by the Allahabad High Court shows that the party failing to appear should be the party whose evidence or substantial portion of whose evidence

Order 17 Rule 2 — Note 7 (contd.)
had already been recorded by the Court. AIR 1957 All 344 (346) (DB).

(7) Where the evidence has not yet begun, the Court should either proceed under Order 9 or adjourn the case. AIR 1933 Nag 370 (372): 30 Nag LR 94.

(8) Where the case is part-heard, the rules vests in the Court a discretion either to proceed under Order 9 or to give a decision on the merits. AIR 1925 Oudh 433 (434) ** AIR 1933 Nag 234 (236): 29 Nag LR 326.

(9) In cases where the plaintiff has adduced all his evidence or has made out a prima facie case, but is absent at the adjourned hearing, the Court should proceed to give a decision on the merits and not dismiss the suit for default. (1905) 7 Bom LR 261 (262) (DB) ** AIR 1916 Mad 897 (897) ** AIR 1929 Pat 248 (248, 249) (DB).

(10) Where a case is adjourned to enable the plaintiff to furnish the required particulars, but on that date the plaintiff and his pleader are not present, the Court is empowered to decide the suit on merits or to dismiss it for default of appearance, 1957 Jab LJ 837 (839).

(11) Where a defendant does not appear at an adjourned hearing, irrespective of whether he appeared at the first hearing or not, this rule applies and the Court has to exercise its discretion; its hands are not tied by the previous ex parte order or by the provisions of O. 9, Rule 7. **AIR 1955 SC 425 (433): (1955) 2 SCR 1.**

(12) An order dismissing a suit for want of prosecution when R. 2 added by the Allahabad High Court applies must be construed as if the order was of dismissal for want of evidence. But where the Court clearly says that it is passing an order under Order 9, other considerations might apply. AIR 1957 All 107 (109) (DB).

(13) The effect of an order setting aside an ex parte decree is that all proceedings subsequent to the stage of the defendant's non-appearance no longer bind him. Consequently, where afterwards on the date fixed for peremptory hearing, both parties remain absent, the materials which were available to the Court at the time of passing the ex parte decree against the defendant cannot be utilised in passing an ex parte decree against the plaintiff. AIR 1957 Cal 170 (171) ** AIR 1962 All 381 (382): 1962 All LJ 305 (DB).

(14) Part-heard case adjourned for cross-examination of plaintiff — Plaintiff and his counsel absent— Defendant seeking some time for inspecting document — Court adjourning the suit to some other date on terms — Order is valid — Case governed by Order 17, Rule 2 and not Order 9, Rule 8 — Court not bound to dismiss the suit. (1967) 1 Andh WR 291 (293).

(15) Order 17, Rule 2 empowers the Court to dispose of the suit in one of the modes directed in that behalf by Order 9, or to make such other order as it thinks fit and the Court would be exercising its discretion correctly in favour of the other course only where on the record the plaintiff has already made a case which if uncontradicted would entitle him to a decree. AIR 1959 Manipur 23 (24).

(16) Even in cases of default under Order 17, Rule 3, there is a discretion left in the Court either to proceed to decide case on merits or to give an ex parte decree under Order 17, Rule 2. AIR 1959 Pat 342 (343) (DB).

8. Appeal and revision. — (1) No appeal lies from an order dismissing a suit under this rule. AIR 1952 Assam 33 (33) (FB) ** AIR 1955 Mad 258 (259): ILR (1955) Mad 883 ** ILR (1953) 3 Raj 798 (802) (DB).

(2) An order dismissing a suit or appeal for default under this rule may be open to revision. AIR 1925 Pat 433 (434) (DB) ** AIR 1933 Nag 234 (236): 29 Nag LR 326.

(3) Where a Court wrongly held that no application under Order 9, Rule 13 lay against an order under this rule, it was held that it amounted to a refusal to exercise jurisdiction vested in it and hence liable to revision. AIR 1949 All 221 (221) ** AIR 1925 All 267 (269, 270): 47 All 140 (DB).

(4) Adjourned hearing — Both plaintiff and defendant not appearing — Suit dismissed — Application for restoration also dismissed — Order of dismissal is not appealable. AIR 1949 Sind 26 (28): ILR (1948) Kar 87 (DB).

(5) Whatever provision may be relied upon by the trial Court for dismissal of the suit it is for the plaintiff to seek the remedy which would be open to him if the correct provision has been relied upon. Thus, where the dismissal ought to have been in default under Order 17, Rule 2, read with Order 9, his remedy is to apply for restoration. 1958 All WR (HC) 76 (78).

(6) Where in an appeal against a decree all defendants except one were ex parte an appeal against the decree by the contesting defendant is maintainable. AIR 1967 Ker 76 (76).

(7) In a case where Order 17, Rule 2 applies the remedy of the defendant is not one by way of appeal or revision but by way of getting the ex parte decree set aside. (1961) 27 Cut LT 326 (329) ** AIR 1961 Andh Pra 201 (203): 1960 Andh LT 835 (FB).

R. 3. Court may proceed notwithstanding either party fails to produce evidence, etc.—Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

[1882 and 1877, S. 158; 1859, S. 148.]

HIGH COURT AMENDMENTS

Allahabad

In Rule 3, put a comma after the first word "where" and insert thereafter the words "in a case to which Rule 2 does not apply". (17-1-1953.)

Andhra Pradesh

Add at the end of the Rule 3 the following Proviso:—

"Provided that in a case where there is default under this rule as well as default of appearance under Rule 2, the Court will proceed under Rule 2". [27-4-1961.]

ORDER 17, RULE 3 — SYNOPSIS

1. Scope and applicability.
1A. Allahabad Amendment.
2. Execution proceedings.
3. Distinction between Rules 2 and 3.
4. "To whom time has been granted."
5. When is party deemed to fail to do the act for which time has been granted.
6. "Any other act necessary to the further progress of the suit."
6A. Forthwith.
7. Remedy of a person aggrieved by an order under this rule.

1. Scope and applicability. — (1) The conditions for the applicability of the rule are:

(a) that time must have been granted to a party at his instance. AIR 1956 Bhopal 26 (26) ** AIR 1956 Nag 179 (180): ILR (1956) Nag 132 (DB) ** ('47) AIR 1947 Sind 1 (3): ILR (1946) Kar 349 (FB).

(b) that time must have been granted as aforesaid to do one or other of the three things mentioned in the rule. AIR 1951 Assam 13 (14): ILR (1950) 2 Assam 527 (DB) ** (1907) 34 Cal 235 (240) (DB) ** AIR 1915 Lah 439 (440): 1915 Pun Re No. 51 (DB).

(c) that default must have been committed by the party in doing the act for which time was granted. AIR 1915 Lah 439 (439): 1915 Pun Re No. 51 (DB) ** AIR 1921 Bom 458 (458): 45 Bom 1181 (DB) ** 1962 MPLJ 325: ILR (1962) Madh Pra 766.

(2) Rule 3 comes into operation only where the parties are present and are prepared to proceed with the further hearing of the case but default of the kind mentioned in that rule is committed. AIR 1961 Andh Pra 201: 1960 Andh LT 835 (838) (FB).

(3) Where a party fails to produce the evidence or perform the act for which time had been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith. AIR 1964 Raj 147 (151, 152): 1964 Raj LW 155 (FB). (1954 Raj LW 230, **Overruled** on another point.)

(4) Where two rival suits are consolidated and an application for adjournment is made in one suit by the plaintiff of that suit, and the suit is adjourned, the second suit is also adjourned because it is connected with the former. But such adjournment of the second suit not having been made at the instance of the plaintiff of that suit cannot be treated as an adjournment which would call for the application of Rule 3. AIR 1957 All 238 (238, 239) (DB) ** **AIR 1964 SC 993 (1005, 1006): (1964) 5 SCR 946.**

(5) The rule is permissive and not mandatory as is shown by the words "the Court may" proceed to decide the suit forthwith. AIR 1953 Assam 91 (92): ILR (1952) 4 Assam 112 ** AIR 1953 Trav-Co 387 (388) (DB) ** AIR 1951 Raj 166 (167): ILR (1951) 1 Raj 152 ** AIR 1966 All 615 (617): 1964 All LJ 1085. (A decree passed beyond the period contemplated by this rule, it shall not on this ground alone be invalid.)

(6) As the application of this rule restricts the future remedies of a defaulting party and it is a stringent provision it should be applied with circumspect, caution and judicial restraint. AIR 1964 Raj 147 (151, 152): 1964 Raj LW 155 (FB).

(7) The stringent provisions of the rule should not be applied unless the facts do not admit of the application of any other provision of the Code. AIR 1952 Madh B 46 (47) ** 1899 Pun Re No. 80, p. 335 (336) (DB) ** (1889) 11 All 91 (92) (FB).

(8) The provisions of law contained in Order 17, Rule 3, C. P. C. are penal in their nature and must be construed strictly. And in view of the stringency of the provisions and of drastic conse-

Order 17 Rule 3 — Note 1 (contd.)
quences that follow they should be applied only when the facts admit of no doubt and the conduct of the party at fault cannot be excused. AIR 1960 Punj 500 (506): 62 Pun LR 624 (DB) ** AIR 1964 Ker 99 (101): 1963 Ker LT 320 (DB) ** 1961 Ker LT 653.

(9) Dismissal of suit for default of plaintiff in paying process fee — Application for restoration — Court hearing it and restoring suit without issuing notice to defendants who were present on the day the order of dismissal of suit was made — Court held acted illegally and in any case indiscreetly in restoring suit. AIR 1963 Him Pra 30 (31) ** AIR 1962 J and K 21 (22). (Failure to pay guardian's fee for minor defendant — Suit dismissed at the preliminary stage even before issues were framed—Dismissal is not under O. 17, Rule 3 — Decision not on merit.) ** AIR 1959 Punj 306 (307): 61 Pun LR 286 (DB).

[See also AIR 1962 All 549 (550). (Application by defendant for adjournment date of final hearing — Application taken up after recording plaintiff's evidence without cross-examination — Deft.'s counsel withdrawing from case and his application rejected — Suit decreed —Decision cannot be on merits.)]

(10) Where neither time is granted to a party to do any act on the adjourned date nor does the Court proceed to decide the suit forthwith, the Court cannot act under this rule. AIR 1957 All 344 (346) (DB).

(11) If, in the case of the plaintiff, necessary and available materials fail to substantiate the claim, the suit will be dismissed on that ground and not for the default committed by him. (1956) 22 Cut L Tim 395 (397) ** AIR 1927 Mad 109 (110).

(12) Defendant retiring from case on adjourned day of hearing after Court's order that defendant was to begin with evidence — Court recording evidence of plaintiff and decreeing suit — Application for setting aside decree under O. 9, Rule 13 not maintainable. (1965) 31 Cut LT 871: ILR (1966) Cut 51.

(13) A decree passed against the defendant under this rule will not be an ex parte decree which can be set aside under Order 9, Rule 13. AIR 1943 Sind 94 (95): ILR (1942) Kar 547 (DB) ** AIR 1939 All 642 (643).

(14) The principle of this rule can be applied to miscellaneous proceedings, such as an application for setting aside an ex parte decree. AIR 1950 All 338 (339): ILR (1951) 2 All 121 (DB)..

(15) The rule does not apply to proceedings under Section 36 (6) (a) of the Bengal Money-lenders Act of 1940. AIR 1943 Cal 152 (154): ILR (1943) 1 Cal 386 (DB).

(16) Court suo motu adjourning hearing and passing order on adjourned date, for production of evidence on the following day without any request from parties — Counsel for plaintiff reporting no instructions next day — Dismissal of suit by Court can only fall under O. 9, Rule 8 and not under Order 17, Rule 3 (All). AIR 1962 All 407 (410): 1962 All LJ 495 (DB) ** 1960 Ker LT 648.

[See also (1967) 69 Punj LR 149.]

(17) Refusal of a Court to grant further time to file a written statement does not come within the connotation of the clause 'proceed to decide the suit forthwith' in Order 17, Rule 3 where nothing has been done except to adjourn the case for filing document. AIR 1963 Andh Pra 116 (117): (1962) 2 Andh WR 201.

(18) Order 17, Rule 3 is a general provision of law which can be made applicable to any case. AIR 1964 J and K 79 (80): 1964 Kash LJ 173.

(19) The provisions of O. 17, R. 3 do not justify the striking out of defence. If the defendant is at fault then all that the court can do is to decide the suit forthwith. AIR 1960 Punj 500 (506) : 62 Pun LR 624 (DB).

(20) Order 17 Rule 3 permits decision on merits in cases of certain defaults. It has no relevance when the trial is otherwise concluded without any default by either side. In that case there could be decision on merits without invoking O. 17 R. 3. AIR 1969 Raj 75 (79).

1A. Allahabad Amendment. — (1) The words where in a case where Rule 2 does not apply indicate that Rule 3 contemplates two types of cases (1) where Rule 2 does not apply, (2) where Rules 2 and 3 both apply. In the second class of cases even if Rule 3 can apply it is excluded by Rule 2. 1966 All WR (HC) 399: 1966 All LJ 1078 (1080).

(2) After the amendment Rules 2 and 3 of O. 17 have become mutually exclusively and, if a case falls under Rule 2 it would not be open to the Court to proceed under Rule 3. 1969 All LJ 327 (328) (FB).

2. Execution proceedings.—(1) The provisions of this rule do not apply to execution proceedings. AIR 1955 Nag 305 (306): ILR (1956) Nag 390 (DB) ** AIR 1933 Mad 418 (422): 56 Mad 490 (FB)** (1893) 15 All 84 (94) (FB). (**Overruling** 15 All 49.)

(2) Execution case — Large number of adjournments given — Matter posted for evidence — Judgment-debtor absent on last date of hearing — Their pleader also retiring for want of instructions — **Held** court had no alternative but to refuse adjournment and proceed to dispose of the matter. AIR 1965 Mys 59 (60): (1964) 1 Mys LJ 325.

3. Distinction between Rules 2 and 3. — (1) Rule 2 applies where an adjournment has been generally granted. This rule ap-

Order 17, Rule 3 — Note 3 (contd.)

plies where the adjournment has been given for one of the purposes mentioned in it. AIR 1952 Assam 33 (33) (FB)**AIR 1943 Bom 321 (324): ILR (1944) Bom 1 (FB) ** AIR 1955 Mad 70 (71) (DB) ** AIR 1964 Orissa 246 (248): 32 Cut LT 107.

(2) Rule 2 does not apply unless the party has failed to appear at the hearing. Rule 3 will apply where the party is present and has committed the default referred to in the rule. AIR 1952 Mad 825 (825) (DB) ** AIR 1950 Nag 194 (195): ILR (1951) Nag 443 ** AIR 1946 All 353 (355) : ILR (1946) All 833 (FB) ** AIR 1967 Orissa 14 (16): ILR (1965) Cut 846 ** AIR 1965 Andh Pra 479 (480) : (1965) 2 Andh WR 15 (DB) ** AIR 1964 Ker 99 (100): 1963 Ker LT 320 (DB) ** AIR 1963 Manipur 47 (47).

[See however AIR 1951 Hyd 69 (1) (69): ILR (1951) Hyd 215 (DB).]

(3) While in R. 2 there is emphasis on the expression on the failure of the party to appear there is no reference to it at all in Rule 3. The latter rule puts emphasis on failure of duty on the part of the party to do certain things as previously directed. It does not cover a case where the party himself defaults to appear and in consequence thereof does not take the necessary steps as previously directed. AIR 1967 Orissa 14 (16): ILR (1965) Cut 846.

(4) Where a default under this rule is coupled with a default under R. 2, the Court has discretion to decide the suit on merits under this rule as amended by the Allahabad High Court. AIR 1957 All 107 (109, 110) (DB) ** ('58) 1958 All L Jour 290 (292) (DB) ** AIR 1934 Oudh 171 (174): 9 Luck 586 (DB) ** AIR 1965 Andh Pra 479 (480) : (1965) 2 Andh WR 15 (17) (DB) ** AIR 1962 All 515 (517). (Decision on merits held was covered by R. 3 and not by R. 2.)

[See also AIR 1964 Pat 142 (143).]

[See however AIR 1952 All 208 (209): ILR (1950) All 240 (DB).]

(5) By an amendment made in Allahabad in O. 17, R. 3 it has been specifically provided that O. 17, R. 3 applies only where O. 17, R. 2 is not applicable. 1966 All WR (HC) 733 (734).

(6) Where requisites of R. 2 are satisfied R. 3 should not be applied even though circumstances exist which satisfy the requisites of R. 3. AIR 1952 Mad 825 (825, 826) (DB) ** AIR 1918 Mad 143 (146): 41 Mad 286 (FB). **(Overruling** 34 Mad 97) ** AIR 1952 Bhopal 43 (44) ** AIR 1961 Andh Pra 201: (1960) 2 Andh WR 416 (FB) ** AIR 1964 Ker 99 (101): 1963 Ker LT 320 (DB) (When Rule 2 applies the mere fact that the Court remarks that it was acting under Rule 3 does not make that order under Rule 3.) **(AIR 1964 Raj 147 (151, 152): 1954 Raj LW 230, **Overruled.)**

[See however AIR 1964 Pat 142 (143). (Dismissal of suit for default instead of deciding it under R. 3 — Action of Court at the most only an improper act — Order can be rectified only under O. 9, R. 9.)]

(7) There is a discretion left in the Court even in case of default under the provisions of O. 17 R. 3 either to proceed to decide the case on merits or to give an ex parte decree in accordance with O. 17 R. 2. AIR 1959 Pat 342 (343) (DB).

(8) The circumstances of each case will regulate the exercise of discretion in each case. It is for the Court to exercise its discretion and to indicate without ambiguity whether it is exercising its power under Rule 3 or not. AIR 1964 Raj 147 (151): 1964 Raj LW 155 (FB).

(9) Where a party to whom time has been granted for the production of evidence or for the performance of any other act also does not appear it is a case of double default and the double default does not take away the case from the purview of O. 17, R. 3. AIR 1964 Raj 147 (151, 152): 1964 Raj LW 155 (FB) ** AIR 1967 Pat 366 (367).

[See however AIR 1967 Orissa 14 (16); ILR (1965) Cut 846. (AIR 1964 Raj 147 (FB). **Dissented.)** ** AIR 1964 Ker 99 (101): 1963 Ker LT 320 (DB).]

(10) Mere presence in Court of a party or his counsel not duly instructed cannot be considered as an appearance of the party within the meaning of O. 17 R. 3 and any decree passed in such circumstances would not be deemed to have been passed under O. 17, R. 3. AIR 1967 Andh Pra 152 (153): (1965) 2 Andh WR 481 ** AIR 1967 Assam 14 (15): ILR (1964) 16 Assam 260. (Failure to appear does not necessarily mean physical absence.) ** AIR 1962 All 549.

[See however AIR 1968 Mad 222 (222); (1967) 2 Mad LJ 502 ** (1963) 1 Mys LJ 544 (546) ** AIR 1961 Assam 99 (101): ILR (1961) 13 Assam 463.

(11) The circumstances of each case will regulate the exercise of discretion vested in a Court. It is for the Court to exercise its discretion and to indicate without ambiguity whether it is exercising its power under O. 17, R. 3 or not. AIR 1964 Raj 147 (151, 152): 1964 Raj LW 155 (FB).

(12) The Court can proceed under this rule if there are materials on record to enable the Court to come to a decision on the merits, otherwise the Court should proceed under Rule 2. AIR 1943 Bom 321 (324): ILR (1944) Bom 1 (FB) ** ILR (1955) Mys 552 (553) (DB) ** 1953 Raj LW 365 (366) (DB).

(13) Where the entire evidence is over and the case is posted to a day for the clearing up of a point or for the Court satisfying itself on a particular point before delivering judgment and the parties default on that day and fail even to ap-

Order 17, Rule 3 — Note 3 (contd.)
pear, the Court should proceed under Rule 3 and not under R. 2. AIR 1931 Bom 111 (113, 114) (DB) ** AIR 1914 Mad 381 (382) (DB).

(14) Where after closing evidence the case is adjourned for argument and neither the plaintiff nor the defendant is present, the Court should proceed to act under Rule 2, Order 17 and should not decide the case on merits purporting to proceed under R. 3, O. 17. AIR 1965 Andh Pra 479 (480): (1965) 2 Andh WR 15 (DB).

(15) In every case it will depend upon the interpretation of the order passed by the Judge on the adjourned date of hearing as to whether the order is one under O. 17, R. 3 or one under O. 17, R. 2. AIR 1967 Assam 14 (15): ILR (1964) 16 Assam 260.

(16) If a party takes part in the proceedings when the Court considers the question as to who should begin first and retires from the case after the decision of the Court on this point it is not a case of non-appearance of the party and if the Court decides the case on the materials before it it is an order under O. 17, R. 3. (1965) 31 Cut LT 871: ILR (1965) Cut 51 (56).

(17) Where the case after recording evidence was adjourned for arguments and on the adjourned date neither the plaintiff nor his advocate was present, the Court after the Andhra amendment has either to adjourn the case or as provided by O. 9, R. 8 dismiss the suit, if the defendant does not admit the claim or part thereof. AIR 1965 Andh Pra 479 (480): (1965) 2 Andh WR 15.

4. "To whom time has been granted."— (1) Where a party is ordered to be present at an adjourned hearing it does not amount to a granting of time to the party to do any act within the meaning of this rule. AIR 1940 All 217 (218) ** ('06) 1906 Pun Re No. 30. p. 112 (114) ** AIR 1927 Lah 388 (388) ** AIR 1968 Orissa 225 (226): 34 Cut LT 1389.

(2) Order 17, R. 3 empowers the Court to dispose of the suit on merits against a party only in case where the suit has been adjourned at his instance to enable him to produce evidence or to do any other act necessary for the progress of the suit. If the case is disposed of for non-appearance of the plaintiff but the case does not come within the purview of O. 17, R. 3 the Court can proceed only under O. 17, R. 2. AIR 1962 Ker 17 (18): 1961 Ker LT 178.

(3) An adjournment under O. 15, Rule 3(2) for the production of further evidence is not covered by this rule. AIR 1943 Bom 321 (324): ILR (1944) Bom 1 (FB) ** (1953) ILR (1953) 3 Raj 1038 (1040) (DB) ** AIR 1941 Bom 83 (85): ILR (1941) Bom 150 (DB) ** 1966 Raj LW 81 (81): ILR (1966) 16 Raj 573 ** (1961) 2 Ker LR 206: 1961 Ker LT 653 ** AIR 1961 Raj 59 (63): 1961 Raj LW 506.

(4) Apart from the provisions contained in Section 90 (3) from dismissal of a petition there is no provision permitting dismissal of an election petition without deciding the questions raised in the petition simply because one of the witnesses or one of the parties to the petition does not appear when the case is called for hearing. AIR 1964 All 181 (182) (DB).

(5) An adjournment on the joint application of both the parties is not within this rule. ('87) 10 Mad 270 (271) (DB) ** AIR 1964 SC 993 (1005, 1006): (1964) 5 SCR 946 ** AIR 1963 Pat 83 (85): 1962 BLJR 854 (DB) (1948 Mad 143 FB; 1943 Bom 321 (FB) Foll.)

[See however AIR 1939 All 524 (525, 526) (DB).]

(6) Adjournment of suit on application of both parties — Defendant absent on adjourned date — Court deciding case on plaintiff's evidence alone — Disposal is both under Rr. 2 and 3 — Defendant is entitled to show sufficient cause for non-appearance. 1963 Ker LT 256.

(7) The rule will not apply where time was granted not to the party in default but to the opposite party. 1956 Madh BLJ 399 (401) ** AIR 1947 Oudh 84 (85): 21 Luck 581 ** AIR 1968 All 119 (123) (DB).

(8) The time must have been granted for the doing of an act which it was not the duty of the Court to do. ILR (1953) 3 Raj 1038 (1040) (DB) ** AIR 1924 Lah 404 (404) (DB).

(9) Party paying process fee for summoning the witnesses and doing everything in its power to get the production of document—Witnesses refusing service—Any adjournment resulting thereby can not be treated as 'time granted to one party' within the meaning of O. 17, R. 3. AIR 1960 Punj 500 (506): 62 Pun LR 624 (DB).

5. When is party deemed to fail to do the act for which time has been granted.— (1) Refusal of application for issue of warrants for arrest against defaulting witnesses at adjourned hearing — Pleader reporting no instructions — Dismissal is not under this rule. ('10) 5 Ind Cas 499 (499) (DB) (Cal.) (34 Cal 235, Referred.)

(2) Where a party takes steps in time but the witnesses are not served owing to delay on the part of the Court's Officers to serve them, the party cannot be said to have committed default. AIR 1924 Lah 272 (272) (DB) ** AIR 1925 Lah 296 (296) ** AIR 1917 Lah 281 (281, 282).

(3) A party will be held to have committed default if the steps are taken too late to get the witnesses served. AIR 1926 Lah 27 (28) (DB).

(4) When a commission has been issued the non-return of the commission is no failure on the part of a party. AIR 1927 All 749 (750) (DB).

Order 17, Rule 3 — Note 5 (contd.)

(5) Adjournment at instance of plaintiff — On adjourned date plaintiff again moved for adjournment which was refused —Case taken up after short postponement — No one appearing on behalf of plaintiff — Dismissal of suit — Order is either under O. 17, R. 3 or is decree and as such appealable. 1965 All LJ 575.

[See however AIR 1964 Ori 246 (249); 32 Cut LT 107 (When a party appearing through a pleader or himself withdraws from the suit after adjournment application is refused he cannot be said to have appeared in the suit.)]

(6) Assuming that the expression to perform any other act necessary to the further progress of the suit for which time has been allowed is comprehensive enough to take in the failure to file written statement, O. 17, R. 3 cannot come into operation where the Court had not proceeded to decide the suit. AIR 1963 Andh Pra 116 (117): (1962) 2 Andh WR 201.

(7) Claim for compensation under Section 110-C Motor Vehicles Act — Commission to examine witness returned unexecuted on ground of witness not being found — Application by claimant for opportunity to produce witness rejected but case adjourned for production of certified copy of judgment of criminal court — Order 17, R. 3 which empowers court to decide forthwith does not apply to case in the circumstances. AIR 1965 Punj 477 (478): 68 Pun LR 161.

6. "Any other act necessary to the further progress of the suit." — (1) The act contemplated by this rule is one which must be necessary to the further progress of the suit. (1891) 3 Mad 259 (260) (DB) ** (1898) 21 Mad 403 (404) (DB).

(2) Adjournment sought for amendment of election petition — Amendment not necessary for further progress of the trial — Trial of unamended petition proceeding — Dismissal of the election petition under this rule for default of making the amendment not justified. AIR 1959 Punj 257 (261): ILR (1959) Punj 596 (DB).

(3) Act necessary to the further progress of 'the suit' — The act is one required to be performed on motion of party asking time and not on motion of opposite party. AIR 1968 All 119 (123) (DB).

(4) An act which brings about a stay and thus arrests the further progress of the suit cannot be interpreted to be an act necessary to the further progress of the suit. AIR 1928 Nag 24 (26).

(5) When an act is one ordered without jurisdiction, a default in doing it will not attract this rule. AIR 1925 Pat 316 (317) (DB).

(6) Where on the date of hearing the plaintiff prayed for an adjournment on the ground of absence of witnesses even though summons were issued and the Court refused adjournment and dismissed the suit for default it was held that order of dismissal can mean the dismissal of the suit for plaintiffs failure to produce evidence or to perform any other act necessary for the progress of the suit. ILR (1960) 1 All 546 (560) (DB).

6A. Forthwith.—(1) By a decision forthwith it is meant that the Court must decide the suit on the same date and cannot adjourn the hearing to some other date and then purport to decide it under this rule. AIR 1953 Nag 222 (223) ** AIR 1966 All 615 (617): 1964 All LJ 1085 ** AIR 1964 J and K 79 (80): 1964 Kash LJ 173.

(2) What is a reasonable period shall depend upon the circumstances of each case. AIR 1966 All 615 (616): 1964 All LJ 1085.

(3) The word "Forthwith" qualifies 'proceed' and not decide. (1965) 31 Cut LT 871: ILR (1966) Cut 51.

(4) If a suit can be decided despite the lack of evidence on the material before it, O. 17, R. 3 can be said to govern the case. AIR 1964 Raj 147 (151, 152): 1964 Raj LW 155 (FB).

(5) Order 17, Rule 3 does not in terms refer to any material. There is no justification to equate evidence with material. The Court can therefore give decision on merits under Order 17, Rule 3 on the material on record of the Court even without any evidence of the parties. (1965) 31 Cut LT 871: ILR 1966 Cut 51 (57) ** AIR 1964 Raj 147 (151, 152): 1964 Raj LW 155 (FB). (ILR (1953) 3 Raj 798, **Overruled.**)

(6) A decision "forthwith" should nevertheless be a decision on the merits i.e. on a consideration of such materials as may be necessary and available. AIR 1941 Bom 83 (85): ILR (1941) Bom 150 (DB) ** AIR 1939 All 642 (643) ** AIR 1938 Sind 142 (144) (DB).

(7) Foreign judgment dismissing suit at preliminary stage for non-production of document by plaintiff before even filing of written statement by defendant and without framing issues— Refusal to adjourn the case for production of pronote — Order of dismissal cannot be said to be a judgment dismissing suit on merits. AIR 1959 Punj 306 (308): 61 Pun LR 260 (DB).

(8) A decision 'forthwith" does not mean a summary decision. (1901) 23 All 462 (464) (DB) ** AIR 1920 Pat 600 (601): 4 Pat LJ 277 (DB) ** AIR 1919 All 252 (253): 41 All 663 (DB).

7. Remedy of a person aggrieved by an order under this rule. — (1) A decision under this rule is a decree and operates as res judicata. AIR 1944 Oudh 39 (40) (DB) ** ('87) 10 Mad 272 (279) ** AIR 1936 Lah 385 (386) ** 1964 MPLJ 919 : 1964 Jab LJ 559.

(2) Rule 3 pre-supposes the appearance of the party at whose instance the case was adjourned but who is unable to give

Order 17, Rule 3 — Note 7 (contd.)

proper explanation for his omission to perform the specific act or acts for which the adjournment was granted at his instance. 1964 MPLJ 919: 1964 Jab LJ 559.

(3) If the decision is not one properly within the rule, there is no bar against a second suit. (1890) 13 Mad 510 (511) (DB) ** (1895) 18 Mad 466 (467, 468).

[See also AIR 1963 All 143 (146): 1962 All LJ 786.]

[But see 1885 All WN 168 (168) (DB).]

(4) The remedy of a party aggrieved by an order under this rule is by way of appeal or review. AIR 1958 Andh Pra 450 (451) (DB) ** AIR 1958 Raj 7 (9): ILR (1957) 7 Raj 760 (DB) ** AIR 1958 Tripura 19 (20) ** 1958 All L Jour 290 (292) (DB) ** 1957 Jab LJ 268 (270) ** AIR 1946 All 353 (354, 355): ILR (1946) All 833 (FB) ** (1900) 22 All 66 (78) (FB) ** AIR 1918 Mad 143 (145): 41 Mad 286 (FB) ** AIR 1968 Mad 222 (222): (1967) 2 Mad LJ 502 ** AIR 1964 Assam 144 (144): ILR (1964) 16 Assam 579 ** AIR 1960 Raj 245 (247): 1960 Raj LW 217.

(5) Suit disposed of under this rule — Application for restoration under O. 9, Rule 9 does not lie. AIR 1957 All 107 (109) (DB) ** AIR 1946 All 353 (354, 355): ILR (1946) All 833 (FB) ** AIR 1918 Mad 143 (146): 41 Mad 286 (FB) ** AIR 1962 J and K 21 (22) ** AIR 1967 Pat 366 (367).

(6) Rule 13 of Order 9 has no application where a suit is disposed of under this rule. ('58) AIR 1958 Tripura 19 (20) ** 1958 All L Jour 290 (292) (DB) ** 1957 Jab LJ 268 (270) ** Madh BLJ 1955 HCR 7 (9) ** AIR 1964 Assam 144 (144); ILR (1964) 16 Assam 579.

(7) Defendants not appearing on adjourned date of hearing — Ex parte decree passed — Disposal of suit not within purview of Order 17, Rule 3 — Application under Order 9, Rule 13 maintainable. AIR 1967 Orissa 14 (16): ILR (1965) Cut 846.

(8) Where the order has been expressly passed under this rule, the remedy is by way of appeal only, even though the Court had no power to proceed thereunder and acted erroneously in doing so. AIR 1954 All 222 (223) (DB) ** 1957 Jab LJ 268 (270) ** AIR 1918 Mad 143 (146): 41 Mad 286 (FB).

(9) The matter may be different where no specific provision is mentioned. In such a case, if the Court finds that the order would be valid if passed under Rule 2, the order may be presumed to be passed under that rule. 1962 MPLJ 325: ILR (1962) Madh Pra 766.

[But see ('76) 1 Mad 287 (288) (DB).]

(10) Notwithstanding the express reference to Rule 3, an order may be held to be one under Rule 2 if the circumstances of the case bring it within that rule, and it may be set aside under the provisions of Order 9. AIR 1953 Trav-Co 387 (388) (DB) ** ILR 1953) 3 Raj 798 (802) (DB) ** AIR 1952 Mad 160 (160): ILR (1952) Mad 547 ** 1968 All WR (HC) 860: 1969 All LJ 327 (332) (FB) ** AIR 1964 J and K 63 (65) : 1963 Kash LJ 242 (DB).

(11) Where a suit is erroneously disposed of under Rule, instead of under Rule 2, the aggrieved party may either appeal against the decision or proceed under Order 9. AIR 1948 Mad 80 (80) ** AIR 1947 Mad 378 (379): ILR (1948) Mad 109 (DB) ** AIR 1960 Raj 245 (247): 1960 Raj LW 217.

[See also AIR 1963 Him Pra 30 (32). (If an order is erroneously passed under Order 17, Rule 3 and is referable to one of the rules of Order 9 an application for setting aside the order also lies.)]

(12) Erroneous order of dismissal under Rule 3 instead of Rule 2 — Appeal — Proper order to pass is to substitute an order under Rule 2 for order under Rule 3 and not to remand the case after setting aside the order under Rule 3. 1963 MPLJ 919: 1964 Jab LJ 559.

[See 1968 MPLJ 183. (Limitation must commence from the date of substitution.)]

(13) Remedy of aggrieved person has to be ascertained with reference to the final and operative order that may be passed by the highest Court. AIR 1965 Madh Pra 21 (23): 1967 MPLJ 625.

(14) Where the rule under which the order is passed is not stated, the Court must decide whether the order is really one under Rule 2 or Rule 3. AIR 1953 Assam 91 (92): ILR (1952) 4 Assam 112 ** AIR 1928 Lah 427 (428).

(15) Unless the facts and circumstances of the case clearly indicate that the order was one under this rule, the order should be treated as one under Rule 2. AIR 1953 Nag 222 (223) ** AIR 1933 Cal 73 (74) (DB) ** AIR 1925 All 267 (269): 47 All 140 (DB) ** 1962 MPLJ 325.

(16) Non-appearance of defendant on adjourned date — Hearing concluded in defendant's absence — As disposal can fall under Rule 2 as well as Rule 3 defendant's remedy is by way of appeal or revision or for setting aside ex parte decree under Order 9, Rule 13—Section 151 cannot be invoked. (1961) 27 Cut LT 326 ** AIR 1960 Raj 245 (247). (If the Court acts under Rule 2 the party may file an application for restoration. If the Court acts under Rule 3, the party can file an appeal only.)

[See however AIR 1967 Andh Pra 152 (153): (1965) 2 Andh WR 481. (If an application falls both under Order 17, Rule 2 and Rule 3 the judgment will be treated as falling under Rule 2 for the purpose of the remedy.)]

ORDER XVIII

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES

[See Sections 30 and 31.]

R. 1. Right to begin.—The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

[1882, S. 179, Expln.; 1877, S. 179.]

ORDER 18, RULE 1 — SYNOPSIS

1. Right to begin.
2. Allegations.
3. Admissions.
4. Preliminary issue raised by the defendant that the suit does not lie.

1. Right to begin. — (1) As a general rule, the plaintiff has to prove his claim by positive proof. Madh BLJ 1954 HCR 890 (892) ** AIR 1928 All 688 (688) ** AIR 1923 Lah 41 (42).

(2) Best evidence not produced — Inferior evidence is admissible and can be considered. AIR 1963 Cal 500 (504).

(3) Evidence need not always be led by the party who has the right to begin and on whom lies the burden: it is open to him to sustain the onus by facts which he may elicit in cross-examination of the other party's witnesses. AIR 1924 Nag 367 (371, 372).

(3) It is open to the plaintiff to say that although he has the right to begin he may rest content with relying upon the averments made in the written statement and may say that he does not propose to adduce further evidence, but the plaintiff should make this statement before the defendant is called upon to adduce evidence. AIR 1954 Orissa 191 (193): ILR (1954) Cut 165 (DB).

(5) If on the issue or issues of fact, the burden of proof is on the defendant, he has the right to begin. (1936) 40 Cal WN 865 (868).

(6) Where there is a controversy between the parties as to who has the right to begin it is incumbent upon the Court to decide the controversy and give its judgment thereon and the determination of that question is an inherent part of the hearing itself. (1965) 31 Cut LT 871: ILR (1966) Cut 51.

(7) Normally the plaintiff must first come into the witness box to depose to his case to be followed by corroborative evidence. AIR 1962 Punj 180 (181).

(8) No evidence need be led by any party on a point which is not in issue. AIR 1969 All 248 (254) (DB).

2. Allegations. — (1) The plaintiffs are bound to prove the essential fact to substantiate their case when it is not admitted in the pleadings. AIR 1963 Cal 500 (504).

(2) In all claim petitions it is the claimant to the attached property that must begin. (1868) 11 Suth WR 8 (15) (FB) ** ('96) 18 All 369 (370) ** ('88) 16 Cal 473 (479): 16 Ind App 23 (PC).

(3) In a suit for defamation. it is the plaintiff, who complains of an attack upon his character or reputation, that must begin and make out that he had a reputation which had been damaged by the writing complained against. AIR 1954 Orissa 191 (193): ILR (1954) Cut 165 (DB).

(4) Suit for partition of joint family property including ornaments — Plaintiff must prima facie satisfy Court that there are reasons to believe that particular property does exit before defendants can be called upon to account. AIR 1953 Nag 70 (77): ILR (1954) Nag 30 (DB).

(5) In suit by employee for a declaration that the order of dismissal was illegal it is for the defendant to give evidence justifying the dismissal at the first instance. AIR 1957 Pat 145 (146, 147).

(6) Suit on strength of sale deed — Defendant pleading that document was intended to be mortgage — Burden is on defendant and he ought to lead evidence. AIR 1960 Manipur 11 (13).

(7) Where it is the case of the plaintiffs that the supplementary deed of waqf which had been mentioned by them in their plaint stood vitiated on account of any fraud or misrepresentation it is for them to prove their allegations. AIR 1958 All 67 (70) (DB).

(8) Suit challenging sale deed executed by plaintiff — Plaint assertions about fraud and plaintiff being pardanashin illiterate lady — Denial by defendant — Plaintiff must begin and not defendant. (1964) 30 Cut LT 463.

(9) In suit for possession the plaintiff cannot take advantage of the failure of the defendant to prove his case. AIR 1958 Pat 600 (600) (DB).

(10) There is no invariable rule that all allegations must be proved by the party who affirmatively asserts them. AIR 1958 Pat 249 (251).

3. Admissions. — (1) Where the defendant admits the facts alleged by the plaintiff but contends that he is not en-

R. 2. Statement and production of evidence.—(1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

[1882 and 1877, Ss. 179, 180.]

HIGH COURT AMENDMENTS

Allahabad

For the present Rule 2, substitute the following:—

2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him, and the nature of the oral evidence which he proposes to adduce and shall then call his witnesses in support of the issues which he is bound to prove.

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any)."

Andhra Pradesh

Same as that of Madras.

Bombay: Dadra and Nagar Haveli

In Order XVIII, Rule 2, after sub-rule (3), insert the following explanation:—

"Explanation.—Nothing in this rule shall affect the jurisdiction of the Court, for reasons to be recorded in writing, to direct any party to examine any witness at any stage." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Delhi and Himachal Pradesh

Same as that of Punjab. See Act 26 of 1966, Ss. 7 and 17 (31-10-1966; 1-5-1967).

Order 18, Rule 1 — Note 3 (contd.)

titled to any part of the relief which he seeks, the defendant gets the right to begin. (1884) 6 All 73 (74) (DB) ** AIR 1914 Low Bur 210 (212): 7 Low Bur Rul 347 (DB).

(2) In a suit to recover possession of land from the tenant by the landlord it is not for the plaintiff to explain the possession of the defendant tenant but for such defendant to show that it necessarily leads to an inference of perpetual tenancy. (1888) 16 Cal 223 (232): 16 Ind App 6 (PC).

(3) Where, notwithstanding the admission by the defendant, an issue is raised on a question, the plaintiff is bound to lead evidence to prove his case on the question. 1951 Orissa 95 (98) (DB).

4. Preliminary issue raised by the defendant that the suit does not lie. — (1) Where the defendant raises a preliminary objection that the suit does not lie as, for instance, where he pleads that the suit is barred by res judicata, he has the right to begin (1888) 12 Bom 454 (459).

(2) For the purposes of the preliminary issue, the pleadings are taken as true. (1913) 40 Cal 598 (609): 40 Ind App 58 (PC).

Order 18, Rule 2

1. Scope. — (1) On the day fixed for hearing the party having the right to begin must state his case, but this does not give him the right to introduce new pleas without the leave of Court. AIR 1927 Lah 615 (615).

(2) The counsel while opening the case is not entitled to take the Court through substantial portion of the evidence which would be a matter of proof. (1968) 70 Bom LR 397: 1968 Mah LJ 629.

(3) The Courts ought not to allow evidence to be given in regard to contentions not raised in the pleadings. AIR 1923 Lah 363 (365) (DB).

(4) Where the question is one of fact which could be found on the pleadings the question of taking evidence may not arise. (1966) 1 Andh WR 218: (1966) 1 Andh LT 297.

(5) When parties are at issue on certain statement made in their pleadings, then the matter cannot be decided on pleadings alone and the parties must produce evidence to support their averments. AIR 1963 Madh Pra 164 (171): 1963 MPLJ 162 (DB)

Kerala and Laccadive, Minicoy and Amindivi Islands

After sub-rule (3) the following explanation shall be inserted, namely:—

"Explanation.—Nothing in this rule shall affect the discretion of the Court to direct or permit the examination of any witnesses at any stage of the suit for reasons to be recorded. (9-6-1959); Reg. 8 of 1965, S. 3 and Schedule.

Madhya Pradesh

Add the following as sub-rule (4) to Rule 2:—

"(4) Notwithstanding anything contained in this rule, the Court may order that the production of evidence or the address to the Court may be in any order which it may deem fit." (16-9-1960.)

Madras and Pondicherry

At the end of Rule 2, insert the following "Explanation" :—

"Explanation.—Nothing in this rule shall affect the jurisdiction of the Court, for reasons to be recorded in writing, to direct any party to examine any witnesses at any stage."

(R.C.O. No. 1729 of 1926); Act 26 of 1968, S. 3 and Sch. Pt. II (with effect from 5-9-1966).

Mysore

At the end of Rule 2, add the following Explanation:—

"Explanation:—Nothing in this rule shall affect the jurisdiction of the Court, for reasons to be recorded in writing, to direct any party to examine any witness at any stage." (30-3-1967.)

Orissa

At the end of Rule 2 insert the following :—

"Explanation.—Nothing in this rule shall affect the jurisdiction of the Court to direct any party to examine any witness at any stage, for reasons to be recorded by the Court in writing." (7-5-1954.)

Order 18, Rule 2 — Note 1 (contd.)

(6) It is not the duty of the Court to determine what witnesses shall be examined. AIR 1943 Mad 266 (267).

(7) The practice of parties coming into the witness box at the end of their evidence to fill up the blanks or lacuna left by their corroborative evidence is not justified. AIR 1962 Punj 180 (181).

(8) Statement of witness recorded before that of plaintiff — Both recorded on same day no time elapsing between the recording—Objection not raised by defendant — Presumption of permission of Court to do so arises. AIR 1969 Raj 9: 1968 Raj LW 345.

(9) The effect of a party not giving evidence in support of the case made by him in the pleadings may be fatal. Besides, the Court is entitled to draw the inference as provided in Illustration (g) to Section 114 of the Evidence Act. (1964) 68 Cal WN 611.

(10) Where the onus is on the plaintiff and he has failed to sustain it successfully, the Court will act rightly in dismissing the suit without insisting on the defendant to go into the witness-box. 1954 All L Jour 671 (673) ** (1913) 21 Ind Cas 96 (102) (DB) (Mad)

(11) Where the onus of proving all the issues was cast upon the defendant, the order of the Court dismissing the plaintiff's suit on the adjourned hearing for his failure to produce his witnesses cannot stand. AIR 1950 Pepsu 43 (44) (DB).

(12) Reasonable time must be given for either party to produce his evidence and the Court will exercise sound discretion, if it allows the party to produce his evidence at any time before it proceeds to judgment. 1956 Madh BLJ 407 (409, 410) ** (1893) 20 Cal 740 (743, 745) (DB).

(13) When the defendant's request for time to produce his witnesses was refused but the defendant produced them on the day the case was posted for judgment, it was held that it was a wrong exercise of discretion not to examine the witnesses before proceeding to judgment. 1956 Madh BLJ 407 (409, 410) ** (1893) 20 Cal 740 (743, 745) (DB).

[See however AIR 1954 Raj 238 (240): ILR (1953) 3 Raj 995 (DB).]

(14) Either party to a suit is not precluded from making a request to the Court for examination of additional witnesses or making documents merely on the ground that the evidence in the suit has been closed and the matter has been posted for arguments. AIR 1966 Andh Pra 295 (297): (1966) 1 Andh WR 22.

(15) The Explanation to Order 18, R. 2 (Orissa Amendment) has its bearing on

Punjab, Haryana and Chandigarh

At the end of sub-rule (3) insert the following Explanations:—

"Explanation I.—Nothing in this rule shall affect the jurisdiction of the Court, of its own accord or on the application of any party for reasons to be recorded in writing, to direct any party to examine any witness at any stage.

Explanation II. — The expression "witness" in Explanation I shall include any party as his own witness." (9-6-1942.): Act 31 of 1966, Ss. 29 and 32 (1-11-1966).

Rajasthan

The following shall be inserted as sub-rule (4) to Rule 2 :—

(4) Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined; provided that the Court may on an application made in this behalf and for reasons to be recorded, permit him to appear as his own witness at a later stage." (25-7-1957.)

HIGH COURT AMENDMENTS

Rule 2A

Assam and Nagaland

Same as that of Calcutta—See Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 (1-12-1963).

Calcutta: Andaman and Nicobar Islands

Insert the following as Rule 2A:—

"2A. Notwithstanding anything contained in clauses (1) and (2) of Rule 2, the Court may for sufficient reason go on with the hearing although the evidence of the party having the right to begin has not been concluded, and may also allow either party to produce any witness at any stage of the suit." (8-11-1927.)

R. 3. Evidence where several issues.—Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply especially on the

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Order 18, Rule 2 — Note 1 (contd.)

the question of the sequence laid down in the main rule in Order 18, Rule 2 and has nothing to connect itself with the question of non-appearance of a party at a particular stage. (1961) 27 Cut LT 326.

(16) Petitioner showing slackness in prosecution of election petition — Respondent supporting the petition can be allowed to lead evidence in support of the petition — Matter governed by O. 18, Rule 2, Civil P. C. AIR 1964 Punj 105 (108): 66 Pun LR 297.

(17) Amongst defendants the order of leading evidence should be as follows: (1) Those defendants who fully support the case of the plaintiff. (2) Those defendants who partly support the case of the plaintiff; (3) Those defendants who do not support the case of the plaintiff in any part. AIR 1964 Guj 26 (26): (1964) 5 Guj LR 327.

(18) Practice of calling the opposite party as a witness should not be countenanced as it is not in the interests of justice. AIR 1959 Mys 194 (196): 37 Mys LJ 261 (DB).

(19) Rule 2 merely gives indication as to the rights of the parties and not to the power of the Courts. ILR (1966) Cut 51: 31 Cut LT 871.

2. Arguments. — (1) It is in the option of the parties to argue their case when the evidence has been closed and it is for them to decide whether they will exercise that privilege or not. AIR 1920 Lah 246 (247).

(2) A Court delivering judgment without hearing arguments is not acting irregularly where the parties having had the opportunity did not choose to make use of it. AIR 1949 Lah 131 (146): Pak LR (1949) Lah 215 (FB) ** AIR 1924 Lah 107 (107, 108): 4 Lah 364 (DB).

(3) The practice of submitting written arguments by pleaders is not proper and in any case must first be submitted to the other side and then to the Court. AIR 1921 Cal 426 (428) (DB) ** AIR 1928 Mad 1130 (1131).

Order 18, Rule 3 — Note 1

(1) The provisions of this rule are subject to the provisions of Rule 1. Whether the plaintiff should lead the evidence or the defendant is to be determined in accordance with Rule 1. AIR 1954 Vindh Pra 53 (55).

evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

[1882 and 1877, S. 180.]

HIGH COURT AMENDMENT

Allahabad

For the present Rule 3, substitute the following:—

"3. (1) Where there are several issues the burden of proving some of which lies on the other party, the party beginning may, at his option, either state his case in the manner aforesaid and produce his evidence on those issues or reserve the Statement of his case and the production of his evidence on those issues by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may state his case in the manner aforesaid and produce evidence on those issues after the other party has produced all his evidence.

(2) After both parties have produced their evidence, the party beginning may address the Court on the whole case; the other party may then address the Court on the whole case; and the party beginning may reply generally on the whole case, provided that in doing so he shall not, without the leave of the Court, raise questions which should have been raised in the opening address."

R. 4. Witnesses to be examined in open Court.—The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

[1882 and 1877, S. 181; 1859, S. 172.]

HIGH COURT AMENDMENT

Rajasthan

Insert the following words at the commencement of the rule, viz.,—
"Subject to the provisions of Rule 1 of Order XVI". (25-7-1957).

Order 18, Rule 3 — Note 1 (contd.)

(2) Where the onus of proof of some issues in a suit is on the plaintiff, he must begin the case. It is open to him to exercise his right of reservation as prescribed in Rule 3. An order asking the defendant to begin the case, is an order passed without jurisdiction. (1968) 34 Cut LT 543.

(3) Suit challenging sale deed executed by plaintiff — Plaint assertions about fraud and plaintiff being pardanashin illiterate lady — Denial by defendant — Plaintiff must begin and not defendant. (1964) 30 Cut LT 463.

(4) Rule 3 does not contemplate summary dismissal of a suit without giving the plaintiffs any opportunity of rebutting new objection. AIR 1949 Cal 209 (211): ILR (1948) 1 Cal 522.

(5) A party trying to prove a point not raised in his pleadings cannot object to the opposite party tendering rebutting evidence as to that point. AIR 1914 Oudh 52 (65) (DB).

(6) A party is not entitled to adduce any evidence over and above what amounts to rebuttal. AIR 1953 Vindh Pra 34 (35).

(7) The question whether or not a particular piece of evidence is really evidence of rebuttal of a nature described in this rule is a question within the discretion of the Court. But whether any evidence of rebuttal should at all be allowed to be adduced is a jurisdictional fact. AIR 1953 Vindh Pra 34 (34).

(8) The option given by the rule is to be exercised at the time the party begins and states his case and not at any earlier time. AIR 1956 Sau 52 (53) (DB). ((1949) 2 Sau LR 156, **Overruled.**)

(9) Burden of proof regarding certain issues lying on defendant — Plaintiff willing to adduce evidence by way of rebuttal — Option can be exercised before commencement of defendant's evidence and not afterwards. AIR 1969 Andh Pra 82 (83): 1969 Andh LT 165.

(10) This rule has no application where a party, having the burden of proof, fails to produce evidence bearing on the issues he was required to prove and later, after the opposite party has led evidence on those points, proposes to rebut them. ILR (1953) Madh B 18 (21).

(11) The plaintiff in a suit for specific performance of contract for sale has to establish the contract of sale between him and the vendor. Under no circumstance the initial onus, which is on the subsequent transferee, shifts on to the plaintiff at the first stage. AIR 1957 Pat 224 (225).

Order 18, Rule 4

1. Examination of witnesses. — (1) A party has a right to have all the witnesses tendered by him examined by

R. 5. How evidence shall be taken in appealable cases.—In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

[1882 and 1877, S. 182; 1859, S. 172.]

Order 18, Rule 4 — Note 1 (contd.)

the Court. AIR 1949 Cal 209 (211, 212): ILR (1946) 1 Cal 522.

(2) The Court cannot ordinarily refuse to examine witnesses. AIR 1949 Cal 209 (211, 212): ILR (1946) 1 Cal 522 ** AIR 1926 Lah 450 (450) ** AIR 1934 Lah 317 (317).

(3) It is not proper for the Court not to examine a party as a witness at the request of the opposite party on the ground that no notice had been served or to direct the opposite party to summon the party as if he is a stranger witness. AIR 1964 Andh Pra 365 (366, 367): (1964) 1 Andh WR 290 (DB).

(4) Where the witness to be ex examined is an infant or a person of advanced age, the Court may hold an examination on the voir dire as to his competency to give evidence. AIR 1914 Cal 276 (278): 41 Cal 406 (DB) ** (1889) 11 All 183 (185) (DB).

(5) The examination on the voir dire must be held before the actual examination commences. (1907) 11 Cal WN 51 (53) (DB).

[But see AIR 1914 Cal 276 (279): 41 Cal 406 (DB).]

(6) The examination of a witness is not complete without any opportunity being allowed for his cross-examination by the other side. (1906) 30 Bom 523 (535, 536): 33 Ind App 198 (PC).

(7) A Court cannot fix any time limit for cross-examination. (1910) 8 Ind Cas 418 (421) (DB) (Oudh).

(8) Pro forma defendant examined as P. W. should not be allowed to cross-examine P. Ws. when he supported the plaintiff and there was no claim against him. AIR 1961 Manipur 40 (41, 42).

(9) A Court has full power to prevent any abuse of the rights of cross-examination. AIR 1922 Oudh 124 (128).

(10) Refusal by the trial Court to examine the witnesses tendered by a party before delivery of judgment is a ground for second appeal under Section 100, Clause (c). 1956 Madh BLJ 407 (409, 410) ** (1893) 20 Cal 740 (743, 744) (DB).

(11) No party can be deprived of his right to examine witnesses kept present by him unless there are adequate grounds to do so. Default in respect of the payment of costs previously awarded is not an adequate ground. 1957 Jab LJ 917 (919).

(12) The parties are entitled to examine the expert in proof of their respective contentions. AIR 1958 Andh Pra 254 (255).

2. "Open Court." — (1) The parties have a right to have the evidence of witnesses taken in open Court, i.e., publicly. AIR 1928 Pat 438 (439) (DB) ** AIR 1925 Mad 381 (381) (DB).

(2) All witnesses should, without distinction, give their evidence from the witness-box; it is not desirable that anyone should give his evidence on the dais by the side of the Judge. AIR 1954 Madh B 152 (153)**(1921) 63 Ind Cas 461 (462) (Lah).

(3) Where the Court takes the witnesses out of the hands of the counsel and examines and cross-examines them itself any significance that might attach to the observations of the Court as to the demeanour of witnesses is entirely lost. AIR 1949 Bom 346 (347): ILR (1950) Bom 110 (DB).

(4) The fact that the parties have no counsel to aid them does not cast a duty on the Court to examine witnesses and elicit from them statements relevant to the issues framed. AIR 1952 Him Pra and B 51 (54).

(5) Order 19, Rule 1 is intended as a sort of exception to the provisions contained in Order 18, Rule 4 viz., that the evidence of witnesses in attendance shall be taken orally in open Court. AIR 1967 SC 122 (132): (1966) Supp SCR 401.

(6) It would be improper for a Court to make an order under Rule 1 of O. 19, displacing for no special reason the ordinary mode of proof enjoined by O. 18, Rule 4. AIR 1959 Mys 139 (143): 37 Mys LJ 71.

3. Power of the Appellate Court to examine witnesses. — (1) Where the Court of first instance refuses to examine the witnesses tendered by a party, they may be examined by the appellate Court. (1881) 6 Cal 608 (611) (SB) ** (1898) 22 Bom 253 (255) (DB).

Order 18, Rule 5 — Note 1

(1) This rule applies to all proceedings. AIR 1934 Cal 737 (739): 61 Cal 488.

(2) The rule applies to proceedings conducted by Commissioners for partition appointed by the Original Side of the High Court. AIR 1934 Cal 737 (739): 61 Cal 488.

(3) The notes by a Munsif as to the age or description of the witness in the heading of the deposition do not form

HIGH COURT AMENDMENTS

Allahabad

Between the words and the comma "superintendence of the Judge," and "not ordinarily in the form of," insert the words "or from his dictation". [16-5-1956].

Bombay: Dadra and Nagar Havelis

In Order XVIII, Rule 5, substitute a colon for the full stop appearing at the end of the rule and add thereafter the following proviso :—

> Provided however that upon the hearing of any suit or proceeding in the Bombay City Civil Court the evidence of the witnesses shall be taken down in the presence of and under the personal direction and superintendence of the Judge not ordinarily in the form of question and answer, but in that of a narrative and the notes so taken shall be sufficient for all purposes and shall form part of the record [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965].

Calcutta: Andaman and Nicobar Islands

(i) Omit the 'comma' after the words 'in the language of the Court" and add the words "or in English" after the same :

(ii) After the word 'by' following the inserted words "or in English" strike out the words "or in the presence and under the personal direction and superintendence of";

(iii) After the words "the Judge" following the omitted words, add the words "of from his dictation in open Court" [6-7-1967].

Gujarat

Between the words "in the language of the Court" and "by or in the presence" insert the words "or, in English" [17-8-1961].

Madhya Pradesh

For the existing Rule 5, substitute the following :

> "In cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing, in the language of the Court, or in English, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative and, when completed, shall be read over in the presence of the Judge and the witness, and the Judge shall, if necessary, correct the same and shall sign it." (16-9-1960.)

R. 6. When deposition to be interpreted.—Where the evidence is taken down in a language different from that in which it is given, and the witness does

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Order 18, Rule 5 — Note 1 (contd.)

part of the evidence. AIR 1919 Cal 502 (503) ** (1904) 26 All 108 (118): 31 Ind App 38 (PC).

(4) Where this rule has been complied with in recording the evidence of a defence witness, the Court of appeal is bound to accept the evidence of the witness as recorded as correct under S. 80, Evidence Act until it is proved to be untrue. AIR 1957 Pat 293 (295).

(5) A deposition not read over to the witness is not admissible in evidence against him in a subsequent trial for perjury or forgery. AIR 1924 Cal 705 (707, 709): 51 Cal 236 (DB) ** AIR 1917 Lah 192 (193): 1917 Pun Re Cr. No. 12 ** AIR 1919 Mad 45 (47): 42 Mad 561 (DB).

[But see AIR 1923 Nag 39 (40): 18 Nag LR 192.]

(6) Deposition read over by witness himself — Evidence is not inadmissible. AIR 1919 Cal 514 (515): 46 Cal 895 (DB).

(7) The fact that the reading of the deposition was not in the presence of the Judge does not render it inadmissible. (1910) 34 Mad 141 (142) ** AIR 1918 Mad 334 (334) (DB).

(8) Non-observance of a formality will not render evidence inadmissible. AIR 1929 Cal 78 (80): 55 Cal 1084 (DB) ** AIR 1919 Lah 348 (349): 1918 Pun Re Cr No. 28.

(8) Depositions recorded not by presiding officer but by his reader with Commissioner's note that the same has been recorded at his dictation. AIR 1959 All 586 (588, 589): 1958 All LJ 652 ** (1967) 2 Andh WR 66 (67) (DB). (Subsequent transfer of Judge — Failure to sign deposition does not make deposition invalid.)

Order 18, Rule 6 — Note 1

(1) This rule applies to proceedings conducted by commissioners for partition appointed by the Court on the Ori-

not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given.

[1882 and 1877, S.183; 1859, S. 172.]

R. 7. Evidence under Section 138.—Evidence taken down under Section 138 shall be in the form prescribed by Rule 5 and shall be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule.

[1882, S. 185A (3).]

R. 8. Memorandum when evidence not taken down by Judge.—Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

[1882 and 1877, S. 184; 1859, S. 172.]

HIGH COURT AMENDMENTS

Allahabad

(a) Insert the words "or from his dictation" between the words "in writing by the Judge" and the words "he shall be bound" occurring towards the beginning of the rule;

(b) Substitute the words 'by the Judge or typed to his dictation, shall be signed by him" for the words "and signed by the Judge" occurring towards the end of the rule [19-5-1956].

Bombay: Dadra and Nagar Haveli

For Rule 8 substitute the following :—

"8. Where the evidence is not taken down by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written or dictated and signed by the Judge and shall form part of the record." [1-11-1966.]

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965.)

Calcutta : Andaman and Nicobar Islands

Omit R. 8. [6-7-1967.]

R. 9. When evidence may be taken in English.—Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English, taken down in English, the Judge may so take it down.

[1882 and 1877, S. 185; 1859, S. 172.]

HIGH COURT AMENDMENT

Calcutta: Andaman and Nicobar Islands

Add the following words at the end of the rule, by substituting a comma for the full stop at the end:

"Or cause it to be taken down from his dictation in open Court" [6-7-1967].

Order 18, Rule 6 — Note 1 (contd.)
ginal Side of the High Court. AIR 1934 Cal 737 (739): 61 Cal 488.

Order 18, Rule 8 — Note 1

(1) A memorandum of evidence should be written down in consecutive sentences. 1882 All WN 184 (184) (DB).

(2) In cases governed by this rule, there must be either one or two records of evidence. If it is one record it must be in Judge's own handwriting; if otherwise, there must be a memorandum of evidence. AIR 1929 Cal 78 (79, 80): 55 Cal 1084 (DB).

R. 10. Any particular question and answer may be taken down.—The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.

[1882 and 1877, S. 186; 1859, S. 172.]

HIGH COURT AMENDMENT

Calcutta : Andaman and Nicobar Islands

After the words 'take down' add a comma and thereafter the words 'or cause to be taken down from his dictation in open Court, in the language of the Court or in English" [6-7-1967].

R. 11. Questions objected to and allowed by Court.—Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

[1882 and 1877, S. 187; 1859, S. 172.]

HIGH COURT AMENDMENT

Calcutta : Andaman and Nicobar Islands

After the words 'take down' add a comma and thereafter the words "or cause to be taken down from his dictation in open Court, in the language of the Court or in English" [6-7-1967].

R. 12. Remarks on demeanour of witnesses.— The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

[1882 and 1877, S. 188; 1859, S.172.]

HIGH COURT AMENDMENT

Calcutta : Andaman and Nicobar Islands

Add the following at the end of the rule :

"or cause the same to be recorded under his dictation in open Court, in the language of the Court or in English" [6-7-1967].

Order 18, Rule 11 — Note 1

(1) When a question put to a witness is objected to, the proper course for the Court is to allow the question to be recorded and then give its ruling whether such question is allowed or disallowed. It is improper for the Court to allow the question to be put to the witness subject to objection. AIR 1936 Lah 183 (185) (DB) ** (1968) 70 Bom LR 686: 1968 Mah LJ 608.

(2) Objection as to admissibility of evidence has to be taken in the Court of first instance and if not so done the Appellate Court will not entertain any such objection. (1907) 34 Cal 1059 (1074): 34 Ind App 194 (PC) ** AIR 1926 Cal 752 (754) (DB).

(3) An erroneous omission to object to irrelevant evidence will not make it relevant and will therefore be disregarded. (1897) 19 All 76 (92): 23 Ind App 106 (PC) ** (1896) 23 Cal 335 (338) (DB) ** (1899) 26 Cal 53 (56, 72) (SB) ** (1966) 2 Lab LJ 282 (286): (1966) 12 Fac LR 80 (Cal). (Enquiry under industrial dispute.) ** AIR 1960 Punj 430 (431, 432): 62 Pun LR 699. (Commissioner has no power to disallow question he considers irrelevant under Order 18, R. 11.)

(4) Rule 11 of Order 18 however does not forbid taking any application in writing about any objection to particular question. (1968) 70 Bom LR 686: 1968 Mah LJ 608.

Order 18, Rule 12 — Note 1

(1) This rule provides for the recording of a note as regards the demeanour of the witnesses while they are giving evidence. AIR 1955 Mad 179 (181, 182).

(2) Remarks about demeanour of witness cannot be expunged under the cloak of an amendment. AIR 1922 All 107 (110): 44 All 401 (DB).

(3) It is not the subjective impression of the Judge about the witness but what occasioned any such impression that is relevant under the rule. AIR 1951 Trav-Co 12 (13) ** 1968 Ker LJ 123.

R. 13. Memorandum of evidence in unappealable cases.—In case in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

[1882 and 1877, S. 189; 1859, S. 172.]

HIGH COURT AMENDMENTS

Allahabad

Substitute the words "by the Judge or typed to his dictation, shall be signed by the Judge" for the words "and signed by the Judge" occurring towards the end of this rule [19-5-1956].

Calcutta : Andaman and Nicobar Islands

(i) Strike out words 'and signed' occurring after the words "shall be written";

(ii) After the words "by the Judge", add a comma and thereafter add the following words :

"or taken down under his dictation in open Court, in the language of the Court or in English, and shall be signed by him" [6-7-1967].

R. 14. Judge unable to make such memorandum to record reasons of his inability.—(1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

(2) Every memorandum so made shall form part of the record.

[1882 and 1877, S. 190; 1859, S. 172.]

HIGH COURT AMENDMENT

Allahabad

Delete Rule 14 [19-5-1956].

Calcutta: Andaman and Nicobar Islands

Omit Rule 14 [6-7-1967].

Order 18, Rule 12 — Note 1 (contd.)

(4) The Court's belief that the evidence is biased is not a valid ground for refusing to record it. AIR 1923 Nag 58 (60) (DB).

(5) The remarks respecting the demeanour of witness should not be made after deposition is read over and signed but should be made only when the witness is under examination. AIR 1951 Trav-Co 12 (13).

(6) Value of demeanour need not be too much emphasised — Inability to observe demeanour is no bar to issue of commission. AIR 1955 Mad 210 (211).

Order 18, Rule 13 — Note 1

(1) A Judge is bound under this rule to make a memorandum of the substance of what each witness deposes. AIR 1921 Cal 558 (558): ** AIR 1916 Mad 547 (548) ** AIR 1938 Pesh 46 (47).

(2) A short abstract of the whole evidence is not sufficient compliance with the rule. (1905) 9 Cal WN 418 (419) (DB) ** (1905) 9 Cal WN 420 (421) (DB).

(3) The real import of the rule is giving to the Judge a discretion in the matter of excluding making a record of unimportant matters appearing in the statement of witnesses and no more. AIR 1959 All 287 (288).

(4) The rule does not apply to a Presidency Small Cause Court. AIR 1949 Cal 65 (67): ILR (1949) 1 Cal 72.

(5) This rule applies to Provincial Small Cause Courts. ILR (1953) 1 Cal 277 (278) ** AIR 1965 Manipur 34 (35).

(6) Primarily the Judge himself must make a memorandum of the substance of the evidence. AIR 1956 Raj 9 (11): ILR (1955) 5 Raj 869.

Order 18, Rule 14 — Note 1

(1) Where a Judge is, for some valid reason, unable to make a memorandum himself, he must do two things: first, he must cause the reason of his inability to be recorded and further the memorandum of evidence to be made in writing must be from his dictation in open Court. AIR 1956 Raj 9 (11): ILR (1955) 5 Raj 869.

(2) The safeguards provided by Rr. 13 and 14 are not mere formalities. Presiding officer should carefully comply with them. AIR 1956 Raj 9 (11): ILR (1955) 5 Raj 869.

R. 15. Power to deal with evidence taken before another Judge.—(1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in suit transferred under Section 24.

[1882 and 1877, S. 191.]

R. 16. Power to examine witness immediately.—(1) Where a witness is about to leave jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit.

[1882 and 1877, S. 192; 1859, S. 173.]

R. 17. Court may recall and examine witness.—The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

[1882, S. 198.]

Order 18, Rule 15 — Note 1

(1) This rule does not apply to Chartered High Courts. (1949) 53 Cal WN 569 (573) (DB).

(2) A successor Judge is bound to hear arguments or give the parties an opportunity of being heard before the judgment is given. AIR 1924 Lah 107 (108): 4 Lah 364 (DB).

[But see (1912) 17 Ind Cas 278 (279) (Mad).]

(3) Where a new plaintiff is added after the removal of the predecessor, this rule has no application and the successor is bound to grant a de novo trial. (1911) 9 Ind Cas 254 (254) (DB) (Mad).

(4) Only one out of eight witnesses examined by successor Judge — No advantage of observing demeanour — Lower appellate Court is bound to go through evidence and assess its intrinsic value. AIR 1954 Trav-Co 10 (16) (DB).

(5) Order 18 Rule 15 does not apply to trial of suits in Small Cause Courts in Hyderabad City. AIR 1963 Andh Pra 65 (66, 67): (1962) 1 Andh WR 154 (DB).

(6) Commissioner appointed by High Court for taking accounts in partnership suit is Court within the meaning of O. 18, Rule 15. AIR 1963 Bom 59 (60, 61): 64 Bom LR 611.

(7) Order 18, Rule 15 applies to the proceedings under Madras Cultivating Tenants Protection Act (25 of 1955). (1966) 2 Mad LJ 141 (142): 79 Mad LW 421.

Order 18, Rule 16 — Note 1

(1) This rule provides for the de bene esse examination of a witness about to leave the jurisdiction of the Court. (1870) 5 Beng LR (OC) 252 (253).

(2) Examination of a witness under this rule should ordinarily be held in Court and preferably before the Judge who is ultimately to hear and decide the suit. AIR 1932 Bom 405 (405).

(3) Where the defendants in three suits are the same but the plaintiffs are different and some evidence is recorded under Order 18, Rule 16 (1) and document exhibited in one suit before consolidation, the evidence and the documents will not be binding on the plaintiffs in the other suits as they were not parties to the suit. AIR 1957 Pat 124 (126).

(4) Defendant need not complete his evidence before the plaintiff is called upon to adduce his evidence where defendant has examined certain witness de bene esse in England. AIR 1965 Mad 266 (270): (1964) 2 Lab LJ 164.

Order 18, Rule 17 — Note 1

(1) The powers of the Court to act under this rule are very wide. 1956 Madh

R. 18. Power of Court to inspect.—The Court may at any stage of a suit inspect any property or thing concerning which any question may arise.

HIGH COURT AMENDMENT

Madras and Pondicherry

Add at the end of Rule 18 the following:

"As soon as may be, the Court shall record a memorandum of any relevant fact observed at such inspection. Such memorandum shall form part of the record of the case." [28-1-1959]; Act 26 of 1968, S. 3 and Sch., Pt. II [w.e.f. 5-9-1968.]

HIGH COURT AMENDMENT

Rule 19

Allahabad

Add the following rule at the end of Order 18:

"19. (1) The Judge shall record in his own hand in English all orders passed on applications, other than orders of a purely routine character.

(2) The Judge shall record in his own hand in English all admissions and denials of documents, and the English proceedings shall show how all documents tendered in evidence have been dealt with from the date of presentation down to the final order admitting them in evidence or rejecting them.

(3) The Judge shall record the issues in his own hand in English, and the issues shall be signed by the Judge and shall form part of the English proceedings."

Order 18, Rule 17 — Note 1 (contd.)

BLJ 948 (949) ** AIR 1947 Bom 156 (157).

(2) The power under this rule is discretionary and ought to be exercised with the greatest care and only in exceptional circumstances. 1956 Madh BLJ 948 (949) ** AIR 1947 Bom 156 (157).

(3) The right of the Court to act under the rule is not restricted to action of its own motion. Either party has a right to invite the Court to exercise the power. 1956 Madh BLJ 948 (949) ** AIR 1947 Bom 156 (157).

(4) Just as it is not open to a Court to compel a party to make a particular kind of pleading or to amend his pleading so also it is beyond its competence to virtually oblige a party to examine any particular witness. **AIR 1965 SC 1008 (1014): (1965) 1 SCR 542: 67 Bom LR 782.**

(5) An opportunity to party to recall witness for examination, cross-examination or re-examination cannot be said to be governed by Order 18, Rule 17. If circumstances warrant, Court can grant such opportunity under S. 151. AIR 1966 Andh Pra 295 (296): (1966) 1 Andh WR 22 ** (1967) 71 Cal WN 747 (748, 749). (Witness cannot be re-called to fill up lacuna in evidence.)

Order 18, Rule 18 — Note 1

(1) This rule enables the Court to inspect any property or thing though it may issue a commission for that purpose. AIR 1953 Cal 177 (178) (DB) ** AIR 1921 Mad 323 (323): 44 Mad 640 (DB).

(2) A judgment should not be based solely on the basis of such personal local inspection. AIR 1953 Cal 177 (178) ** 1958 Andh LT 723 (726) ** AIR 1953 Madh B 15 (16) (DB) ** AIR 1963 Madh Pra 230 (232): 1961 MPLJ 135.

(3) A Judge is not entitled to substitute his own view formed as a result of local inspection, for the evidence in the case. AIR 1953 Raj 167 (168): ILR (1952) 2 Raj 54 ** AIR 1953 Sau 106 (107) ** AIR 1941 Nag 292 (292): ILR (1942) Nag 269 ** AIR 1966 Punj 502 (504, 505).

[See also AIR 1962 Mys 17 (18): 39 Mys LJ 402.]

(4) Where the parties agree to accept the opinion of the Judge on the point and for that reason lead no evidence the opinion of the Judge can be accepted in place of evidence. AIR 1953 Raj 167 (168): ILR (1952) 2 Raj 54 ** AIR 1941 Nag 292 (292): ILR (1942) Nag 269.

(5) It is not obligatory on the Judge to record the result of the local inquiry AIR 1953 Cal 177 (178) (DB) ** AIR 1958 Mad 331 (332): ILR (1958) Mad 630 (DB) ** AIR 1946 Cal 444 (446).

(6) It is desirable that the result of inspection should be recorded in the proceedings and not left for the notice till judgment. AIR 1958 Mad 331 (332): ILR (1958) Mad 630 (DB) ** (1953) 6 Sau LR 454 (455) ** AIR 1951 Pepsu 26 (27): 2 Pepsu LR 335 ** (1912) 14 Ind Cas 377 (378, 379) (DB) (Cal).

(7) The judgment of a Court which makes a local inspection but fails to prepare notes of that inspection and keep them on record will be vitiated. AIR 1958

ORDER XIX

AFFIDAVITS

[See Sections 30 and 139.]

R. 1. Power to order any point to be proved by affidavit.—Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:

Provided that where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

[1882 and 1877, S. 194; Cf. R. S. C., O., 37, R. 1. See O. 11.]

Order 18 Rule 18 — Note 1 (contd.)
Mad 331 (333): ILR (1958) Mad 630 (DB).

[But see AIR 1964 Mys 214 (215, 216): (1963) 2 Mys LJ 471 ** AIR 1959 Andh Pra 153 (157, 158).]

(8) The notes of inspection should be confined to the facts observed without recording impressions or opinions of the Judge. AIR 1953 Cal 177 (178) (DB).

(9) Munsif ought not to use statements of any person as confirming his impression though formed independently of them. AIR 1918 Pat 633 (634) (DB).

(10) Local inspection is done by the Court in its discretion and it could be done at any stage of the proceedings either suo motu or at the instance of the parties to the cause. AIR 1958 Mad 331 (332, 333): ILR (1958) Mad 630 (DB).

(11) Notes of local inspection made by trial Court and relied upon them in decreeing plaintiff's suit — Appellate Court must consider notes of inspection. (1967) 1 Andh WR 57 (58): (1967) 2 Andh LT 339.

(12) Under the West Bengal Premises Tenancy Act the Rent Controller, as a Civil Court may if the contingency arises himself enter and inspect or delegate his powers and functions to his subordinate officers. ILR (1960) 1 Cal 529 (531).

(13) Where the Court thinks it is essential to have a local inspection, it may do it after giving notice to the parties and if it inspects, it should prepare notes of inspection and should also make the notes available to the parties. 1962 Ker LT 5 (6): 1962 Ker LJ 494.

ORDER 19, RULE 1 — SYNOPSIS

1. Affidavits, essentials of.
2. Cross-examination of deponent of affidavit.
3. Agreement to take evidence by affidavit.
4. Necessity for affidavits on matters of records or questions of law.
5. Applicability.

1. Affidavits, essentials of. — (1) An affidavit is a declaration as to facts, made in writing and sworn before a person having authority to administer on oath. AIR 1953 Nag 169 (171): ILR (1953) Nag 314 (DB).

(2) Officer authorised must be on duty at the time when the oath is administered. ('10) 4 Sind LR 88 (92).

(3) Want of seal of Magistrate before whom affidavit is sworn does not make it bad. AIR 1927 Lah 376 (377).

(4) Deponent may, instead of signing his name, affix a mark or a stamp bearing his name on affidavit. AIR 1928 Mad 175 (175, 176): 51 Mad 242 (DB).

(5) Any person acquainted with the facts of the case may give the affidavit. AIR 1955 Trav-Co 97 (102) (DB) ** AIR 1954 Cal 159 (163) (DB) ** AIR 1953 Nag 169 (171): ILR (1953) Nag 314 (DB).

(6) An affidavit should not contain any inferences but only facts. AIR 1955 Ajmer 7 (7) ** AIR 1954 All 393 (395): ILR (1954) 1 All 582 (DB) ** (1904) 6 Bom LR 704 (711).

(7) The contents must be read over to the deponent in the language which he understands and vouched by him to be correct. AIR 1914 All 197 (199): 36 All 13.

(8) If a person makes a statement on oath before the Oaths Commissioners knowing it to be false and with the intention of deceiving the Court and of leading it to suppose that which he states is true, then he commits the offence of intentionally giving false evidence and can be convicted under Section 193, Penal Code. 1955 All L Jour 155 (156) ** AIR 1963 Punj 185 (186, 187): 1963 (1) Cri LJ 478: 66 Pun LR 53. (It is not desirable to take a lenient view.)

(9) Question relating to verification of an affidavit is more a question of procedure than a question of law. Affidavit under Section 8 (e) Notaries Act (1952) in support of appeal is not out of the way. (1968) 72 Cal WN 594 (600): (1968) 2 Com LJ 131 (DB).

(10) Where affidavits are filed in support of applications and are received by the Court, the order receiving the affidavit is tantamount to passing an order under Order 19, Rule 1, and complies with the law. Affidavit must be verified by stating the source of information and the grounds of belief with sufficient parti-

Order 19 Rule 1 — Note 1 (contd.)
cularity. AIR 1964 Bom 38 (39, 40): 65 Bom LR 584 ** AIR 1968 Cal 532 (538) (DB).

(11) Where there are allegations of mala fides made in affidavit, unless they are refuted in affidavit-in-opposition adverse inference can be drawn. (1967) 71 Cal WN 499 (505) (DB).

(12) Alternative statemest can be made in affidavit by use of conjunction "and/or". AIR 1967 Goa 169 (186) ** AIR 1967 Guj 214 (219): 8 Guj LR 281 (DB).

(13) Scandalous allegations in affidavits can be expunged under Section 151 if irrelevant. AIR 1966 Mad 161 (162): (1965) 2 Mad LJ 477.

(14) Application for transfer of suit — Affidavit casting aspersions on officer — It is advisable to avoid positive assertion like "I state" and to use only such language as "I suspect" or "I believe." etc. AIR 1959 Mad 331 (333): (1959) 1 Mad LJ 329 (FB).

(15) Swearing of an affidavit is essential—Affidavit not sworn before but simply attested by judicial officer does not amount to an affidavit of the signatory. ILR (1967) 2 Punj 11 (15).

(16) It is incumbent on the parties to state the facts very clearly and precisely in affidavits. AIR 1967 Punj 399 (401): 1965 Pun LR (Sup) 397.

(17) A statement on oath, whether true or false, has to be met by a counter affidavit in reply, or by challenging the statement by cross-examining the deponent. If that is not done, it will be presumed that the allegations, if untrue, would have been rebutted by the other side. AIR 1962 All 407 (411): 1962 All LJ 495 (DB) ** AIR 1962 All 439 (443).

(18) Averments in counter-affidavit — Averment not controverted by filing rejoinder affidavit by petitioner — Averments made in counter affidavit must be accepted as true and correct. AIR 1966 All 156 (157): 1965 All LJ 945.

(19) When other party has no opportunity to rebut affidavit it cannot be looked into in support of contentions advanced by one party. AIR 1967 Andh Pra 202 (206): 1967 Cri LJ 845: (1966) 2 Andh WR 460 (DB).

2. Cross-examination of deponent of affidavit. — (1) Where the adverse party bona fide desires the production of the deponent for cross-examination, the Court has no power, under this rule, to order that the affidavit may be read at the hearing on proof of certain fact. AIR 1956 Ajmer 35 (36) ** AIR 1945 Bom 60 (63): ILR (1944) Bom 558 (DB) ** AIR 1960 SC 571 (574): (1960) 2 SCR 841.

(2) The Court will refuse to act on an affidavit, when the deponent cannot be cross-examined. AIR 1953 Nag 169 (171): ILR (1953) Nag 314 (DB) ** AIR 1936 All 671 (672) (DB).

(3) No right is conferred on any person by J and K Commission of Enquiry Act (32 of 1962) to cross-examine a witness giving evidence before a commission by an affidavit. AIR 1967 SC 122 (132): (1966) Supp SCR 401.

3. Agreement to take evidence by affidavit. — (1) When parties agree to take evidence by affidavit, it does not preclude them from taking oral evidence for supplementing the same except where the agreement specifies that the evidence is upon affidavits alone. AIR 1953 Madh B 82 (83): ILR (1953) Madh B 222 (DB).

4. Necessity for affidavits on matters of records or questions of law.—(1) An affidavit is of no weight when it is simply a party's opinion on a question of law. AIR 1914 Oudh 206 (207) (DB).

(2) It is superfluous when the facts deposed to therein are already a matter of record. AIR 1953 Nag 288 (289): ILR (1953) Nag 787 (DB) ** (1905) 32 Cal 146 (149) (DB).

5. Applicability.—(1) This rule enables any Court to order that any fact may be proved by affidavit. AIR 1954 Nag 260 (263): ILR (1954) Nag 603 (DB) ** AIR 1960 SC 571 (574): (1960) 2 SCR 841.

(2) Unless and until Court orders any particular fact to be proved by affidavit, a fact cannot be proved by filing an affidavit, because an affidavit in support of an application is no evidence. 1956 Madh BLJ 255 (259) ** AIR 1955 Ajmer 7 (7, 8) ** AIR 1953 Nag 135 (135).

(3) It is always open to the Court to take into consideration all the facts alleged in an uncontroverted affidavit. 1957 All LJ 228 (232).

(4) Where on the day of the first nearing of a suit the defendant does not appear though served, the execution of the document which is sued upon may be proved by an affidavit without calling a witness. AIR 1953 Mad 164 (165).

(5) When Advocate comes forward with submission in affidavit, it should ordinarily be accepted by courts, unless circumstances are very exceptional. (1965) 2 Mad LJ 567: 78 Mad LW 697.

Writ petition.—(6) Order 19 should be followed in the enquiries in the High Court connected with petitions for writs. AIR 1956 Trav-Co 35 (41) (DB) ** AIR 1954 Assam 161 (164): ILR (1954) 6 Assam 161.

[See also (1954) 58 Cal WN 1066 (1076).]

(7) Affidavit cannot be acted upon in execution petitions which are original proceedings and not interlocutory applications. An objection thereof should be taken at the time of its reception. AIR 1963 Andh Pra 445 (447): (1966) 1 Andh WR 380. (ILR (1957) Andh Pra 165 and AIR 1953 Nag 135, Rel. on.)

(8) A decision based on evidence in form of affidavits with permission of Court under O. 19 is in accordance with law. (1962) 3 Guj LR 1013 (1015).

(9) Under Rule 1, reasons for taking the evidence by affidavits have to be set

R. 2. Power to order attendance of deponent for cross-examination.—(1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

[1882, S. 195; Cf. R. S. C., O. 38, R. 1. See Ss. 132, 133 and O. 11.]

Order 19 Rule 1 — Note 5 (contd.)
out in the order. AIR 1967 Guj 214 (218): 8 Guj LR 281 (DB).

(10) Where a Court is expressly permitted to decide interlocutery matters on affidavit provision of O. 19 cannot be pressed into service. AIR 1968 Guj 198 (200, 201): 9 Guj LR 907.

(11) An "affidavit" is evidence within the meaning of the word 'evidence' used in S. 146 (1-A) Criminal P.C. (1898). AIR 1969 All 82 (85): 1969 Cri LJ 139: 1968 All LJ 325 ** AIR 1965 All 442 (442): 1965 (2) Cri LJ 337: 1964 All WR (HC) 550.

(12) For arriving at a finding of possession in a case under S. 145 Criminal P. C.. affidavits form an important piece of evidence. 1967 Mad LJ (Cri) 456 (458): (1967) 1 Andh WR 437.

(13) An order under Rule 1 of Order 19 is permissible only in exceptional circumstances. In proceedings arising under the Mysore House Rent and Accommodation Control Act, the parties should not be compelled to produce affidavits in proof of their cases without their being permitted to examine the witnesses in the ordinary way. AIR 1959 Mys 139 (142, 143): 37 Mys LJ 71.

(14) In view of S. 118 of the Bombay Industrial Relations Act (1946), the Industrial Courts under the Act may, subject to the conditions laid down in O. 19, ask a particular fact or facts to be proved by affidavits. **AIR 1960 SC 571 (574):** (1960) **2 SCR 841.**

(15) In a writ proceeding the affidavits will not be allowed to contain new points not covered in original petition. 69 Pun LR 98 (105): 64 ITR 249 (DB).

(16) Plea not raised in writ petition but raised for the first time in a rejoinder affidavit should not be allowed. AIR 1967 Guj 198 (199) (DB).

(17) Writ petition — Document to be produced as evidence not specified in affidavit — Document cannot be admitted at late stage of arguments. (1965) 67 Pun LR 452 (455): 1965 Cur LJ 279.

ORDER 19, RULE 2 — SYNOPSIS

1. "May be given by affidavit."
2. Rule to show cause.
3. Application to declare a person tout.
4. Affidavit of documents.
5. Cross-examination of deponent.
6. Evidentiary value.

1. "May be given by affidavit." — (1) Order 19, Rule 2 applies to interlocutory applications and also to applications of a substantive nature. AIR 1954 Nag 260 (261): ILR (1954) Nag 603 (DB) ** (1961) 1 An WR 212 (217). (ILR (1957) Andh Pra 165, **Overruled.)** ** AIR 1959 Mys 139 (142): 37 Mys LJ 71.

(2) When contributories of a company in liquidation complain of misapplication of the funds by the liquidators, and apply to make an officer of the company liable for such misappropriation they must definitely set out the sum misapplied and the grounds of the charge in the affidavit. (1895) 19 Bom 88 (94).

(3) A party in a suit for dissolution of marriage is not entitled as of right to give evidence by affidavit. 1891 Pun Re No. 13, p. 88 (90) (SB) ** (1935) 62 Cal 541 (545).

(4) Under S. 70 (b), Trade Marks Act, 1940, it is open to the Registrar not to admit oral evidence or to admit oral evidence in addition to the evidence by affidavit. AIR 1956 Bom 641 (643).

(5) In view of S. 118 of the Bombay Industrial Relations Act (1946), the Industrial Courts under the Act may, subject to the conditions laid down in O. 19, ask a particular fact or facts to be proved by affidavits. **AIR 1960 SC 571 (574):** (1960) 2 SCR 841.

(6) Legal practitioners are officers of the Court and, when called upon to speak to facts relating to the case in which they are engaged, should not be asked to file affidavits. Their statements should be accepted. AIR 1928 Mad 690 (692) (DB).

(7) In a reference under S. 146 Criminal P. C. provisions of S. 141 Civil P. C. are not attracted; so an application under O. 19, R. 2 is not maintainable in such a reference. AIR 1965 Andh Pra 17 (18): 1965 (1) Cri LJ 8: (1964) 2 Andh WR 129.

(8) The rule is applicable to any application which is made to court irrespective of its nature whether substantive or interlocutory. 1959 Raj LW 124 (126).

(9) An affidavit in support of an application is no evidence. It is intended merely to satisfy a Court that allegations in the application are true and may be acted upon if the opposite party does not contest the allegations. AIR 1968 Madh Pra 33 (36): 1967 MPLJ 776 (DB).

(10) Rule 2 applies to applications and not to suits. AIR 1967 Guj 214 (218): 8 Guj LR 281 (DB).

2. Rule to show cause. — (1) An application for a rule to show cause must be supported by an affidavit. (1880) 5 Cal 605 (611).

3. Application to declare a person a tout.—(1) Though it is open to a Court in

R. 3. Matters to which affidavits shall be confined.—(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: Provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

[1882 and 1877, S. 196; R. S. C., O. 38, R. 3.]

HIGH COURT AMENDMENT

Rules 4 to 15
Allahabad

Add the following Rules:

"4. Affidavits shall be entitled, In the Court of ——at——(naming such Court.) If the affidavit be in support of, or in opposition to, an application respecting any case in the Court it shall also be entitled in such case. If there be no such case, it shall be entitled, In the matter of the petition of.

5. Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and as nearly as may be shall be confined to a distinct portion of the subject.

6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly; and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade, and the true place of his residence.

Order 19 Rule 2 — Note 3 (contd.)

an application under the Legal Practitioners Act to act on an affidavit to declare a person a tout, it is desirable that Courts should hear oral evidence. (1903) 26 Mad 596 (597) (DB).

4. Affidavit of documents. — (1) The production of documents can be resisted by a party by claiming privilage and the grounds of privilege must be sufficiently disclosed in the affidavit of documents. If the affidavit of documents does not sufficiently set out the plea, a party may supplement the same by a separate affidavit. (1895) 22 Cal 105 (110).

(2) When a party claims to seal up a portion of a document on the ground that it is irrelevant to the issue, the affidavit of documents must clearly specify such portions and the grounds on which he claims to seal them. (1893) 20 Cal 587 (589).

(3) Where it was claimed in affidavit that documents required to be produced were unpublished official records relating to affairs of State, Court must consider the matter objectively. When such a claim is to be made it should be made by the Minister or the Secretary of the concerned department and the affidavit should show that they have read and considered those documents individually. AIR 1968 All 42 (43, 44): 1967 All LJ 431 (DB).

5. Cross-examination of deponent.— See also Order 19, Rule 1, Note 2 — (1) Power of court to call deponent for cross-examination is to be rarely exercised and unless the Court is convinced that in the interests of justice such course is necessary, court would not ordinarily in writ petition exercise the power. AIR 1967 Guj 229 (255): 7 Guj LR 597 (DB). (1965-6 Gug LR 632, Relied on.)

6. Evidentiary value — (1) Affidavits — Cannot be used as evidence under Evidence Act but can be so used under O. 19 provided Court passes an order as required by O. 19, R. 1 — Affidavit not properly drawn up or verified should not be received in evidence. AIR 1964 Bom 38 (39, 40): 65 Bom LR 584.

(2) Decision based on affidavits is not one not in accordance with law. (1962) 3 Guj LR 1013 (1015).

(3) The practice of taking evidence by affidavits is deprecated. AIR 1967 Gui 214 (218): 8 Guj LR 281 (DB).

(4) The definition of evidence in Evidence Act does not include an "affidavit". 1962 Jab LJ 197 (198).

(5) Rule 2 is an enabling provision entitling parties to give evidence by affidavit, but does not empower a Court to compel parties to do so. AIR 1959 Mys 139 (142): 37 Mys LJ 71.

(6) Document to be produced as evidence not specified in affidavit — Document cannot be admitted at late stage of arguments. ILR (1965) 2 Punj 174 (179, 180): 1965 Cur LJ 279.

ORDER 19, RULE 3 — SYNOPSIS

1. Interlocutory application.
2. Statements as to belief must contain grounds thereof.
3. Scandalous and irrelevant matter.
4. Affidavit by Government Officers.

1. Interlocutory application.— (1) An application to obtain relief under S. 36,

Order 19 Rule 3 — Note 1 (contd.)
Bengal Money-lenders Act is not an interlocutory application within sub-rule (1). Hence an affidavit in support of such an application must be confined to facts which the deponent is able of his own knowledge to prove. (1942) 46 Cal WN 474 (476) (DB).

(2) Writ petitions under Article 226 of the Constitution are entirely decided upon affidavits. It is not necessary that everything in the affidavit must be true to the personal knowledge of the deponent. AIR 1954 Assam 161 (164): ILR (1954) 6 Assam 161 (DB) ** (1954) 58 Cal WN 1066 (1076).

[See however 1956 All L J 198 (200).]

2. Statements as to belief must contain grounds thereof.—(1) Grounds of belief must be stated with sufficient clearness to enable a Court to judge whether it would be safe to act on deponent's belief. AIR 1953 Madh B 82 (83): ILR (1953) Madh B 222 (DB) ** AIR 1919 Cal 970 (971) (DB) ** AIR 1924 Pat 312 (313) (DB).

(2) Unless the affidavits are properly verified and are in conformity with the rule, they will be rejected by the Court. AIR 1956 Madh B 244 (245) (DB) ** 1957 Jab LJ 234 (236, 237) ** AIR 1952 Cal 255 (256) ** AIR 1964 Bom 38 (39, 40): 65 Bom LR 584 ** AIR 1968 Raj 282 (286): 1968 Raj LW 205 ** (1969) 73 Cal WN 192.

(3) Where the verification on an affidavit was to the effect that the entire contents were true according to the knowledge of the party and according to the information received and believed to be true, the affidavit was held to be infructuous. AIR 1944 Nag 161 (163): ILR (1944) Nag 436** AIR 1967 Goa 142 (147).

(4) An affidavit is defective if the deponent does not say which part is based on information and which on belief or if he does not state the grounds of his belief. AIR 1956 Cal 496 (497) ** AIR 1956 Madh B 244 (245) (DB) ** AIR 1952 Raj 90 (91): ILR (1951) 1 Raj 304 (DB) ** AIR 1962 Pat 101 (105): ILR 40 Pat 783. (37 Cal 259, Relied on.) ** AIR 1968 Punj 406 (410): 1968 Lab IC 1173: ILR (1969) 1 Punj 378 ** AIR 1965 Punj 318 (319): ILR (1965) 1 Punj 744 ** (1962) 3 Guj LR 66 (67) (DB).

[But see AIR 1967 Guj 186 (189): 7 Guj LR 850 (DB).]

(5) Where the matter deposed to is not based on personal knowledge, but on information, the sources of information should be clearly disclosed. **AIR 1952 SC 317 (319):** 1952 SCR 674: 1952 Cri LJ 1269 ** AIR 1956 Cal 496 (497) ** AIR 1956 Madh B 244 (245) (DB) ** AIR 1955 Trav-Co 97 (102) (DB) ** **AIR 1967 SC 295 (319):** (1966) Sup SCR 311 ** AIR 1968 Punj 406 (410): 1968 Lab IC 1173.

(6) When an affidavit denies an averment the denial carries with it the inevitable connotation that the denial is based upon knowledge and not merely upon ignorance of true facts. Mere denial without giving reason therefor, will not help the deponent. AIR 1954 Bom 468 (470): ILR (1954) Bom 1333 (DB).

(7) Statement in affidavit filed by opposite party in proceedings under Art. 226 that the statements in above paragraphs of the petition are "more or less correct" is not proper statement which should be placed on affidavits and it is a practice which deserves strong condemnation. AIR 1954 Cal 41 (43).

(8) Affidavit affirmed by saying "several paragraphs of this affidavit were true to his knowledge or knowledge derived from his reading of the records of the case" — Affidavit is not fit to be looked at. AIR 1954 Cal 499 (504) (DB).

(9) Writ petition — Statement in affidavit that paras 4 and 5 are wrong and are not admitted is of little use to Court which desires to know, if facts stated by petitioner are wrong, what are true facts — Affidavit is not pleading. 1956 All L J 198 (200).

(10) Averment in affidavit to the effect that a particular letter did not probably reach the addressee being merely a guess cannot carry any weight merely because it is contained in counsel's affidavit. AIR 1948 Oudh 144 (144, 145): 23 Luck 101 (DB).

(11) Declaration before a notary public — Not an affidavit — An affidavit can be made on solemn affirmation only. AIR 1968 Cal 388 (390): 70 Cal WN 852.

(12) Affidavit in reply in a writ under Art. 226 of Constitution—Disputed questions of fact can be traversed. AIR 1969 Manipur 30 (32).

(13) Return to a rule issued in Civil Writ case has to be made on affidavits satisfying requirements of O. 19 R. 3 of C. P. Code. (1966) Cur LJ 318 (328) (Punj).

(14) If an affidavit is not in the form as prescribed under S. 83 of the Representation of the People Act (1951) but substantially complies with it it cannot be thrown out. AIR 1963 Raj 157 (159): 1963 Raj LW 85.

(15) An affidavit filed under S. 83 (1) Proviso to the Representation of the People Act (1951) should satisfy requirements of O. 19, R. 3. AIR 1968 Raj 282 (285): 1968 Raj LW 205.

(16) Verification of an affidavit under S. 491 Criminal P. C. should be modelled on lines of O. 19. R. 3 AIR 1964 Punj 198 (202): 1964 (1) Cri LJ 535: 66 Pun LR 429.

(17) Verification must be made under O. 19, R. 3 when serious charges of fraud collusion etc. are made or denied in application under Ss. 397 and 398 of Companies Act, 1956. ('64) 68 Cal WN 884 (901).

(18) The company Rules, which govern the practise and procedure of the matters relating to companies, which are dealt with

7. Unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to. Two or more persons may join in an affidavit; each shall depose separately to those facts which are within his own knowledge, and such facts shall be stated in separate paragraphs.

8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words "I affirm" or "I make oath and say".

9. Except in interlocutory proceedings affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed," and if such be the case, "and verily believe it to be true," and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any Court of justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

10. When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

11. Every person making an affidavit for use in a Civil Court shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address, and description of him by whom the identification was made as well as the time and place of such identification.

Order 19 Rule 3 — Note 2 (contd.)

in the Original Side of the Calcutta High Court override the general provisions of the Civil P. C. AIR 1961 Cal 439: (1962) 32 Com Cas 575.

(19) Order 19, Rule 3 applies to affidavits simpliciter which can be used as evidence in a suit. A petition must be verified as laid down in O. 6, R. 15. (1964) 68 Cal WN 163 (168).

(20) Affidavits filed in interlocutory application can be verified both on personal knowledge or on information received and believed to be true provided grounds for belief are stated. (1966) 68 Bom LR 431 (440): ILR (1967) Bom 334 (DB).

(21) Verification of affidavits filed in writ proceedings should be modelled on the lines of O. 19 R. 3 though Civil P. C. does not apply to proceedings under Article 226 of Constitution. AIR 1967 Tripura 25 (29): 1967 Cri LJ 1066.

(22) To file a false affidavit for securing admission of an appeal is a very serious matter and court should not take a lenient view of such serious wrongs. AIR 1963 Punj 185 (186): 1963 (1) Cri LJ 478: 66 Pun LR 53.

3. Scandalous and irrelevant matter.—(1) If an affidavit contains scandalous and irrelevant allegations, it may be ordered to be taken off the file or the particular passage may be expunged. AIR 1956 Manipur 4 (7) ** 1956 All LJ 198 (200) ** (1909) 4 Ind Cas 380 (381) (DB) (Cal) ** (1966) 33 Cut LT 423 (498): 9 Orissa JD 24 (FB) ** AIR 1959 Mad 331 (333): (1959) 1 Mad LJ 329 (FB).

4. Affidavit by Government Officers. — (1) The verification of an affidavit filed by a Government officer to prove that certain order was validly made by the State Government should invariably be modelled on the lines of O. 19, R. 3. **AIR 1952 SC 317 (319):** 1952 SCR 674: 1952 Cri LJ 1269 ** **AIR 1967 SC 295 (319):** (1966) Supp SCR 311.

Order 19, Rule 7 (All) — Note 1

(1) Affidavit supporting a petition under Article 226 of Constitution must be sworn by a person who can relate facts from his personal knowledge. AIR 1962 All 70 (71): (1961) 1 Lab LJ 686.

Order 19, Rule 8 (All) — Note 1

(1) Form No. 25 prescribed in Rules framed under Representation of the People Act prevails over O. 19, R. 8 as amended by Allahabad High Court. AIR 1964 All 86 (92) : ILR (1964) 1 All 299 (DB). **(Reversed on another point in AIR 1964 SC 1249.)**

Order 19, Rule 9 (All) — Note 1

(1) Form No. 25 prescribed in Rules framed under Representation of the People Act (1951) prevails over Order 19, R. 3 as amended by Allahabad High Court. AIR 1964 All 86 (92): ILR (1964) 1 All 299 (DB). **(Reversed on another point in AIR 1964 SC 1249).**

11A. Such identification may be made by a person:

(a) personally acquainted with the person to be identified, or

(b) satisfied, from papers in that person's possession or otherwise, of his identity:

Provided that in case (b) the person so identifying shall sign on the petition or affidavit a declaration in the following form, after there has been affixed to such declaration in his presence the thumb impression of the person so identified:—

FORM

I (name, address and description), declare that the person verifying this petition (or making this affidavit) and alleging himself to be A. B. has satisfied me (here state by what means, e. g., from papers in his possession or otherwise) that he is A. B.

12. No verification of a petition and no affidavit purporting to have been made by a pardanashin woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition, or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her.

13. The person before whom any affidavit is about to be made shall, before the same is made ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof; or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made.

14. The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place when and where it was made and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit.

15. If it be found necessary to correct any clerical error in any affidavit, such correction may be made in the presence of the person before whom the affidavit is about to be made and before, but not after, the affidavit is made. Every correction so made shall be initialled by the person before whom the affidavit is made, and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made."

ORDER XX

JUDGMENT AND DECREE

[See Section 33.]

R. 1.[a] Judgment when pronounced.—The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or, as soon there-

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ORDER 20, RULE 1 — SYNOPSIS

1. Chartered High Courts.
2. "After the case has been heard."
3. "Shall pronounce judgment in open Court."
4. When judgment may be pronounced.
5. Holiday.
6. "Or on some future day."
7. Notice to parties.
8. Non-compliance with Rules 1, 2 and 3.

1. Chartered High Courts.— (1) This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction. AIR 1929 All 403 (403) (DB).

2. "After the case has been heard."—(1) Commencing to write judgment before hearing evidence fully, held to be a gross irregularity and judgment was set aside in revision. AIR 1933 All 196 (196).

(2) Where, after arguments were partly heard, a party died and the Court, with-

after as may be practicable, on some future day; and when the judgment is to be pronounced on some future day, the Court shall fix a day for that purpose, of which due notice shall be given to the parties or their pleaders.

[1882 and 1877, S. 198; 1859, S. 183.]

[a] Substituted by the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), S. 14 (4) [1-1-1957].

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Kerala : Laccadive, Minicoy and Amindivi Islands

Rule 1 shall be renumbered as sub-rule (1) thereof and the following shall be inserted as sub-rule (2), namely :—

"(2) The judgment may be pronounced by dictation to a shorthand writer in open Court" [9-6-1959]; Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3.

Order 20 Rule 1 — Note 2 (contd.)

out bringing his legal representatives on record, pronounced judgment. it was held that the judgment was a nullity as the case had not been fully heard. AIR 1919 Mad 685 (690) (DB).

(3) It is not legal for the Judge to appoint assessors to appraise the value of the evidence in the case and base his judgment on that opinion. (1913) 21 Ind Cas 427 (428) (All).

(4) It is not legal for the judge to base the judgment upon the unrecorded statements made at the Bar. AIR 1921 Cal 558 (558).

(5) As a general rule it is the Judge who heard the evidence that should give the judgment. (1866) 4 Bom HCR (AC) 98 (101, 102, 103) (SB) ** (1867) 7 Suth WR 441 (441, 445) (DB).

(6) Where hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that O. 20, R. 1 permits judgment to be delivered after an interval after the hearing is completed. There is no hiatus between reservation of judgment and pronouncing of it. **AIR 1964 SC 993 (995):** (1964) 5 SCR 946.

(7) Hearing of a suit comes to end only when judgment is delivered or when the suit is posted for judgment where it is reserved. Hearing is not concluded when it is posted for arguments though recording of evidence is over. AIR 1966 Andh Pra 295: (1966) 1 Andh WR 22. (AIR 1954 Punj 207, Rel. on.)

(8) Once the judgment is delivered in open Court after the matter is heard in the presence of the parties, it becomes effective and operative and the subsequent part of correcting and initialling or authenticating the same would be a matter of procedure. The order no sooner it is formally declared with the intention of making it the operative decision of the Court, becomes thus final and effective and it makes no difference whether it is signed, or initialled. AIR 1968 Guj 289 (292). (AIR 1966 All 221 (FB), Diss. from.)

(9) Once a party files an application for consideration Court can reject the application only after giving a hearing. AIR 1964 Orissa 185 (186): 30 Cut LT 22.

(10) Suit to set aside decree on ground of fraud — Issue involved one of mixed law and fact — Finding on, cannot be given without giving opportunity to lead evidence. AIR 1959 Andh Pra 212 (214) : ILR (1958) Andh Pra 129 (DB).

3. "Shall pronounce judgment in open Court." — (1) Judgments should be pronounced in open Court. AIR 1923 Pat 129 (130): 1 Pat 771 (DB) ** (1906) 30 Bom 455 (456, 457) (DB).

(2) The expression "open Court" refers to the place and manner of pronouncement of judgment. (1912) 13 Ind Cas 463 (464) (DB) (Mad).

(3) Mere posting of a notice on notice-board announcing result of appeal is not a sufficient compliance with rule. AIR 1921 Mad 690 (690, 691) (DB).

(4) It is not necessary that the whole of the judgment should be read out by the Judge in open Court. (1926) 94 Ind Cas 121 (121) (DB) (Nag).

(5) A judgment of the Full Bench is not rendered invalid by its pronouncement at a time when one of the Judges of the Bench was absent on other duty. AIR 1925 Mad 58 (59) (DB).

(6) Where a judgment was written and signed by the Judge who heard the case, but, at his request, was read out by his colleague a Judge presiding in another Court, it was held that such a procedure is not invalid and will in any case be only an irregularity which is cured by S. 99 of the Code. AIR 1919 Cal 799 (799) (DB).

(7) Reading of Order 20, Rr. 1, 6, 7, Ss. 2 (2), 2 (9) and 33 together shows that a "decree" comes into existence as soon as a judgment is pronounced. AIR 1962 Pat 398 (399): 1962 BLJR 434.

Madras and Pondicherry

Substitute for Rule 1 the following:

"(1) The Court, after the case has been heard, shall pronounce judgment in open Court, either, at once or on some future day, of which due notice shall be given to the parties or their pleaders.

(2) The judgment may be pronounced by dictation to a shorthand writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court" [6-5-1930]; Act 26 of 1968, S. 3 and Sch. Pt. II.

Mysore

Renumber Rule 1 as Rule 1 (1) and add the following as sub-rule (2):—

(2) The judgment may be pronounced by dictation to a shorthand writer in open Court, where the Presiding Judge has been specially empowered in that behalf by the High Court. Where the Presiding Judge is not so empowered the judgment shall be reduced to writing before it is pronounced [30-3-1967].

Order 20 Rule 1 (contd.)

4. When judgment may be pronounced. — (1) The Court cannot pronounce its judgment before the date fixed for hearing. AIR 1954 Punj 207 (207, 208).

(2) The Court has ample authority to direct successive trials of different issues. and to record interlocutory judgments thereon to be made the basis of the final judgment at the conclusion of the trial of the whole case. AIR 1924 Cal 467 (473) (DB).

(3) There is no objection to a judge at the close of the hearing of a suit or appeal stating at once orally the judgment which he intends to record and deliver, and afterwards to pronounce in open Court his written judgment. (1869) 5 Mad HCR App 8 (8).

[See however AIR 1960 Madh Pra 163 (165): 1960 MPLJ 129 (DB).]

5. Holiday.—(1) The delivery of a judgment or the doing of any judicial act on a holiday is not illegal. (1912) 13 Ind Cas 463 (463) (DB) (Mad) ** (1907) 29 All 562 (563).

(2) If a party is injuriously affected by a judicial act done on a holiday he will be entitled to have the proceedings set aside on that ground. (1887) 9 All 366 (382) (DB) ** (1912) 13 Ind Cas 463 (465) (DB) (Mad).

(3) Civil Judge can dispose of matter pending before him during vacation when the parties agree to it, even if there is a vacation judge to deal with matters during vacation period. (1968) 1 Mad LJ 195 (197): 81 Mad LW 106.

6. "Or on some future day." — (1) The law pre-supposes a prompt and coutinuous trial and a judgment must be pronounced as quickly as possible. (1912) 8 Nag LR 91 (92) ** (1908) 35 Cal 756 (761) (FB).

(2) A judgment delivered after an interval of seven months on an incomplete and imperfect record of evidence was held not to be a legal decision. (1912) 8 Nag LR 91 (92).

(3) Delay in disposal of cases — Simple suit dragged on in Courts for more than eleven years with a number of adjournments, dismissal for default and restoration, ex parte proceedings and setting them aside, appeals and revision — Delay deprecated. 1964 Kash LJ 121 (127).

7. Notice to parties.—(1) Where a judgment is to be passed on a future day after the case has been heard, it is necessary that the Court should fix a day for that purpose and due notice thereof should be given to the parties or their pleaders. AIR 1917 Low Bur 90 (90).

(2) Where particular dates for the delivery of judgment are fixed in Court on the dates fixed, the parties ought to appear on those dates and if they do so, they would have notice of the dates fixed for delivery of judgment. AIR 1956 Raj 113 (118): ILR (1956) 6 Raj 388.

(3) Object of notice in this rule is to enable parties to conform to the adjective law in respect of periods of limitation enacted or periods during which conditional payments are prescribed, as for instance, in matters of pre-emption or the making of final or preliminary decrees. AIR 1933 Nag 12 (13): 28 Nag LR 308 (DB).

(4) The posting of a notice on the notice board is not a compliance with this rule.. AIR 1921 Mad 690 (690) (DB).

(5) Sending of a notice to the pleader of a party or to the party announcing the result of a case, is not a compliance with the rule. AIR 1927 Lah 839 (839) (DB). (Notice to pleader.) ** AIR 1925 All 293 (294): 47 All 332 (DB). (Notice to party.)

(6) Where a judgment has been pronounced without previous notice to a party and, on a subsequent date, information as to the judgment is sent to the party or his pleader, the latter date must be taken to be the date of the delivery of the judgment. AIR 1938 Lah 707 (708) ** 1967 All LJ 276: 1967 All WR (HC) 277. (Reservation of order by R. T. A. for pronouncement — Subsequent pronouncement without intimation to party — Intimation to party after passing of order — For purposes of computing limi-

R. 2. Power to pronounce judgment written by Judge's predecessor.—A Judge may pronounce a judgment written but not pronounced by his predecessor.

[1882, S. 199; 1877, S. 200; 1859, S. 184.]

Order 20 Rule 1 — Note 7 (contd.)

tation for revision against order, same must be deemed to have been passed on date of intimation.)

(7) It is not necessary that the parties should be present at the time of the delivery of the judgment and a suit cannot be dismissed on the ground that the parties were not present at the time of the delivery of the judgment. 1901 Pun Re No. 82, p. 267 (268) ** (1911) 11 Ind Cas 842 (842) (Lah).

(8) A Court is not bound to communicate the result of a case to the parties. AIR 1936 Lah 742 (743).

(9) Nothing on record to show that notice was not given to parties or their pleaders. It must be presumed that they did receive such notice. AIR 1920 Oudh 42 (42): 22 Oudh Cas 379.

(10) Whether the notice to a party was sufficient or not is a question of fact. AIR 1956 Raj 113 (119): ILR (1956) 6 Raj 388.

(11) The provisions of this rule apply also to cases where a judgment is pronounced by a successor under the next rule. (1912) 17 Ind Cas 278 (279) (Mad).

(12) Delay in filing appeal due to mistake of Court in failing to give intimation of delivery of judgment as required under law — Appeal within limitation from date of knowledge but beyond limitation from date of judgment — There is no delay in filing appeal and no question of condonation arises. AIR 1964 All 228 (230).

(13) If the Court fixes a day for the pronouncement of a judgment and the judgment is pronounced then period of limitation would commence from that day whether they were present or not. AIR 1965 Raj 82 (83): 1964 Raj LW 476 (DB).

8. Non-compliance with Rules 1, 2 and 3. — (1) A judgment not pronounced at all is not a valid judgment. AIR 1931 Cal 164 (165) (DB).

(2) Non-compliance with Rules 1 to 3 as to the manner in which it is to be pronounced, dated and signed is only an irregularity within Section 99 of the Code and does not afford a ground for the reversal in appeal of the decree based on the judgment in the absence of prejudice. AIR 1956 Raj 113 (118): ILR (1956) 6 Raj 388 ** AIR 1920 Cal 597 (599): 46 Cal 978 (DB) ** AIR 1933 Nag 12 (13): 28 Nag LR 308 (DB) ** AIR 1964 Madh Pra 288 (292): 1964 MPLJ 502 (DB).

(3) A decree that follows a judgment is valid until set aside on appeal. AIR 1925 All 293 (295): 47 All 332 (DB).

ORDER 20, RULE 2

1. Rule does not apply to Chartered High Courts. — See Order 49, Rule 3.

2. "Written but not pronounced by his predecessor." — (1) For applicability of this rule it is necessary that the predecessor must have written the judgment and also signed it. AIR 1920 Pat 578 (581): 5 Pat L Jour 147 (DB) ** (1885) 7 All 857 (859) (DB).

[But see (1904) 31 Cal 1057 (1064) (DB).]

(2) It is not necessary for the predecessor to have written the judgment at a time when he had still jurisdiction over the suit. AIR 1953 Orissa 298 (299) (DB) ** (1908) 35 Cal 756 (761) (FB) ** AIR 1936 Rang 147 (147) : 14 Rang 136 (FB) ** AIR 1960 Madh Pra 18 (19): 1959 MPLJ 942 (DB). (7 CPLR 18, **Dissented.**)

[But see (1894) 7 CPLR 18 (19) ** AIR 1919 Lah 265 (269): 1919 Pun Re No. 80 (DB).]

(3) A Judge who has ceased to be the Judge of the Court in which the suit was tried cannot pronounce a judgment therein, though it had been written by himself. AIR 1924 Rang 358 (359): 4 Upp Bur Rul 171.

[But see AIR 1916 Lah 78 (78): 1916 Pun Re No. 80.]

(4) A Judge who merely pronounces a judgment under this rule does not accept the judgment as his own so as to render him incompetent to hear an appeal against him judgment under Section 38 of the Bengal, Agra and Assam Civil Courts Act, 1887. AIR 1953 Orissa 298 (299) (DB).

3. "May pronounce". — (1) The rule is not mandatory and the successor is not bound in all cases to pronounce the judgment written by the predecessor, he may, if he sees reason to do so, refuse to pronounce that judgment and may deliver a judgment according to his own view of the case. (1911) 33 All 236 (237) (DB) ** AIR 1936 Rang 147 (149): 14 Rang 136 (FB). (If he is in doubt as to correctness of judgment written by his predecessor he ought either to act in accordance with Order 18, Rule 15, or to hear the case de novo.)

[But see AIR 1959 Andh Pra 16 (17): ILR (1958) Andh Pra 755 (DB) ** AIR 1951 Orissa 313 (326) (DB). (Obiter — Das J.)]

(2) The rule does not warrant the assumption that the succeeding Judge, who merely pronounces, in open Court, a judgment prepared by his predecessor, necessarily expresses himself as being in agreement with the view contained in that judgment; or that when he does

R. 3. Judgment to be signed.—The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it, and, when once signed, shall not afterwards be altered or added to, save as provided by Section 152 or on review.

[1882, S. 202; 1877, Ss. 201, 202 and 203; 1859, S. 185.]

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Bombay: Dadra and Nagar Haveli[a]

In Order XX, Rule 3, substitute a colon for the full stop appearing at the end of the rule and add thereafter the following proviso :—

Provided that where the judgment is pronounced by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall after making such corrections therein as may be necessary be signed by the Judge and shall bear the date of its pronouncement, and when the judgment is once so signed by the Judge it shall not afterwards be altered or added to save as provided by Section 152 or on review [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras except that for the words "provided also that, where the Judge pronounces his judgment by dictation" the words "provided that where the judgment is pronounced by dictation" are substituted [9-6-1959]; Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3.

Madras and Pondicherry

Substitute the following for Rule 3 :

"3. The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as provided by S. 152 or on review, provided also that where

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Order 20 Rule 2 — Note 3 (contd.)

not pronounce that judgment and orders a retrial he necessarily expresses himself as being in doubt as to the correctness of that judgment. AIR 1951 Orissa 313 (317) (DB). (Per Panigrahi J.)

(3) Where a judgment is signed and dated by the predecessor himself and there is nothing to show that it was not pronounced by him, the successor cannot proceed to pronounce it for a second time. AIR 1920 Lah 288 (288).

ORDER 20, RULE 3 — SYNOPSIS

1. Rule does not apply to Chartered High Courts.
2. Applicability.
3. "Shall not afterwards be altered or added to."
4. Non-compliance with Rules 1 to 3.

1. Rule does not apply to Chartered High Courts. — (1) This rule does not apply to Chartered High Courts in exercise of their ordinary or extraordinary original civil jurisdiction. AIR 1947 All 211 (213): ILR (1947) All 180 (FB).

[See O. 49, R. 3.]

(2) The principle underlying the rule applies to Chartered High Courts. AIR 1956 Pat 209 (210): 35 Pat 254 (FB) ** AIR 1937 Cal 222 (224). (Consent decree cannot be varied even by consent of parties: AIR 1916 Mad 604. Followed.)

(3) The rule applies to Chartered High Courts in their appellate or revisional jurisdiction. AIR 1947 All 211 (213): ILR (1947) All 180 (FB) ** AIR 1953 All 416 (418, 419): ILR (1953) 1 All 632 (DB).

2. Applicability. — (1) The rule applies to appeals also. ILR (1956) 1 All 408 (412).

3. "Shall not afterwards be altered or added to." — (1) The jurisdiction of the Court to reconsider its order continues so long as the order has not been perfected under this rule. AIR 1956 Bhopal 48 (48) ** AIR 1957 Punj 186 (189): ILR (1957) Punj 348.

(2) Judgment which has been orally dictated in open Court can be completely changed before it is signed and sealed provided notice is given to all parties concerned and they are heard before the change is made. AIR 1966 All 221 (222): 1965 All WR (HC) 668 (FB).

[But see AIR 1968 Guj 289 (292). (AIR 1966 All 221 (FB) **Dissented.**)]

(3) Jurisdiction of Court to reconsider its order ceases once the judgment is signed, except as provided by S. 152 or on review. AIR 1953 All 416 (419): ILR (1953) 1 All 632 (DB) ** AIR 1942 Pat 234 (235) (DB) ** AIR 1939 Cal 732 (733).

the Judge pronounces his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall after such revision as may be deemed necessary, be signed by the Judge" [6-5-1930]; Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-68].

Mysore

Delete Rule 3 and substitute the following :—

3. The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and when once signed shall not afterwards be altered or added to, save as provided by Section 152 of the Code or upon review, provided also that where the Judge pronounces his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge [30-3-1967].

Rajasthan

In Order XX, the existing Rule 3 shall be renumbered as sub-rule (1) of that rule, and after sub-rule (1) as so renumbered, the following sub-rules shall be inserted :—

"(2) Where the judgment is pronounced by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge and shall bear the date of its pronouncement,

(3) In cases where judgment is not written by the Judge in own hand, and dictated and taken down verbatim by another person, each page of the judgment shall be initialled by the Judge" [11-3-1965].

Order 20 Rule 3 — Note 3 (contd.)

(4) Errors arising from accidental slip can be corrected subsequently not only in decree drawn up by ministerial staff but even in judgment pronounced and signed by Court as provided in S. 152. Civil P. C. AIR 1967 SC 1440 (1443): (1967) 2 SCR 18.

(5) After the judgment is signed Court cannot alter it, or add to it in any manner except as provided by this rule, and this even with the consent of the parties. (1900) 24 Mad 1 (10, 11, 13): 27 Ind App 197 (PC) ** AIR 1925 Mad 457 (458, 459) (DB).

(6) Where a statement appears in the judgment of a Court that a particular thing happened or did not happen before it, ought not ordinarily to be permitted to be challenged by a party unless both the parties to the litigation agree that the statement is wrong, or the Court itself admits that the statement is erroneous. The remedy of a party aggrieved is by way of review. AIR 1964 SC 377 (380): (1964) 1 SCR 842.

(7) After a decree has been appealed from and the appeal Court has made a final order in that appeal the lower Court ceases to have all jurisdiction over the matter. AIR 1959 Cal 153 (156): (1958) 62 Cal WN 881 (DB).

(8) Court cannot add findings on issues omitted to be decided by judgment. (1902) 4 Bom LR 129 (132) (DB).

(9) A successor cannot alter the judgment which had been pronounced by his predecessor on any point. (1889) 16 Cal 749 (752): 16 Ind App 104 (PC) ** AIR 1925 Pat 47 (47, 48): 3 Pat 654 (DB).

[But see AIR 1918 Low Bur 7 (8).]

(10) Where a Judge pronounces a judgment but suspends the drawing up of the decree till a succession certificate is produced by the plaintiff, he cannot, on the plaintiff's failure to produce the certificate, cancel the judgment and deliver a different one inconsistent with the former. (1909) 31 All 153 (155) (DB).

(11) After a judgment is pronounced in favour of the plaintiff in a suit, the Court has no power to admit an application for scaling down the debt under the Madras Agriculturists' Relief Act and to direct that the decree in the suit should be for the amount so scaled down. AIR 1941 Mad 929 (932): ILR (1942) Mad 346 (FB). [AIR 1940 Mad 478, Overruled.]

(12) This rule does not bar the power of the High Court to alter under Section 151 a scheme framed by it under Section 92 on a proper cause being shown. AIR 1948 Bom 146 (148): ILR (1947) Bom 466 (DB).

(13) A conditional order that the sale would be set aside if the decretal amount is paid within a certain date and that otherwise, the application would stand dismissed, is final in itself and no further reference to the Court is necessary for the purpose of implementing it. Hence, after such an order is passed, the Court has no jurisdiction to alter the order except on review. AIR 1939 Cal 581 (581): ILR (1939) 1 Cal 468.

(14) Application to set aside ex parte decree dismissed on merits — Court cannot set aside its order under inherent powers. AIR 1950 All 338 (339): ILR (1951) 2 All 121 (DB).

R. 4. Judgments of Small Cause Courts.—(1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

Judgments of other Courts.—(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

[1882, S. 203; 1877, Ss. 201, 202, 203; 1859, S. 185.]

Order 20 Rule 3 — Note 3 (contd.)

(15) Rejection of plaint for non-payment of court-fee — It cannot be restored under Section 151 — Proper procedure is to apply for review. AIR 1949 Pat 366 (367).

(16) Rate of interest fixed by decree cannot be enhanced by executing Court. AIR 1926 Bom 368 (368).

(17) Unless authorised by Statute a Court or Judge has no inherent power to set aside or modify order once made merely because it is wrong. AIR 1957 All 67 (69) (DB).

(18) Decree for specific performance fixing time within which sale consideration is to be deposited — Since the fixation of time does not in such cases partake of the nature of a decree, Court's power to extend the time is not affected by this rule. AIR 1958 All 488 (490, 491): ILR (1957) 2 All 453 (DB).

(19) Order 20, Rule 3 does not affect the power of the executing Court to record and enforce a compromise. Order 20, Rule 3 read with Order 20, R. 11 shows that a direction for postponement of payment of the decretal amount upon the term that the judgment-debtor should pay a reasonable rate of interest, is not an alteration of or addition to the decree. **AIR 1968 SC 1087 (1088): (1968) 3 SCR 158.**

(20) Appellate Court while remanding the case for fresh trial also allowing amendment of plaint on payment of costs within a certain date and ordering that the appeal shall stand dismissed on default of such payment — Court must be held to have finally disposed of the matter and hence could not interpret that as a result of default by non-payment of costs the appeal stood dismissed — Such order is possible only under Section 151 or 152 or Review. 1966 All LJ 1108 (1109, 1110).

(21) Application under Section 398 Companies Act (1956) — Interim Committee of management appointed for certain term of management. Court may issue instructions to such Committee — To issue directions and instructions to such Committee would not amount to infringement of Order 20, Rule 3. AIR 1964 All 75 (76): ILR (1963) 1 All 135 (DB).

(22) Conditional decree to be effective on payment of deficit court-fee within specified period — Further extension of time allowed before expiry of first period — Order 20, Rule 3 did not apply to the case and the trial Judge had complete jurisdiction to extend the time. AIR 1960 Assam 126 (128): ILR (1960) 12 Assam 93.

(23) The practice of Gujrat High Court is not to sign the judgments but only to put the initials thereon. In this respect Gujrat High Court follows, High Court Rules and orders of Bombay High Court. Thus a judgment or order becomes operative no sooner it is pronounced in open Court. AIR 1968 Guj 289 (293).

(24) The effect of Order 20, Rule 3 cannot be allowed to be taken away by the provisions of Section 148. Where however a decree fixing the time is not intended to be final and the Court still retains control over it an exception has to be made. AIR 1969 Orissa 7 (9): 34 Cut LT 930.

(25) In a proceeding under Section 19 of Bihar Money Landers Act (3 of 1938) the Court must record its opinion if the money lender is guilty of fraud and unfit to carry on money-lending during the suit itself and the latest in the final judgment. After the judgment is given Court cannot express its opinion. AIR 1967 Pat 264 (265, 266): 1967 Cri LJ 1045: 1967 BLJR 451.

(26) When on alteration in period fixed for performance of any condition does not fall either under Section 152 or Order 47 extending time would amount to varying a decree which executing Court cannot do. AIR 1962 Raj 54 (55): 1961 Raj LW 382.

4. Non-compliance with Rules 1 to 3.—(1) The failure to date an order is no doubt an irregularity but it does not invalidate the order and does not prevent it from having a legal operation from the date on which it is made, the date can be proved by other evidence. (1891) 1 Mad L Jour 478 (479) (DB).

(2) An accidental omission to sign an order is only an irregularity. AIR 1934 Lah 763 (764).

(3) Judgment typed but not signed by the Judge — Death of Judge — It is not a valid judgment. AIR 1960 Madh Pra 163 (165): 1960 MPLJ 129 (DB).

ORDER 20, RULE 4 — SYNOPSIS

1. Rule does not apply to chartered High Courts.
2. Personal knowledge.

HIGH COURT AMENDMENT

Kerala: Laccadive, Minicoy and Amindivi Islands

In Rule 4—

(i) in sub-rule (1) for the marginal note the words "Judgments in suits tried as Small Causes" shall be substituted and for the words "Judgments of a Court of Small Causes" in the rule, the words "Judgments in suits tried as Small Causes" shall be substituted.

(ii) in sub-rule (2) for the marginal note the words "Judgments in other cases" shall be substituted and for the words "Judgments of other Courts" in the rule, the words "Judgments in all other cases" shall be substituted [9-6-1959]; Act 37 of 1956, S. 60 read with Reg. 8 of 1965, S. 3.

Order 20 Rule 4 — Synopsis (contd.)

3. Appreciation of evidence.

4. Contents of judgments.

5. Construction of judgments.

6. Judgments of Small Cause Courts.

7. Other judgments.

1. Rule does not apply to chartered High Courts. — (1) This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction: see O. 49, Rule 3.

(2) Though in an ordinary case a Judge of a High Court in the exercise of ordinary or extraordinary original civil jurisdiction should give his reasons for his decision, the absence of reasons would not detract from the legal validity of the decision. AIR 1927 Bom 113 (115): 51 Bom 267 (DB).

(3) The rule applies to Chartered High Courts in the exercise of their appellate jurisdiction. (1879) 2 Mad 67 (70): 6 Ind App 170 (PC) ** (1889) 11 All 460 (469, 470): 16 Ind App 205 (PC).

2. Personal knowledge. — (1) A Judge cannot import his own private knowledge or opinion into a case but must decide it on the evidence before him. AIR 1953 Manipur 5 (6) ** AIR 1950 Him Pra 15 (17) ** (1875) 3 Ind App 259 (286) (PC) ** (1866) 11 Moo Ind App 213 (221) (PC) ** AIR 1936 Mad 278 (280).

(2) If the Judge intends to use his personal knowledge, he is bound to give evidence like any other witness. (1867) 7 Suth WR 189 (189) (DB).

(3) A judgment based upon such knowledge without any reference to the evidence in the case is not one in accordance with law and is liable to be set aside. AIR 1923 Cal 311 (312) (DB).

(4) The record made by the Court in its judgment or order regarding what happened before it cannot be assailed before the appellate Court. AIR 1958 Ker 307 (308): ILR (1957) Ker 859 (DB).

3. Appreciation of evidence. — (1) It is a fundamental principle that the decision of a Court rests, not upon mere suspicion, or surmises or conjectures, but upon legal grounds established by legal testimony. AIR 1957 Pat 647 (649) (DB) ** AIR 1953 Punj 3 (15): ILR (1953) Punj 140 (DB) ** AIR 1932 PC 202 (207) ** AIR 1969 Delhi 197 (198): (1969) 71 Pun LR (D) 59. (Judgment of first Appellate Court must clearly suggest that the Court has applied its judicial mind to the appreciation of evidence.)

[See (1968) 1 Mys LJ 193. (Lease in contravention of Section 29 — Madras Aliyasanthana Act — Written consent of majority of major members not secured — Lower Court not discussing adequately whether the lease was for legal necessity or for benefit of family — **Held,** that since the finding of the Court was that there was no consent to execute the lease, the omission to discuss the evidence could not have any impact on the decree made by it.)]

(2) It is necessary that a judgment must not only be a record of right conclusions, but should contain reasons lucidly expressed, unmistakably indicating the grounds on which the order is rested. 1969 Ker LT 57: 1968 Ker LR 553.

[See AIR 1969 Andh Pra 294 (297).]

(3) A judgment based on evidence of witnesses whom the opposite party had no opportunity to cross-examine cannot be sustained. (1868) 9 Suth WR 587 (588) (DB).

(4) A judgment based on evidence recorded in a different suit, is not a judgment that can be maintained. AIR 1925 Mad 230 (230) (DB).

(5) An omission to make special mention of oral evidence, or to refer to every detail in evidence, does not warrant a presumption that the evidence has not been adequately or reasonably considered. AIR 1920 Cal 869 (870) (DB) ** AIR 1931 All 210 (210) (DB).

(6) Where a Judge makes only a colourable pretence of considering the evidence without really having done so, the judgment cannot be accepted as a proper one. AIR 1951 Madh B 92 (94) ** AIR 1917 Pat 288 (289) (DB).

(7) It is not the proper way of appreciating the evidence to approach it with prejudice and suspect everything and everybody. (1888) 15 Cal 684 (693, 697): 15 Ind App 81 (PC).

(8) The mere fact that a witness is related to a party or supports the party does not necessarily make his evidence

Order 20 Rule 4 — Note 3 (contd.)
interested or unreliable; nor does the rejection of a portion of his testimony vitiate the whole testimony on that ground alone. (1905) 32 Cal 84 (94, 95): 31 Ind App 160 (PC) ** AIR 1967 Assam 55 (56): ILR (1964) 16 Assam 23.

(9) The fact that a witness had given evidence in other cases is not always a legitimate objection to his credibility though it may be a legitimate objection to a man's credit that he is a professional witness. (1872) 18 Suth WR 285 (285) (PC).

(10) The testimony of a person who testifies that a certain conversation took place is of more value than that of one who says that it did not. (1841-46) 3 Moo Ind App 347 (357) (PC).

(11) When the oral testimony adduced in an action is directly conflicting and irreconcilable, the only safe guide for the Judge is that afforded by the conduct of the parties and the contents of the documents produced. (1909) 31 All 116 (127): 36 Ind App 9 (PC).

(12) The maxim falsus in uno falsus in omnibus does not apply to conditions prevalent in India and it is only if a witness is found to be wholly untrustworthy that no part of his evidence can be accepted. AIR 1948 Oudh 88 (93): 22 Luck 407 (DB).

(13) If a document is admissible only against one of the defendants but there is other evidence available against all defendants a reference to the document in the judgment does not vitiate the judgment as against the other defendants. AIR 1947 Mad 345 (346).

(14) The method of dealing with the case or discussing the evidence on mere reliance upon notes of arguments submitted by the lawyers of both sides is not in consonance with the law. AIR 1954 Hyd 39 (40): ILR (1953) Hyd 637 (DB).

(15) The standard of assessment of the value of the evidence whether that of a reputedly respectable person or otherwise must be the same. (1949) 54 Mys HCR 285 (293) (DB).

(16) Where there has been no cross-examination on a point, evidence in examination-in-chief must be accepted. (1966) 2 Andh WR 218 (221): (1966) 2 Andh LT 280.

(17) The statement by a witness, who was brought to Court under arrest and was therefore an unwilling witness, can have little value. AIR 1960 Andh Pra 222 (226): (1960) 1 Andh WR 340 (DB).

(18) In land acquisition proceedings — Reference by appellate Court after conclusion of arguments to documents which are not part of record is not permissible — They should be admitted as fresh evidence and parties given opportunity to rebut them. **AIR 1969 SC 255 (257): (1969) 1 SCJ 344.**

(19) It is the duty of the trial Court to refer to the evidence in respect of the points at issue between the parties before he arrives at his findings. AIR 1961 Manipur 10 (11).

4. Contents of judgments. — (1) It is the duty of the Court to adjudicate on a claim as brought. AIR 1947 Oudh 22 (27): 21 Luck 222 (DB) ** (1911) 9 Ind Cas 673 (674): 1911 Pun Re No. 1 (DB).

(2) The decision of a case cannot be based on ground outside pleadings of parties and it is the case pleaded that has to be found. **AIR 1953 SC 235 (240): 1953 SCR 789** ** AIR 1958 Pat 571 (574). (Decree against the pleadings of the parties cannot be sustained.) ** AIR 1957 Madh Pra 138 (139) (DB).

(3) A judgment is bad if it is based on a question neither raised in the written statement nor included in any issue. **AIR 1954 SC 526 (545): ILR (1954) Trav-Co 867: 1955 SCR 520.** (AIR 1952 Trav-Co 120: ILR (1952) Trav-Co 1031 (FB), **Reversed.)** ** AIR 1958 Raj 269 (272): ILR (1958) 8 Raj 233 ** AIR 1953 Punj 220 (221) (DB).

(4) It is open to a Court to find that the case of a party lies somewhere between the cases of both the parties. AIR 1953 Trav-Co 560 (565) (DB).

(5) It is the duty of the Courts to write their judgments without unnecessary prolixity and repetition of pleadings. AIR 1919 Mad 305 (307) (DB).

(6) A judgment is unsatisfactory if it is a mere catalogue of documents without any consideration of their probative value. AIR 1917 Oudh 374 (374).

(7) A judgment is bad if it simply repeats the arguments of the counsel on both sides. AIR 1921 Lah 119 (120): 2 Lah 271 (DB).

(8) It is not desirable that Judges should make remarks against the character of a person who is neither a party nor the witness in the proceedings before them. AIR 1921 Bom 394 (395): 45 Bom 1127 (DB).

(9) Judge should not give findings on matters which are unnecessary for the disposal of suit. AIR 1945 All 54 (54): ILR (1945) All 3 (DB) ** (1885) 11 Cal 544 (545) (DB) ** AIR 1963 Punj 331 (336) (FB).

(10) The statements or their findings must be specific and precise. AIR 1917 All 212 (212) (DB).

(11) When commenting on the conduct of parties and others, Judges should be very careful to use sober, restrained language. AIR 1954 Trav-Co 10 (16) (DB).

(12) A Court is bound to decide any question raised before it in accordance with what it considers to be the law and not according to Government's interpretation of it. AIR 1943 Mad 555 (556).

Order 20 Rule 4 — Note 4 (contd.)

(13) Unbalanced language is generally out of place in judicial adjudications. **AIR 1958 SC 1012 (1016).**

(14) A Court is not entitled to put something into the judgment in regard to a witness's statement if that statement does not contain what the judgment says it contains. AIR 1953 All 287 (288).

(15) Per Gajendragadkar, Wanchoo and Das Gupta, JJ.: In dealing with constitutional questions Courts should be slow to embark upon an unnecessarily wide or general enquiry and should confine their decision as far as may be reasonably practicable within the narrow limits of the controversy arising between the parties in the particular case. **AIR 1961 SC 232 (251): (1961) 1 SCR 809.**

(16) Where the validity of a law made by a competent legislature is challenged in a Court of Law that Court is bound to presume in favour of its validity. The Court will not itself restrict to the pleadings of the State and it would be free to satisfy itself whether under any provision of the Constitution the law can be sustained. **AIR 1961 SC 954 (963): (1962) 1 SCR 44.**

(17) Court should not make obiter observations on constitutional matters not directly raised before it for its decision. **AIR 1964 SC 1573 (1581): (1964) 7 SCR 1.**

(18) Undignified observations even about Judges of subordinate Courts without the clearest evidence of impropriety are uncalled for in a judgment. When made against a colleague they are even more open to objection. **AIR 1968 SC 453 (456): (1968) 1 SCR 813.**

(19) Where in the judgment of the trial Court, statement of the facts of the case is concise to a degree but it is not apparent from the judgment as to what the points of determination were and there is no discussion whatsoever of any oral or documentary evidence, nor the conclusions that the plaintiff's suit shall stand decreed supported by any reasoning whatsoever, the judgment does not fulfil the requirements of law. AIR 1959 All 505 (508): 1959 All LJ 306 (DB).

(20) A judgment which referred neither to the oral evidence nor discussed the documentary evidence is perfunctory. (1960) 1 Andh WR 355 (357): 1960 Andh LT 278.

(21) In judgment where decision on constitutional problems is to be taken, attempt to summarize constitutional law should be avoided. AIR 1961 Cal 578 (584) (SB).

(22) The Court is not prevented from recording a finding which is deducible from the evidence on record but which is not consistent with the pleadings of either of the parties. **AIR 1962 Mad 219** (223): (1962) 1 Mad LJ 193. (AIR 1927 Cal 498. Rel. on.)

(23) It is a duty cast on subordinate Courts to record findings on all issues although it may appear that findings on certain issue would render findings on other issues unnecessary. (1967) 2 Mys LJ 210 (239): 11 Law Rep 645 (DB).

5. Construction of judgments. — (1) As a gentral rule, where the language of a judgment is doubtful, the benefit of the doubt ought to go to the judgment-debtor. AIR 1921 Oudh 138 (138).

(2) All parts of the judgment should be read together and construed as a whole. (1874) 22 Suth WR 202 (203) (DB) ** AIR 1969 Mad 1 (4): (1969) 1 Mad LJ 1 (FB).

(3) Where the previous part of the judgment cannot be reconciled with the conclusion ultimately drawn, the former should be rejected. (1873) 19 Suth WR 104 (104, 105) (DB).

(4) Where the intention expressed by the Judge in his judgment corresponds to his real intention then, in such a case the interpretation put by the Judge on his own judgment cannot be wholly without value. AIR 1954 J and K 23 (24): 11 J and K LR 119.

(5) Findings in judicial proceedings could not be divested from the rest for the reasons given in the judgment. **AIR 1961 SC 1402 (1412): (1962) 1 SCR 383.**

(6) Decision based on weight of authority and not on individual judgment of Judge is invalid as contrary to oath of office taken by Judge. AIR 1963 Guj 291 (295): (1963) 4 Guj LR 1022.

(7) Decision of Court is mere declaration of law as it exists and cannot be treated as statute imposing law for first time. 1965-31 Cut LT 91 (99).

6. Judgments of Small Cause Courts. — (1) A judgment of Small Cause Court need not set out the reasons for the decision. AIR 1945 Nag 192 (194, 195): ILR (1945) Nag 475 ** AIR 1918 Cal 252 (253) (DB) ** (1907) 31 Bom 314 (318) (FB).

[But see AIR 1920 Mad 310 (310) ** AIR 1935 Pat 452 (452).]

(2) As a matter of practice it is usual to give reasons except in unimportant cases. AIR 1945 Nag 192 (194, 195): ILR (1945) Nag 475.

(3) Judgment must set out the points for determination and the decision on each of those points. Madh BLJ 1954 HCR 770 (771) ** AIR 1928 All 688 (688) ** AIR 1933 Nag 272 (272): 30 Nag LR 14 ** AIR 1925 Oudh 283 (284).

(4) The judgment must be sufficiently intelligible. AIR 1950 Lah 128 (129): Pak LR (1950) Lah 177 ** AIR 1959 Madh Pra 26 (27): 1958 MPLJ 253.

(5) A judgment must indicate clearly that the Judge has applied his mind to the case and that the decree or order is

Order 20 Rule 4 — Note 6 (contd.)

according to law. AIR 1932 Oudh 143 (144): 7 Luck 526 ** AIR 1932 Cal 257 (258) ** AIR 1937 Sind 243 (244) (DB) ** AIR 1936 Mad 486 (487).

(6) In cases involving difficult questions of law or mixed questions of fact and law, the Judge should set out so much of his reasoning as will make clear the road by which he has reached the conclusion. AIR 1945 Nag 192 (194, 195): ILR (1945) Nag 475 ** AIR 1932 Mad 336 (340, 343): 55 Mad 671 (DB).

(7) The mere fact that the judgment of a Small Cause Court does not set out the points for determination is no ground for setting it aside, if otherwise the judgment is intelligible and the Judge has applied his mind to the case. AIR 1917 Low Bur 34 (34).

(8) The procedure of a Court empowered under Section 18, C. P. Courts Act, is governed by Order 20, R. 4 (1). AIR 1945 Nag 192 (194): ILR (1945) Nag 475.

(9) Judgment of Small Cause Courts need not discuss evidence of each witness. AIR 1963 All 574 (578).

(10) Judgment of a Small Cause Court must be intelligible and must ex facie convey that the Judge had applied his mind thereto. The judgment must be such as to enable the superior Court exercising revisional powers to be satisfied that it was in accordance with law. (1963) 1 Andh LT 218: (1963) 1 Andh WR 111 (113, 114).

(11) Not fact of settlement but amount of rent in issue — Small Cause Judge commits error in holding that there was no settlement — Claim must be adjudicated as brought. AIR 1965 Madh Pra 24 (26): 1965 MPLJ 102.

(12) Disposal of an application for new trial with a brief order, "Heard. There is no question of law. Dismissed." is not a judgment in accordance with law. AIR 1963 Mad 87 (89): (1962) 2 Mad LJ 443.

(13) Judgment in Order 20, Rule 4 means the same thing as judgment in Sec. 2(9) and must in all eventualities contain a statement by the Judge of Small Causes Court of the grounds on which decree or order was passed. AIR 1966 Punj 227 (228): 1965 Cur LJ 884.

7. Other judgments. — (1) A judgment of a Court, other than a Small Cause Court should contain — (1) A concise statement of the case, (2) the points for determination. (3) the decision thereon, and (4) the reasons for such decision. AIR 1951 Hyd 69 (1) (69): ILR (1951) Hyd 215 (DB) ** AIR 1960 Madh Pra 163 (165): 1960 MPLJ 129 (DB).

[See AIR 1969 Mad 235 (247): (1969) 1 Mad LJ 366 (DB). (Matrimonial causes — Duty of Courts — They do not exist for the sake of discipline, but for the sake of deciding matters in controversy.)]

(2) In writing judgments in appealable cases, the provisions of this rule should be strictly followed. AIR 1954 J and K 44 (44).

(3) It is desirable that the trial Court should deal with reasonable fullness, with the facts as it finds them. AIR 1945 PC 38 (41).

(4) The judgment should state not merely the finding on the point raised but must also state what the evidence consists of, and how it proves the plaintiff's or defendant's case. AIR 1952 Trav-Co 560 (561) (DB) ** AIR 1950 Assam 79 (80) (DB).

(5) A judgment unsupported by reasons cannot be accepted as legally binding on parties. (1949) 8 J and K LR 157 (161) ** (1884) 8 Bom 368 (371) (DB) ** (1869) 12 Moo Ind App 495 (502) (PC) ** AIR 1938 Pat 69 (70) (DB) ** 1963 Ker LT 362 (364).

(6) In the case of findings of fact arrived at by the first appellate Court, giving of reasons for its conclusions is all the more necessary as the findings are binding on the Court of second appeal. AIR 1948 Oudh 27 (28): 22 Luck 363.

(7) A judgment is no defective merely because specific issues were not framed, if all the points arising have in fact been determined. (1911) 10 Ind Cas 291 (291) (DB) (Mad).

(8) A judgment is not bad merely because it does not fully state the reasons for its conclusion but states that it adopts the reasons given in a judgment in a previous suit between the same parties, the evidence being almost the same. (1912) 15 Ind Cas 434 (434) (DB) (Mad).

(9) In a case where the Court has good reason to believe that the plaintiff has not disclosed the truth in his plaint and evidence, the only course possible is to dismiss the suit in toto. AIR 1949 Mad 756 (758).

(10) Order 20, Rules 4 (2) and 5 are not necessarily to be strictly followed when there is absolutely no evidence on the record. AIR 1957 All 107 (110) (DB).

(11) Where challenge is only to the factum of adoption and not to its validity in law then the Court is not justified in raising the question of legal validity AIR 1960 Madh Pra 46 (49): 1959 MPLJ 693.

(12) An order granting an injunction, which gives no reasons therefor and does not consider the objections taken to the relief, is one in disregard of Order 20 Rule 4 (2). (1961) 39 Mys LJ 549 (555).

(13) Where a party has asked for the award to be set aside or modified on more than one ground, before the Court of the first instance refuses his prayer or

R. 5. Court to state its decision on each issue.—In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

[1882 and 1877, S. 204; 1859, S. 186.]

Order 20 Rule 4 — Note 7 (contd.)

partly allows it, it should record its finding on his objections. AIR 1965 Pat 66 (69).

(14) A Court should not attempt to establish a title for a party against party's own case. A party must succeed or fail on the strength or weakness of his case. AIR 1960 Manipur 16 (17).

(15) Appellate Court reversing the finding of lower Court without going into entire material on record and without any discussion — Finding of appellate Court held perverse and not maintainable in law. 1963 BLJR 339 (341).

(16) Appellate Court should not necessarily deal with each and every reason given by trial Court. AIR 1965 Pat 205 (208): 1964 BLJR 863 (DB) ** 1964 Raj LW 7 (10).

(17) Recording finding of facts without any discussion of evidence is not a proper judgment of reversal. It must appear that lower appellate Court has considered reasonings of trial Court and has come to contrary findings. 1968 BLJR 374 (377, 379): 1968 Pat LJR 359.

(18) Justice must not only be done, but it must also indubitably be seen to be done. The High Court can never countenance anything which may tend to create an impression in the mind of the suitors that Courts of justice in this country are inspired by any undisclosed collateral consideration and that they decide the citizens' disputes in a manner which is not strictly judicial and impartial. AIR 1960 Punj 521 (523) (DB).

(19) A decision of a Court should not rest on conjecture, surmise or suspicion but on legal grounds supported by legal testimony. Failure to consider evidence in arriving at conclusion without considering legal principles vitiates a seeming finding of fact. AIR 1968 Punj 399 (401): 1968 Cur LJ 453.

(20) Judgment of affirmance — Substantial compliance with Order 41, R. 31, essential. ILR (1963) 13 Raj 801 (806).

(21) Provisions of O. 20 R. 4 (2) are applicable to proceedings under Punjab Land Revenue Act (17 of 1887) by virtue of S. 117 (2) (b). So any judgment under Act (17 of 1887) which does not contain a concise statement of the case, points for determination, decisions thereon with reasons for them, is bad. AIR 1968 Punj 341 (343): 1968 Punj LJ 102.

(22) Variance between pleading and proof — Absence of issue on particular question — Court cannot allow evidence or give a finding on it. AIR 1965 Madh Pra 275 (282): 1967 MPLJ 711 (DB).

Order 20, Rule 5

1. Rule does not apply to Chartered High Courts. — See O. 49, R. 3.

2. Decision on each issue necessary.— (1) It is imperative upon the Court to pronounce its findings upon all such issues as may be necessary for the disposal of the suit. AIR 1951 Pepsu 138 (139): ILR (1952) Patiala 309 (DB) ** ('81) 4 Mad 134 (136) (DB) ** AIR 1962 Manipur 36 (39). (Party giving in writing that he did not press the issue — Finding need not be given.)

[But see AIR 1959 Orissa 132 (140): 25 Cut LT 119 (DB).]

(2) There should be a finding on each issue separately and not on all issues together. (1912) 17 Ind Cas 881 (882) (DB) (Cal) ** AIR 1965 Ker 189 (194) : 1964 Ker LT 497 (DB).

(3) In appealable cases, it is always desirable that the Court should as far as may be practicable, pronounce its opinion on all the important points which have been raised in the case. AIR 1950 FC 140 (142): 1949 FCR 667 ** AIR 1955 Hyd 268 (269): ILR (1954) Hyd 637 (DB) ** AIR 1922 PC 405 (408): 50 Cal 243: 50 Ind App 247 ** (1966) 10 Moo Ind App 476 (488) (PC). (This is ordinarily expected where evidence has been allowed to be given on all issues.) ** (1964) 2 Andh WR 130. (1961) 1 An WR 250, Relied on.) ** AIR 1963 Raj 100 (103, 104): 1963 Raj LW 101.

(4) The concluding words of the rule do not preclude the Judge from giving his findings on all the issues, though some of them may be unnecessary for the decision of the case. (1882) 4 Mad 134 (136) (DB) ** 1907 Pun Re No. 121, p. 550 (FB) ** (1905) 9 Cal WN 60 (67, 69) (DB).

(5) Findings on issues unnecessary for decision should not form part of the Court's decree. (1903) 26 All 234 (236) (DB).

(6) A finding in favour of a party need not include the whole of the claim of such party. AIR 1943 Nag 84 (84): ILR (1943) Nag 27.

(7) When the plaintiff is wholly unable to proceed with the case, an order simply dismissing the suit may be made. In such circumstances it would be a sheer formality to write a judgment on every issue because it will be a repetition of the same reason for every issue. AIR 1957 All 107 (110) (DB).

(8) Issue not arising out of pleadings— Should not be decided by Trial Judge. AIR 1968 SC 534 (537): (1968) 1 SCR 805.

R. 6. Contents of decree.—(1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

[1882, S. 206; 1877, Cf. S. 257; 1859, S. 189; Cf. S. 206.]

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Bombay: Dadra and Nagar Havelia

In Order XX, Rule 6, for the existing sub-rule (1) and its marginal note, substitute the following as sub-rule (1) and marginal note:—

Contents of decree.—(1) The decree shall agree with the judgment; it shall contain the date of presentation of the plaint, the number of the suit, the names and descriptions of the parties, their registered addresses, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965.)

Order 20 Rule 5 — Note 2 (contd.)

(9) Judgment and Decree — Decision on each issue necessary — Case set up on one issue not discussed and points covered by other issues not considered in the judgment — Judgment and decree should be set aside. AIR 1967 Ker 132 (133).

(10) In ex parte cases, judgments are cryptic, evidence is barely referred to and hardly elaborate discussions are made. Merely from the fact of absence of elaborate discussion, as in contested cases, it cannot be said that the Court did not apply its judicial mind and did not appreciate the issue and evidence properly. AIR 1964 Orissa 98 (100).

(11) Where a Court framed four issues in a suit but issues 2 to 4 could arise only if decision on issue No. 1 was in favour of the plaintiff, and the Court having found on issue No. 1 against the plaintiff, did not give its finding on remaining issues, the judgment is valid. (1966) 68 Pun LR 39 (41): ILR (1966) 1 Punj 781 (DB).

(12) An order which does not assign any reason thereto is in utter disregard of O. 20, R. 5. (1961) 39 Mys LJ 549 (555).

ORDER 20, RULE 6—SYNOPSIS

1. **Rule does not apply to Chartered High Courts.**—See O. 49, R. 3.
2. **Scope.**
3. **Form and contents of decree.**
4. **Amendment of decree.** See S. 152.
5. **Construction of decree.** See Notes on Section 47.
6. **Provision for costs — Sub-rule (2).**
7. **Decree not in accordance with judgment.**
8. **Set-off of costs towards sums admitted or found due.**

1. Rule does not apply to Chartered High Courts. — See O. 49, R. 3.

2. Scope.—(1) It is imperative that the decree should agree with the judgment. AIR 1944 PC 46 (50): 71 Ind App 65: ILR (1944) Nag 597: ILR (1944) Kar (PC) 185.

(2) Where the decree does not agree with the judgment, the Court has an inherent power to amend it so as to bring it into conformity with the judgment. AIR 1953 Trav-Co 220 (222): ILR (1953) Trav-Co 89 (FB) ** 1955 Raj LW 560 (562) ** AIR 1954 J and K 23 (24): 11 J and KLR 119 ** AIR 1953 All 485 (486) ** AIR 1966 Orissa 225 (226): (1965) 7 Orissa JD 275.

(3) Where the decree does agree with the judgment, it cannot subsequently be altered or added to by the Court passing it, except under S. 152, or under O. 20, Rule 11. AIR 1956 Pat 209 (210): 35 Pat 254 (FB).

(4) Where a decree or any part of a decree is passed by consent of parties, it should always so appear on the face of the decree when drawn up. AIR 1931 PC 107 (109): 27 Nag LR 139.

[See also 1955 Raj LW 560 (562).]

(5) The decree must automatically follow pronouncement of judgment. Court has no power to direct that preparation of decree be stopped until payment of deficit court-fees. AIR 1932 Pat 228 (231): 11 Pat 582 (DB).

Delhi and Himachal Pradesh

Same as that of Punjab. See Act 26 of 1966, Ss. 7 and 17 (31-10-1966) and 1-5-1967).

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras (a). (9-6-1959) and Act 37 of 1956, S. 60 read with Reg. 8 of 1965, S. 3.

Madras and Pondicherry

(a) In sub-rule (1) after the words "descriptions of the parties" insert the words "their addresses for service". (6-5-1930.)

(b) After sub-rule (2), the following be inserted as sub-rule (2A):—

"(2A) In all cases in which an element of champerty or maintenance is proved, the Court may provide in the final decree for costs on a special scale approximating to, the actual expenses reasonably incurred by the defendant."

(R.O.C. No. 3019 of 1926); Act 26 of 1968, S. 3 and Sch. Pt. II (w.e.f. 5-9-1968).

Mysore

Delete Rule 6 and substitute the following:—

"6. (1) The decree shall agree with the judgment; it shall contain the number of the suit, names and descriptions of the parties, their respective addresses for service as originally set out in their pleadings or where they have been subsequently changed in accordance with Rule 14 of Order VI of this Code such modified addresses, the particulars of the claim and shall specify clearly the relief granted or other determination of the suit.

Order 20 Rule 6 — Note 2 (contd.)

(6) Where the copy of the decree which is filed with the appeal is not in accordance with O. 20, R. 6 and is not capable of execution as the appellant is not responsible for the mistake he cannot be penalised for any fault of the Court and a proper and executable decree can be prepared by the appellate Court on decision of the appeal on merits, which would include the decree of the trial Court as well. AIR 1957 Punj 238 (240) (DB).

(7) A decree comes into existence as soon as judgment is pronounced. An execution filed shortly after judgment but before preparation of a formal decree under O. 20 R. 6 is legal and valid. AIR 1962 Pat 398 (399): 1962 BLJR 434.

(8) Where decree is clear, executing Court cannot go behind it and alter it by looking into pleadings and judgment. These could be looked into only for interpreting decree if it was vague. 1966 All WR (HC) 770 (771).

3. Form and contents of decree. — (1) Decree drawn up in suits should contain all the particulars required by this rule. AIR 1917 All 281 (283): 39 All 13 (DB) ** AIR 1957 Tripura 50 (51).

(2) Decree should be in form prescribed in Appendix D to Sch. I with such variations as the circumstances of each case may require. AIR 1949 East Punj 400 (401).

(3) A decree properly prepared should indicate against whom, and in favour of which of the parties, it has been made and should state the names of all the persons against whom it has been passed and who will be affected thereby. AIR 1917 All 281 (283): 39 All 13 (DB).

(4) Death of plaintiff pending suit and and his minor son allowed to represent him — Decree must describe new plaintiff as "substituted plaintiff as representative of his father, the deceased plaintiff," and not as "the minor plaintiff." (1891) 18 Cal 111 (120): 17 And App 173 (PC).

(5) In a suit against a legal representative, decree should state that it is against defendant in that character. (1904) 27 Mad 243 (248) (FB) ** (1887) 14 Cal 316 (320) (DB) ** (1884) 8 Bom 309 (310) (DB).

(6) In a suit for declaration of title and recovery of possession two things have to be found, title and possession. If it is found that the plaintiffs have proved subsisting title, then they are entitled to a decree for recovery of possession to the extent of the area from which they have been dispossessed. No decree for demarcation of the whole plot of land belonging to the plaintiff can be granted in such a suit, particularly when it is not asked for. AIR 1950 Pat 306 (308).

(7) The decree must be quite distinct from the judgment. AIR 1949 East Punjab 400 (401) ** AIR 1920 Lah 395 (396): 1 Lah 223 (DB).

(8) The decree must be self-contained and capable of execution without reference to any other documents. AIR 1944 Oudh 42 (43) ** (1882) 8 Cal 975 (979) (DB).

(9) Court should not pass unexecutable decree while taking into account changes in the law that took place during the pendency of suit. AIR 1966 Cal 63 (67) (DB).

(2) The decree shall also state the amount of costs incurred in the suit and by whom or out of what property and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

(4) In all cases in which an element of champerty or maintenance is proved, the Court may provide in the final decree for costs on a special scale approximating to the actual expenses reasonably incurred by the defendant." (30-3-1967.)

Punjab, Haryana and Chandigarh

After sub-rule (1) add the following:—

"(1A) In addition to the particulars mentioned in clause (1), the decree shall contain the addresses of the plaintiff and the defendant as given in O. 7, R. 19 and O. 8, R. 11 or as subsequently altered under O. 7, R. 24 and O. 8, R. 12, respectively." (10-2-1937); Act 31 of 1966, Ss. 29 and 32 (1-11-1966).

Order 20, Rule 6 — Note 3 (contd.)

(10) A copy of judgment with schedule of costs appended thereto does not constitute a proper decree. (1871) 15 Suth WR 325 (327) (DB).

(11) Order which itself directs decree to be drawn up cannot be treated as decree. AIR 1958 All 720 (728): ILR (1958) 1 All 614 (DB).

(12) In preparing a decree, Courts ought to clearly define and specify what their intentions are. AIR 1956 Pat 244 (251) (DB) ** AIR 1914 Cal 784 (784) (DB) ** (1896) 18 All 344 (347) (DB).

(13) The parties and their pleaders should see that decrees are properly drawn up. (1886) 8 All 492 (495) (DB) ** ('82) 8 Cal 687 (689) (DB) ** AIR 1914 Bom 23 (24): 38 Bom 331 (DB).

[See however AIR 1928 Rang 215 (216). (Decree not properly drawn up — Party not responsible.)]

(14) Courts in India cannot make a decree of non-suit. (1887) 9 All 690 (697) (DB).

(15) In cases of orders passed under S. 47 of the Code no decree need be drawn up. (1902) 6 Cal WN 283 (284) (DB).

(16) Court will not be deterred from making a decree by the mere fact that there is no specific provision for passing a decree in the particular case. (1908) 30 All 290 (295, 296). (Dismissal of appeal under O. 41, R. 11 is a decree.)

(17) In the case of appellate decrees, it will be always expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of reference to the superseded decree. (1872) 14 Moo Ind App 465 (492) (PC).

(18) The Code does not prescribe any particular form for drawing up of a decree for specific performance nor does it indicate the contents of such decree. All that such decree can properly contain is an adjudication to the effect that plaintiff was entitled to the enforcement of contract entered into with him by the defendant. AIR 1958 All 488 (490, 491): ILR (1957) 2 All 453 (DB).

(19) A Court can mould its decree in order to suit events which have taken place after institution of suit. AIR 1964 Manipur 1 (2).

(20) Decree for specific performance of contract of sale — Proper form is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resided in him to the prior transferee. AIR 1964 Pat 525 (526): ILR 44 Pat 738 (DB).

(21) Form No. 14 in Appendix D and Sch. I, C. P. Code, shows what a decree for injunction against private nuisance should be like: only restraining the defendant from doing an act so as to occasion a nuisance to the plaintiff. AIR 1968 Cal 91 (99): 72 Cal WN 717.

4. Amendment of decree. — See also Notes on Section 152.

(1) The question whether there is a mistake in a decree as it stood is a matter which cannot be gone into by an executing Court, but only by the Court which passed the decree even though the executing Court and the Court that passed the decree happen to be one and the same. AIR 1963 Tripura 55 (56).

(2) When a decree as drawn does not correctly express the intention of the Court, the Court has an inherent power to amend the decree so as to express its own meaning. (1966) 32 Cut LT 733 (740): ILR (1966) Cut 556.

5. Construction of decree. — See Notes on Section 47.

6. Provision for costs — Sub-rule (2). —(1) Ordinarily judgment does not set forth actual amount of costs awarded in suit. (1900) 24 Mad 25 (26) (DB).

(2) The decree must state specifically the actual amount of costs, and by whom and in what proportions they are to be paid; and no costs can be recovered unless they are so mentioned. AIR 1949 East Punj 400 (401) ** AIR 1944 Oudh 42 (43) ** AIR 1933 Pat 135 (138, 139).

R. 7. Date of decree.—The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

[1882, S. 205; 1877, Ss. 204, 205, 206; 1859, S. 189.]

HIGH COURT AMENDMENTS

Bombay: Dadra and Nagar Haveli[a]

In Order XX, Rule 7, substitute a colon for the full stop appearing at the end of the rule and add thereafter the following proviso:—

"Provided that in proceedings taken in the Bombay City Civil Court the decree shall bear date the day on which the judgment was pronounced and it shall be engrossed in the office of the Registrar and be signed by him and sealed with the seal of the Court." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Order 20, Rule 6 — Note 6 (contd.)

(3) Mere specification of costs alone without any allotment of responsibility is not a sufficient compliance with rule. (1871) 15 Suth WR 4 (5) (DB).

(4) Suit against a minor — If Court considers that guardian should be personally ordered to pay costs, it should be so stated in decree or order. (1874) 21 Suth WR 298 (298) (DB).

(5) The usual practice is that unless the judgment awards separate costs to several defendants in a suit, the decree, should not award separate costs to them. AIR 1935 Pat 41 (41).

7. Decree not in accordance with judgment. — (1) Where judgment awards costs without specifying actual amount, costs must be calculated according to law. (1904) 7 Oudh Cas 43 (45) (DB).

(2) Where assessment of costs is not according to law decree can be amended. AIR 1932 All 337 (340): 54 All 490 (DB).

(3) Where decree awards costs in a case in which judgment is silent the decree to that extent is at variance with judgment and can be amended under S. 152 or under Court's inherent powers. (1894) 4 Mad L Jour 280 (281).

(4) As to whether interest which is inadvertently omitted in decree, though mentioned in judgment, can be awarded in execution, see the following case: AIR 1930 Cal 349 (350) (DB).

(5) If a decree is in conformity with the judgment, the Court has no power to order its amendment, but if it is not in harmony with the judgment, the Court has no alternation but to rectify the mistake which has been committed. AIR 1959 Punj 88 (89): 60 Pun LR 185.

8. Set-off of costs towards sums admitted or found due. — (1) Where in a suit by A against B a decree is passed against B for payment of a certain sum of money to A, but A is ordered to pay the costs of B, B can set off the amount of costs against the amount payable by him to A. AIR 1914 Oudh 416 (417) (DB)** (1893) 17 Bom 32 (34) (DB) ** (1912) 34 All 596 (597) (DB).

(2) Costs made payable under different orders in same suit, may be set off against each other. (1883) 9 Cal 797 (801, 802): 10 Ind App 113 (PC).

(3) A set-off cannot be allowed for sums of money which one party might get from the other on the latter's applying for delivery of possession. (1907) 11 Cal WN 64.

ORDER 20, RULE 7 — SYNOPSIS

1. Rule does not apply to Chartered High Courts.
2. Date of the decree.
3. Registration Act, Section 77.
4. Limitation.

1. Rule does not apply to Chartered High Courts. — (1) This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction. See O. 49, Rule 3.

(2) Even in cases of decrees passed on the Original Side of the High Court, the practice is to make the decree bear the same date as the judgment. (1913) 21 Ind Cas 545 (545) (Mad).

2. Date of the decree. — (1) The date of decree must correspond to the date on which judgment is pronounced, no matter what the date of the signing of the decree may happen to be. AIR 1954 Hyd 104 (108): ILR (1954) Hyd 12 (DB) ** (1881) 7 Cal 547 (551): 8 Ind App 159 (PC) ** (1886) 13 Cal 104 (106) (FB) ** (1890) 12 All 461 (468) (FB) ** AIR 1968 Guj 189 (192): 8 Guj LR 1043 ** AIR 1960 Madh Pra 108 (109): 1958 MPLJ 679. (AIR 1933 Cal 239 and AIR 1938 Pat 149 and AIR 1957 All 114. Dissented.)

(2) The decree, though drawn up afterwards, relates back to and operates from the date of the judgment. (1890) 17 Cal 347 (357): 16 Ind App 195 (PC) ** AIR 1942 Oudh 139 (141) ** (1905) 32 Cal 483 (491) (DB) ** AIR 1968 Andh Pra 138 (140) ** AIR 1960 Cal 85 (86): ILR (1960) 2 Cal 511.

(3) Where one of the plaintiffs dies subsequent to the date of delivery of

Kerala: Laccadive, Minicoy and Amindivi Islands

To Rule 7, the following proviso shall be added, namely:—

"Provided that the decrees of the High Court may be signed by the officer empowered in that behalf." (9-6-1959); Act 37 of 1956, S. 60 read with Reg. 8 of 1965, S. 3.

HIGH COURT AMENDMENT

Rule 7A
Allahabad

Add the following new Rule 7A:—

"7A. A Court, other than a Court subordinate to the District Court exercising insolvency jurisdiction, passing an order under Section 47 or Section 144 of the Code of Civil Procedure or one against which an appeal is allowed by Section 104 or Rule 1 of Order 43, or an order in any case, against which an appeal is allowed by law, shall draw up a formal order embodying its adjudication and the memorandum of costs incurred by the parties."

Order 20 Rule 7 — Note 2 (contd.)

judgment but before the decree is actually drawn up, this fact does not affect the validity of the decree. (1902) 6 Cal WN 196 (196) (DB).

(4) Where a Court gives a judgment but refuses or is unable to give a decree, till a condition is performed and draws up a decree after the performance of the condition, it must be held that the judgment given is only a provisional one which does not become operative until the decree is prepared, and that the latter date is the date of the judgment as well as of the decree. AIR 1916 Sind 2 (3): 9 Sind LR 171 (DB).

(5) Order 20, Rule 7, Civil P. C.. does not apply to a case where a preliminary and final decree is contemplated. The order for the preparation of a final decree is not a judgment. AIR 1957 All 114 (115, 116): ILR (1956) 1 All 563 (DB).

(6) Court's failure to draw up decree — Duty of party to remind Court. **AIR 1961 SC 832 (836): (1961) 2 SCR 918.**

(7) Decree becomes effective from the moment the judgment is pronounced — Signing of decree is purely consequential administrative function. AIR 1966 Guj 281 (283): (1965) 6 Guj LR 498.

(8) Filing of execution after pronouncement of judgment but before preparation of formal decree is legal. AIR 1962 Pat 398 (399): 1962 BLJR 434.

(9) Date of the decree is the one that the decree bears and not any other — Decree passed after the Displaced Persons (Debts Adjustment) Act (1951) Act — Decree not executable beyond six years. ILR (1967) 2 Punj 408 (415) (DB).

(10) Date of decree — Decree amended — Amendment relates back to the date of decree which is date on which the judgment is pronounced. AIR 1969 Ker 183 (185): 1968 Ker LT 969.

(11) Decree incorporating orders of High Court for costs of defendant to be drawn up by Registrar but signed by Deputy Registrar — Decree notified but no objection that decree was not drawn up by Registrar taken — **Held** decree was in order. AIR 1969 Orissa 134 (136): 34 Cut LT 1305.

(12) Passing of decree follows as a matter of course as soon as a judgment is pronounced. AIR 1969 Guj 152 (155).

3. Registration Act, Section 77. — (1) For purposes of Section 77, Registration Act the period of 30 days is to be reckoned not from the time when the judgment is pronounced, but from the time when the decree is actually drawn up and signed. AIR 1915 Mad 865 (866): 38 Mad 291 (DB).

4. Limitation. — (1) Period of 90 days mentioned in Articles 4 and 5, Sch. I, Court-fees Act, is to be counted from the date of the decree which under this rule, is the date of judgment. AIR 1955 Raj 165 (166): 1955 Cri L Jour 1392: ILR (1954) 4 Raj 818 (DB).

(2) Through mistake of Court decree dated wrongly — Execution application in time from wrong date but barred from correct date — **Held,** execution is in time and act of Court should not prejudice a party. AIR 1933 Cal 239 (240).

(3) Where an order fixing mesne profits directs that a formal decree would be drawn up on payment of the necessary court-fee and a formal decree is drawn up after the expiry of limitation for appeal when the court-fee was paid, the date of the formal decree would still be the date of the prior order and an appeal against the formal decree would be barred by limitation. AIR 1963 Bom 263: 65 Bom LR 436.

(4) Bombay Co-operative Societies Act (1926), Sections 54, 59 (1) (a) — Award under Section 54 — Certificate under Section 59 (1) (a) — Execution — Limitation runs from date of certificate and not from date of award. (1962) 3 Guj LR 512 (521) (DB).

(5) Per Tare, J. (In final order): The principle of Order 20, Rule 7, Civil P. C. equally applies to an order and the starting point of limitation for execution of the order would be the date of its pronouncement. AIR 1961 Madh Pra 223 (228): 1961 MPLJ 685. (ILR 17 Cal 347 (PC), Rel. on.)

R. 8. Procedure where Judge has vacated office signing decree.— Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

R. 9. Decree for recovery of immoveable property.—Where the subject-matter of the suit is immoveable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

[1882 and 1877, S. 207; 1859, S. 190.]

Order 20 Rule 7 — Note 4 (contd.)

(6) If the decree is amended or corrected in respect of unsubstantial matters a party may not get a right of appeal against such unsubstantial amendments or corrections. But if it is substantially amended, the right of appeal would be from the date of such substantial amendment. Or, at any rate, if a party files an appeal against the amended decree, he can invoke Section 5 of the Limitation Act; and if his attack is against the amendment itself, the Court should extend time in his favour. AIR 1968 Madh Pra 220 (223): 1968 Jab LJ 633.

(7) In absence of any express definition to contrary Order 20, Rule 7 would, govern the meaning of expression "date of decree" in Article 123, Limitation Act (1963). AIR 1968 Orissa 207 (208): 34 Cut LT 472.

(8) While considering whether appeal was filed within time, for exclusion of time spent for obtaining copies, time taken by Court for preparation of decree before filing application for copy cannot be excluded. Order 20, Rule 7 is of no effect after 1-1-1964 when Limitation Act (1963) came into force. AIR 1967 Madh Pra 127 (128). (1955 Nag LJ 286 (FB), held bad law in view of Limitation Act (1963).)

ORDER 20, RULE 8

1. Scope and applicability. — (1) This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction: See Order 49, Rule 3, Clause (5).

(2) Where the decree was imperfect, and the Judge who pronounced it had left the district and it was impossible to draw up a decree from the judgment, it was held that there was no alternative but to order a new trial. (1873) 19 Suth WR 267 (268) (DB).

(3) Where a judgment is written by one Judge and is pronounced by his successor who signs the decree, the decree should be regarded as passed by the predecessor within Section 38 (2) of the Bengal, Agra and Assam Civil Courts Act. AIR 1951 Orissa 313 (326) (DB).

(4) Where the Chief Justice and a puisne Judge of a High Court heard an appeal, but they ceased to be Judges of the High Court at the time of signing the decree, it was held that there was nothing wrong in the succeeding Chief Justice signing the decree on their behalf. AIR 1952 Trav-Co 60 (61) (DB).

(5) Officer of Court vacating office after pronouncement of judgment — Decree drawn up in accordance with the judgment — Successor in office can sign decree. 1965 BLJR 628: ILR 44 Pat 742 (DB).

ORDER 20, RULE 9

1. Scope. — (1) In suits relating to immovable property the decree should contain a description of the property sufficient to identify the same otherwise, the decree may in many cases become impossible of execution by reason of the indefiniteness of the property dealt with by it. AIR 1950 Pat 306 (308, 309) ** (1878) 4 Cal 69 (72) (DB) ** (1884) 6 All 30 (33) (DB).

(2) If there is a discrepancy between two descriptions the leading description should be accepted. AIR 1944 Pat 254 (255, 256): 23 Pat 145 (DB).

(3) Omission to comply with the strict letter of the rule does not render the decree invalid. (1881) 5 Bom 208 (213) ** 1905 Pun Re No. 74, p. 237 (238).

(4) The Court can ascertain the subject upon which the decree operates, from the acts and conduct of the parties. (1892) 19 Cal 312 (321, 322): 19 Ind App 60 (PC) ** AIR 1914 Cal 775 (775) (DB).

2. Decree for possession of land. — (1) A decree for possession of a village passes with it the village account books and other documents relating to the management of the village. (1887) 11 Bom 485 (487) (DB).

(2) Decree for possession of village will pass with it any buildings or other constructions erected thereon. (1882) 8 Cal 582 (590, 591) (DB).

(3) Where the defendant is not a trespasser and is entitled under law to remove the building, a decree for possession will not pass with it the buildings constructed thereon. (1866) 6 Suth WR

R. 10. Decree for delivery of moveable property.—Where the suit is for moveable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

[1882 and 1877, S. 208; 1859, S. 191.]

Order 20, Rule 9 — Note 2 (contd.)
228 (229) (FB) ** (1904) 27 Mad 211 (217) (DB).

(4) Misdescription for insufficient description of property in decree — Boundaries not given — Executing Court can hold enquiry to ascertain subject-matter of decree. 1961 Raj LW 128 (131).

(5) Where under a decree defendant was required to quit altogether from the house the decree could not be said to be incapable of execution on the ground of uncertainty as to the portion from which the defendant was sought to be ejected. AIR 1959 Madh Pra 384 (385): 1959 MPLJ 1000.

(6) Where a judgment-debtor is contesting suit for properties mentioned in decree and putting forth claim for reimbursement of money spent for their improvements he cannot say that property is not identifiable under Order 20, Rule 9. 1961 Raj LW 128 (131).

ORDER 20. RULE 10

1. Scope. — (1) A person entitled to the delivery of moveable property from another is not bound to sue for the delivery of the property itself; he may sue for the value thereof. AIR 1924 Nag 176 (178).

(2) In a suit for delivery of movable property the decree need not always be for the delivery of the property in the first instance. The Court may in proper cases, decree only the value of the property as damages. 1880 Pun Re No. 81, p. 189 (191) (DB).

(3) Where the defendant is not in possession of the property claimed, the Court need not decree delivery thereof but may pass a decree for the value of such property. AIR 1916 Mad 314 (317): 39 Mad 1 (FB).

(4) Where the Court considers it proper to direct a restoration of property, the decree should also state the amount of money to be paid as an alternative if delivery cannot be had. AIR 1940 Cal 337 (343): ILR (1940) 1 Cal 372 (DB).

(5) The rule is no doubt mandatory; but the failure to state the amount of money to be paid in the alternative does not render the decree unexecutable, for it is still possible for the executing Court to fix the compensation and recover it for the decree-holder under Order 21, Rule 31 (2). AIR 1953 Vindh Pra 20 (20, 21).

(6) The Court cannot issue a commission to ascertain the value of the property. AIR 1940 Cal 337 (343): ILR (1940) 1 Cal 372 (DB).

(7) The judgment-debtor cannot claim any option of either surrendering the property or paying the money decreed. AIR 1951 Trav-Co 176 (177): 1950 Trav-Co LR 504 (DB) ** (1903) 13 Mad L Jour 444 (444) (DB).

(8) The words "moveable property" mean specific moveable property such as is referred to in Articles 48 and 49 of the Limitation Act. AIR 1954 Trav-Co 473 (478): ILR (1954) Trav-Co 627 (FB) ** (1899) 22 Mad 478 (481) (DB).

(9) A suit for recovery of a certain quantity of grain is not one for specific moveable property. AIR 1954 Trav-Co 473 (478): ILR (1954) Trav-Co 627 (FB) ** AIR 1924 Nag 176 (178).

(10) No decree can be passed under this rule for delivery of property against several defendants jointly, unless there is a combination among them; if it is found that any one of them took possession of the property, the decree should be made against him only, and to the extent of the property taken by him. (1909) 1 Ind Cas 205 (206, 207) (DB) (Cal).

(11) A decree-holder is entitled to apply for simultaneous execution of a decree passed in terms of this rule by one of the modes of execution specified in Order 21, Rule 31. AIR 1953 Cal 717 (718) (DB).

(12) See also Order 21, Rule 31 and Notes thereon.

(13) Where under the decree the plaintiff was entitled to get two 'Ras' bullocks or their price HS Rs. 800 giving of an alternate remedy did not give the decree-holder any option of refusing to take the delivery of the property and of insisting upon the money portion of the decree. AIR 1959 Mys 164 (165): 36 Mys LJ 916.

(14) Decree fixing time for delivery of movable property — In default decree-holder entitled to a decree for certain sum — Decree not under Order 20, R. 10 — Order 21, Rule 31 not applicable — Decree-holder not bound to exhaust his remedy for recovery of property before proceeding to recover the money. AIR 1961 Raj 241 (242): 1961 Raj LW 330.

(15) Suit for ejectment of tenant — Compromise order directing tenant to purchase demised land on which he had built a house — Assignment by tenant of his rights in house together with his rights under compromise order — Assignee can be impleaded as party defendant under Order 22, Rule 10. (1962) 2 Mad LJ 488.

2. "Amount of money to be paid." — (1) The money to be paid as an alter-

R. 11. Decree may direct payment by instalments.—(1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) **Order, after decree, for payment by instalments.**—After the passing of any such decree, the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.

[1882 and 1877, S. 210; 1859, S. 194.]

Order 20, Rule 10 — Note 2 (contd.)

native is the value of the property together with damages for the time the plaintiff has been kept out of it. (1871) 16 Suth WR 240 (243. 244) (DB).

(2) The value of the property is to be assessed according to the rate prevailing at the time when the suit is instituted. AIR 1951 All 413 (414) (DB) ** AIR 1945 Pesh 5 (5) (DB).

(3) Where a decree is passed in terms of an award ordering delivery of moveable property, and a part of such property is lost subsequently before delivery, the decree cannot be modified by the Court by inserting in it an order to pay the value of the property so lost. (1893) 17 Bom 657 (661).

(4) If there is a dispute as to the property claimed the Court must, of course, determine it before passing the decree; it cannot leave the matter to be settled in execution. (1875) 7 NWPHCR 75 (77) (DB).

ORDER 20, RULE 11 — SYNOPSIS

1. Scope.
2. Decree must be for the payment of money.
3. "The Court".
4. Postponement of payment.
5. Order for payment by instalments.
6. Sufficient reason.
7. "Notwithstanding anything contained in the contract under which the money is payable."
8. "With or without interest."
9. Order for instalments after decree — Sub-rule (2).
10. Taking of security.
11. Appeal.

1. Scope. — (1) After the passing of decree Court can pass an order under sub-rule (2) only if the decree-holder gives his consent thereto. AIR 1956 Pat 209 (210): 35 Pat 254 (FB) ** (1948) 52 Cal WN 440 (441) ** AIR 1926 Bom 250 (251): 50 Bom 262 (DB).

(2) The rule does not apply to decrees for recovery of money by sale of property, as in the case of mortgage decrees. AIR 1956 Kutch 15 (16) ** AIR 1948 Pat 18 (25): 26 Pat 231 (DB) ** (1879) 2 All 320 (322) (DB) ** (1881) 5 Bom 604 (608) (DB).

[See however AIR 1949 Nag 174 (175, 176): ILR (1949) Nag 182 (FB). (Final decree for sale under Order 34, Rule 5 — Payment by instalments can be ordered under Section 11, C. P. and Berar Money-Lenders Act. 1942 Nag L Jour 150 and AIR 1948 Nag 180: ILR (1947) Nag 470, **Overruled.**) ** (1913) 20 Ind Cas 8 (10) (DB) (Lah).]

(3) Independently of this rule, a decree may, in a suit on a mortgage or for partition, be passed on a compromise between the parties, providing for a payment by instalments and for sale of the mortgaged property in default. AIR 1916 All 331 (331).(Partition.)

[See (1907) 34 Cal 886 (890, 891) (DB) ** AIR 1925 Bom 509 (509) (DB).]

(4) The provisions of the U. P. Agriculturists' Relief Act (XXVII of 1934) relating to instalment decrees do not derogate from the provisions of this rule and the Court can pass an instalment decree under this rule even where such decree would not be permissible under the provisions of the Agriculturists' Relief Act. AIR 1940 Oudh 196 (196): 15 Luck 456 ** AIR 1938 All 52 (52).

(5) This rule is not in any way controlled by the provisions of the Imperial Bank of India Act which limit the powers of the Bank in the matter of advancing loans on longer terms than six months. AIR 1933 Nag 330 (331, 332) (DB).

(6) Even in case of decrees based on award the Court has power under this rule to order payment by instalments at the time of passing decree on application by the defendant. AIR 1957 Cal 21 (22) (DB).

(7) Where a joint and several decree is passed against the defendants the Court has no discretion left in it to direct that the plaintiff should exhaust his remedies as against some defendants and to proceed against the other defendant last. Order 20, Rule 11, Civil P. C does not provide such a course. (1960) 1

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Madhya Pradesh

In sub-rule (2) for the words "and with the consent of the decree-holder", the words "and after notice to the decree-holder" shall be substituted. (16-9-1960.)

Madras and Pondicherry

Substitute the following for Rule 11:—

"**11.** (1) Where and in so far a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which money is payable.

(2) After the passing of any such decree, the Court may, on the application of the judgment-debtor and after notice to the decree-holder, order the payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise as it thinks fit."
(R.O.C. No. 2191 of 1926): Act 26 of 1968, S. 3 and Sch. Pt. II.

Orissa

In sub-rule (2) for the words "and with the consent of the decree-holder", substitute "and after notice to the decree-holder". (7-5-1954).

Order 20 Rule 11 — Note 1 (contd.)
Andh WR 397 (399): 1960 Andh LT 335 (DB).

(8) Decrees merely postponing payment of amount decreed for six months — Article 175, Limitation Act has no application. (1968) 34 Cut LT 1347.

2. Decree must be for the payment of money. — (1) A decree for money need not necessarily be one which has been passed in what are called "money suits." Court has power to direct payment by instalments the amount decreed in other suits as well, such as decrees in suits for arrears of rent. AIR 1956 Ajmer 69 (70).

(2) Personal decree under Order 34, Rule 6 of the Court is only a decree for the payment of money. (1911) 11 Ind Cas 736 (736) (DB) (Cal).

3. "The Court." — (1) It is the Court which passed the decree that can act under this rule. AIR 1943 Nag 340 (344): ILR (1944) Nag 1 (FB) ** AIR 1918 Mad 1174 (1175): 40 Mad 233 (FB) ** AIR 1932 All 273 (282): 54 All 573 (FB).
See also Notes on S. 48.

4. Postponement of payment. — (1) A judgment-debtor who has enjoyed the benefit of the arrangement for delay in execution by virtue of an order passed under this rule cannot subsequently resile from such arrangement. (1912) 13 Ind Cas 204 (205) (DB) (Mad).

(2) Order 20, Rule 11 enables Court passing decree to order postponement of payment of decretal amount on such terms as to payment of interest as it thinks fit on an application by judgment-debtor and with consent of decree-holder. AIR 1968 SC 1087 (1089): (1968) 3 SCR 158. (AIR 1961 All 1 (FB), **Overruled.**)

(3) Mere largeness of the amount cannot by itself be a valid consideration for granting time to the defendant to pay the decretal amount. AIR 1964 Guj 253 (259): (1964) 5 Guj LR 369 (DB).

(4) Each sub-rule of Order 20, Rule 11 empowers a Court to postpone payment of decretal amount or to make it payable by instalments and provide for award of interest from the date of the decree or order. Section 34 cannot be invoked when Court acts under O. 20, Rule 11. AIR 1967 Guj 276 (277): 8 Guj LR 307 (DB).

(5) Where the debt is due to a bank, it is a circumstance to be taken special note of while considering the defendants' prayer for a decree for instalment payments. 1959 Ker LR 119 (120).

(6) Money decree directing payment of decretal amount to be made after certain date and decree not to be executed till that date — Execution petition filed within 3 years from such date is not barred by limitation. AIR 1965 Pat 273 (273).

5. Order for payment by instalments. —(1) A decree payable in instalments on a certain condition (e.g., that the defendant should mortgage certain property by way of security) is not illegal on that ground. AIR 1927 Oudh 236 (236).

(2) Decree for maintenance by payment of a fixed rate per mensem for life stands exactly on the same footing as a decree ordering payment by instalments. (1887) 9 All 33 (34) (DB).

Order 20 Rule 11 — Note 5 (contd.)

(3) Execution by arrest of judgment-debtor — Power of Court to direct payment of decretal amount in instalments doubtful. AIR 1964 Ker 264 (265): 1962 Ker LJ 1397 (DB).

(4) Order of executing Court directing payment of decretal amount in instalments, is not subsequent order. AIR 1963 Punj 363 (365): 65 Pun LR 362 (DB).

6. Sufficient reason. — (1) The discretion, under this rule, to order payment of decree amount in instalments should be exercised in a judicial and not in an arbitrary manner. AIR 1955 Ajmer 57 (1) (57) ** AIR 1954 Hyd 96 (96): ILR (1953) Hyd 749 (DB) ** AIR 1933 Nag 330 (331) (DB).

(2) Where instalments are prayed for by debtor, Court should see that the facts relating to the means and circumstances of debtor as also of creditor are brought before Court. AIR 1955 Ajmer 57 (1) (57) ** AIR 1949 Cal 427 (429): ILR (1945) 1 Cal 474 (DB).

(3) The onus is on defendant to show that he is entitled to the indulgence under this rule. AIR 1936 Lah 51 (55) (DB) ** AIR 1935 Cal 559 (560).

(4) A debtor making default in payments of instalments as provided by the bond executed by him is not entitled to a provision for payment of the decretal amount by instalments, more so when there is no evidence to show that he is unable to pay the amount. AIR 1937 Lah 16 (17) (DB).

(5) Court should not pass a decree the effect of which is to stay execution unconditionally. AIR 1925 Mad 908 (909) (DB).

(6) Court should not make the instalments extend over a long period without guaranteeing satisfaction or making any provision for the payment of interest. AIR 1933 All 90 (90): 54 All 539 ** (1878) 2 All 129 (132) (DB) ** AIR 1935 Cal 559 (560).

(7) Mere fact that defendant is unable to pay or is hard pressed or embarrassed, is no ground for passing order under this rule. AIR 1949 Cal 427 (429): ILR (1945) 1 Cal 474 (DB) ** AIR 1925 Mad 908 (909) (DB) ** AIR 1933 Nag 330 (331) (DB).

(8) Mere fact that defendant's estate is under management of Court of Wards is no ground for ordering instalments. AIR 1923 Lah 256 (256) (DB).

(9) Merely because defendant is expecting to get a cross decree against plaintiff in a pending litigation which would enable him to claim a set-off, is not a sufficient reason to enable the Court to order payment by instalments or to postpone payment. AIR 1926 Lah 604 (605): 7 Lah 393 (DB).

(10) Where rate of interest is exorbitant or unconscionable decree for instalments can be passed. (1907) 31 Bom 348 (353).

(11) Where the decree for immediate payment will deprive defendant of his means of livelihood, a decree for instalments can be properly passed. AIR 1925 Rang 33 (33).

(12) Conduct of defendant and his ability to pay is a relevant consideration for refusal to grant instalments. 1957 Jab LJ 972 (974, 975) (DB).

(13) Apart from the Money Lenders Act, there is nothing wrong in principle if the Court on grounds of equity and convenience grants instalments. 1961 MPLJ 249 (252): 1961 Jab LJ 269 (DB).

(14) Acceptance of overdue instalments amounts to waiver. AIR 1961 Madh Pra 29 (30): 1960 Jab LJ 1083 ** AIR 1962 Punj 293 (298): 64 Punj LR 203. (AIR 1928 Lah 378 and AIR 1939 Pat 433 (FB), Rel on.) ** (1951) 4 Sau LR 71 (73).

(15) Jurisdiction of executing Court to extend date of payment of first instalment — Petition filed within week of date fixed for payment of first instalment — Information about date reaching judgment-debtors on previous day — Rejection of petition is not correct. AIR 1966 Pat 266 (267): 1966 BLJR 320.

(16) The expression "sufficient reason" postulates that the Court would take into consideration the amount of the decretal dues and the circumstances of the judgment-debtor. The burden would always be on the judgment-debtor to plead and prove that his circumstances are such that he cannot pay up the decretal dues immediately or without instalments. (1968) 34 Cut LT 1347.

7. "Notwithstanding anything contained in the contract under which the money is payable." — (1) These words only make a reference to a prior contract between the parties settling the whole payment to be paid in one lump sum and it does not follow from these words that the decrees, the payment of which can be directed by instalments are only those passed in what are called "money suits." AIR 1956 Ajmer 69 (70).

8. "With or without interest." — (1) The granting or refusal of interest and the rate at which it is to be granted on the instalments ordered to be paid, are in the discretion of the Court. (1879) 3 Bom 202 (203) (DB).

(2) Where a decree allows interest, to disallow it in passing an order under this rule would be without jurisdiction. AIR 1933 Rang 323 (325) (DB).

9. Order for instalments after decree — Sub-rule (2).— (1) Non-opposition by decree-holder after notice to him may amount to consent within this rule. (1884) 7 Mad 152 (154, 155) (DB).

Order 20 Rule 11 — Note 9 (contd.)

(2) Sub-rule (2) as amended by the Nagpur High Court empowers the Court to order instalments despite the protest of the decree-holder. AIR 1946 Nag 313 (315): ILR (1946) Nag 752.

(3) An order for postponement or for instalments under this sub-rule can be made even when an appeal is pending from the decree. AIR 1927 Mad 416 (419, 420) (DB).

(4) The rule does not direct the decree to be amended by virtue of such order. AIR 1917 Mad 188 (188) (DB).

(5) An order under sub-rule (2) amounts to a variation of the decree. AIR 1943 Nag 340 (344): ILR (1944) Nag 1 (FB) ** AIR 1932 All 273 (280): 54 All 573 (FB).

[But see ('78) 2 Cal L Rep 143 (148).]

(6) An order under sub-rule (2) cannot be made by a Court executing the decree. AIR 1956 Pat 209 (210): 35 Pat 254 (FB) ** AIR 1951 Pepsu 86 (2) (87): 2 Pepsu LR 366 ** (1963) 1 Mys LJ 339 (340).

[See AIR 1956 Kutch 15 (16) ** AIR 1955 Ajmer 24 (24).]

[But see (1924) AIR 1924 Bom 118 (119) (DB).]

(7) Where default is committed in payment of instalments ordered to be paid Court cannot grant relief against forfeiture. AIR 1949 Bom 97 (99) (FB): ILR (1948) Bom 654 (FB). (AIR 1922 Bom 170: 46 Bom 463 and AIR 1926 Bom 81, **Overruled;** AIR 1925 Bom 404, **Impliedly Overruled.)** ** 37 Mys LJ 696 (697): ILR (1959) Mys 299 ** AIR 1961 Punj 439 (441): ILR (1962) 1 Punj 8 (DB).

(8) The fact that an instalment decree has been passed under sub-rule (1) does not preclude the Court from passing a further and different kind of instalment decree coupled with a hypothecation of property under sub-rule (2). The sub-rule applies whether the original decree was for a lump sum or for instalments. (1939) 18 Pat 719 (721) (DB).

(9) Power under sub-rule (2) cannot be exercised by Court after its decree has merged in decrees of superior Courts. AIR 1956 Ajmer 56 (56).

(10) Where parties agree after decree that decretal amount should be paid by instalments and Court, accepting the compromise, passes an order striking off executing proceedings, Court must be deemed to have passed an order under this sub-rule. AIR 1923 Lah 381 (382) (DB) ** (1885) 11 Cal 143 (145) (DB) ** (1884) 6 All 16 (17) (DB).

(11) Unless recognized by Court in some form, the arrangement between parties for payment of decree by instalments will not by itself amount to a direction by the Court under this rule and cannot be enforced in execution. (1887) 14 Cal 348 (350) (DB) ** (1881) 3 All 585 (588, 589) (FB). (Cannot be enforced.)

(12) Where the Court has recognized the compromise between the parties for payments by instalments it cannot, on default of payment in any of the instalments, refuse to execute the decree and drive the plaintiff to a separate suit. AIR 1933 Lah 758 (759) ** AIR 1937 Cal 236 (237) (DB). (Decree-holder can enforce terms by execution.)

(13) Sales Tax Authority issuing recovery certificate to Collector — Assessee coming to arrangement with Collector and agreeing to pay amount of tax in instalments — Order 20 Rule 11 (2), Civil P. C. also would not apply to such case. (1965) 16 STC 701 (All).

(14) Order 20, Rule 11 (2), Civil P. C. does not lay down that before the judgment-debtor is permitted to pay in instalments the consent of the decree-holder should be obtained. The provisions of Section 12 of the Hyderabad Money Lenders Act are in pari materia with those of Order 20, Rule 11 (2), Civil P. C. (1959) 2 Andh WR 115 (116): 1959 Andh LT 866.

(15) Award directing payment by certain time — Decree of Court directing payment of awarded amount by monthly instalments — Decree amounts to substitution of award — Not warranted by Section 15, Arbitration Act. AIR 1962 Bom 40 (41): 63 Bom LR 655.

10. Taking of security. — (1) The security that may be taken under sub-rule (2) for due performance of decree can be enforced in execution and O. 34, Rule 14 is no bar thereto. AIR 1926 Mad 194 (197, 200) (DB) ** AIR 1925 Bom 509 (510) (DB).

(2) Where by an order under sub-rule (2), the judgment-debtor was to execute a mortgage to the decree-holder, the subsequent adjudication of the judgment-debtor as an insolvent cannot affect the rights of the decree-holder to have the mortgage executed in his favour. AIR 1925 Rang 189 (190, 191): 2 Rang 673 (DB).

(3) Decree obtained by creditor against debtor and surety directing creditor to first exhaust remedies against debtor — Direction held not justified under O. 20, Rule 11 (1) or Section 151, Civil P. C. **AIR 1969 SC 297 (298): (1969) 1 SCJ 380.**

11. Appeal. —(1) An order refusing to allow payment of decretal amount in instalments is not appealable under Order 43, Rule 1. AIR 1928 Lah 931 (931) ** ('13) 7 Low Bur Rul 71 (72) (DB).

(2) An order granting instalments under sub-rule (1) will of course be incorporated in decree itself and can therefore be attacked in an appeal against the decree. AIR 1931 Rang 152 (152) ** AIR 1933 Pesh 31 (33) (DB) ** AIR 1922 Lah 355 (355) (DB).

12. Decree for possession and mesne profits.—(1) Where a suit for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree—

(a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until—

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

[1882 and 1877, Ss. 211, 212; 1859, Ss. 196, 197. See Ss. 2(12), 144.]

Order 20, Rule 11 — Note 11 (contd.)

(3) If order for payment by instalment is not incorporated, the order will not be appealable. AIR 1931 Rang 152 (152).

(4) An order for instalments made under sub-rule (2) being consent order is not appealable. AIR 1926 Rang 192 (192): 4 Rang 247.

[See however AIR 1954 J and K 39 (39): 12 J and K LR 131 (DB).]

(5) An order under sub-rule (2) as amended in M. P. and Madras not being a consent order, and being one relating to the execution discharge or satisfaction of the decree within the meaning of Section 47 is appealable as a decree. AIR 1958 Mad 460 (461) ** 1957 MPLJ 191 (191, 192) (DB) (Nag). (1955 Nag L Jour (Notes) 130, Overruled.) ** AIR 1943 Nag 155 (156): ILR (1943) Nag 456.

(6) Where the Court allowed the application of the judgment-debtor for instalments without the consent of the decree-holder it was held that the order fell under Section 47 and was appealable. (1948) 52 Cal WN 440 (441). (AIR 1932 Rang 54, Rel. on.)

(7) An order under sub-rule (2) permitting or refusing to permit the judgment-debtor to pay the decree in instalments is appealable as an order falling under Section 47 of the Code. AIR 1956 Mys 8 (8): ILR (1955) Mys 453.

(8) Court at time of passing decree in terms of award refusing to grant defendant's prayer for instalments — Appeal is maintainable in so far as that part of the decree is concerned. AIR 1957 Cal 21 (22) (DB).

ORDER 20, RULE 12 — SYNOPSIS

1. Scope.
2. Rule applies only where specific interest in land is claimed.
3. Enquiry as to mesne profits is no longer a proceeding in execution.
4. Mesne profits.
4-A. Extent of liability.
4-B. Principles relating to assessment.
4-C. Deductions.
4-D. Onus of proof.
5. Interest forming part of mesne profits.
6. Value of mesne profits, if affects jurisdiction.
7. Right to apply for ascertainment of future mesne profits, when arises.
8. Notice of relinquishment — Clause (c).
9. Three years from date of decree.
10. Appeal.
11. Revision — Review.
12. Courts-fees on mesne profits.

1. Scope. — (1) This rule does not apply to suits for damages which are not mesne profits. AIR 1935 All 186 (187) (DB) ** AIR 1914 Cal 579 (579) (DB) ** AIR 1938 All 445 (446): ILR (1938) All 658 (DB).

(2) The rule does not apply to suits for compensation for use and occupation. AIR 1956 Cal 148 (155) (DB).

(3) A suit for a declaration of title and in the alternative for possession and mesne profits is within this rule. AIR 1917 Cal 562 (563) (DB).

(4) For the purpose of determining whether a suit comes under this rule the averments in the plaint are to be referred to and it is immaterial that eventually a decree is not passed in terms of the prayers contained in the plaint. AIR 1946 Sind 58 (60, 61): ILR (1945) Kar 313.

(5) A plaintiff must specifically claim mesne profits in the plaint: a prayer for general relief will not entitle him to make the claim. AIR 1952 SC 358 (362): 1952 SCR 1133: ILR (1953) 1 All 481.

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Bombay: Dadra and Nagar Haveli

In Order XX, for the existing Rule 12 and its marginal note, substitute the following as Rule 12 and marginal note:—

R. 12. Decree for possession and mesne profits.—(1) Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree—

(a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during the period prior to the institution of the suit, or directing an enquiry as to such rent or mesne profits;

(c) directing an enquiry as to rent or mesne profits from the institution of the suit until—

(i) the delivery of possession to the decree-holder, or

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court.

Order 20, Rule 12 — Note 1 (contd.)

(6) In so far as this rule enables Court to pass a decree for future mesne profits, it is an exception to the general rule that a Court has no jurisdiction to give the plaintiff a decree on a cause of action that had not accrued to him at the date of the suit. AIR 1953 Pat 289 (291). (Its object is to avoid multiplicity of suits.) •• AIR 1943 Cal 1 (4): ILR (1942) 2 Cal 268 (DB) •• AIR 1937 Mad 46 (48): ILR (1937) Mad 284 (DB).

(7) Rule is only directory and does not compel plaintiff to claim future mesne profits. Nor is the Court bound to pass a decree for such mesne profits. AIR 1958 Andh Pra 517 (519): ILR (1957) Andh Pra 52 (DB). (Court may refuse future mesne profits in suitable cases.) •• AIR 1958 Assam 67 (70): ILR (1956) 8 Assam 177 (DB) •• AIR 1967 SC 155 (157): (1966) Supp SCR 128.

(8) Ordinarily a decree for mesne profits can only follow a decree for possession and when the plaintiff fails to obtain a decree for possession, a claim for mesne profits should not be allowed. AIR 1951 Hyd 57 (62): ILR (1951) Hyd 632 (DB) •• AIR 1933 Cal 554 (558) (DB) •• AIR 1962 Ker 55 (57): 1961 Ker LT 704.

(9) As long as a decree for redemption is stayed no right to recover mesne profits, which are incidental to the main relief for redemption, can arise, because the possession can be considered only as that of the mortgagee. AIR 1952 Trav-Co 517 (518) (DB).

(10) In cases falling within this rule, the Court may pass either a final decree for past mesne profits or rent. AIR 1937 All 36 (39) (DB).

[See also AIR 1952 Mys 117 (119): ILR (1952) Mys 384.]

(11) Court may pass under this rule a preliminary decree, directing an enquiry as to the amount of future mesne profits. AIR 1946 Oudh 59 (60) (DB). (Even if they are not specifically claimed.)

(12) Where it is unnecessary to have any enquiry, it is open to the Court to dispense with such enquiry even in the case of mesne profits subsequent to the institution of the suit, and at once pass a final and executable decree in respect of such profits. AIR 1938 Mad 727 (729): ILR (1938) Mad 1050 (DB) •• AIR 1954 Mys 42 (44, 45): ILR (1953) Mys 470 (DB) •• AIR 1947 Cal 68 (69): ILR (1946) 2 Cal 599 (DB).

[But see AIR 1937 Mad 46 (48): ILR (1937) Mad 284 (DB).]

(13) When a Court passes a preliminary decree under this rule and directs an enquiry as to mesne profits, it should, at the same time, decide the basis upon which the mesne profits are to be assessed. AIR 1934 Cal 503 (504) (DB).

(14) Where an enquiry is directed as to mesne profits, a final decree in respect of such mesne profits is to be passed in accordance with the result of such enquiry. AIR 1931 Mad 717 (718): 54 Mad 980 (DB).

(15) The final decree proceedings only relate to matters which are provided in the preliminary decree as to an account for mesne profits; they do not relate to the decision of any substantial rights of the parties as to title to properties which can only be decided in a regular suit. AIR 1953 Mad 723 (726) (DB).

(16) If an application is taken out under O. 20, R. 12 by mistake the Court should correct the mistake and decide it under O. 20, R. 18. AIR 1957 Mad 184 (184).

(17) A decree can be partly final and partly preliminary. So also there can be more than one final decree where the terms of the decree are such as to call for such

(2) Where an inquiry is directed under clause (b) or clause (c) of sub-rule (1) above, a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such enquiry. (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras. (9-6-1959): Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3.

Madras and Pondicherry

Add the following sub-rule (3):—

"(3) Where an appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry; and in every case the Court of first instance may of its own accord and shall whenever moved to do so by the decree-holder, inquire and pass the final decree."

(Dis. No. 550 of 1911 as amended in 1943); Act 26 of 1968, S. 3 and Sch. Pt. II (w.e.f. 5-9-1968).

Mysore

Add the following as sub-rule (3) to Rule 12:—

"(3) Where an Appellate Court directs such an inquiry it may direct the Court of first instance to make the inquiry and in every case the Court of first instance may of its own accord and shall, whenever moved to do so by the decree-holder, inquire and pass a final decree." (30-3-1967.)

Order 20, Rule 12 — Note 1 (contd.)

a course. AIR 1946 Sind 58 (61): ILR (1945) Kar 313.

(18) A decree ordering the delivery of possession and directing an enquiry as to mesne profits will be partly preliminary and partly final. AIR 1929 Cal 383 (383, 384) (DB) ** AIR 1916 Mad 767 (767) (DB).

(19) Where a decree is passed for past and future mesne profits without directing an enquiry, the decree is not preliminary but final. AIR 1925 Mad 1276 (1276) (DB).

(20) A proceeding for ascertainment of mesne profits after a preliminary decree under this rule is not a proceeding in respect of a "debt". A Civil Court is not bound to stay such a proceeding on receipt of a notice from a Board under the Bengal Agricultural Debtors Act. AIR 1941 Cal 639 (641) (DB).

(21) The rule does not prohibit a plaintiff in a suit for possession and mesne profits from asking for additional reliefs. He can ask for compensation for loss occasioned by possession being held, by a receiver who had to be appointed in such a suit because of the defendant's failure to deliver possession. AIR 1946 Cal 357 (363, 364): ILR (1946) 1 Cal 441.

(22) The rule has no application to a suit for assessment and recovery of additional rent. AIR 1943 Cal 544 (552): ILR (1943) 2 Cal 245 (DB).

(23) The substantive law governing redemption of mortgages cannot be said to have been abrogated by this rule. Hence, in a suit for redemption a decree for possession in favour of mortgagor cannot be passed without first determining liability of mortgagor to pay to the mortgagee in respect of the value of improvements, arrears of rent and the like. AIR 1952 Trav-Co 411 (412) (DB).

(24) Mesne profits prior to the suit cannot be awarded unless a claim was made in respect of them but as regards future mesne profits, the position is governed by O. 20, R. 12. AIR 1965 SC 1812 (1817): (1965) 3 SCR 283 ** AIR 1961 Madh Pra 200 (203): 1961 MPLJ 273.

(25) Once it is held that plaintiff is entitled to eject the defendant and the relief is granted, the defendant who remains in possession despite the decree must pay mesne profits or damages. Decree must accompany with direction for future mesne profits or damages. AIR 1966 SC 735 (740): (1966) 2 SCR 286. (F. A. No. 564/1958 Dt/- 14-12-62 (All), Reversed.)

(26) Suit for ejectment, arrears of rent and mesne profits — Claim for mesne profits dismissed as not pressed by plaintiff — Subsequent suit for mesne profits is not barred under Expl. 5 of Sec. 11, Civil P. C., as Court in prior suit was not bound under Rule 12 to pass decree for mesne profits. AIR 1962 Cal 111 (112): 65 Cal WN 1067. (ILR 32 Cal 118, followed.)

(27) Order 20 is not exhaustive of the list of preliminary decrees. Therefore, in the suit for eviction and possession of the premises having cinema house, arrears of rent due and mesne profits, decree for possession can be passed, leaving the issues relating to the ownership of the fittings in the cinema-house, rent and mesne profits to be determined at a later stage. AIR 1964 Madh Pra 288 (297): 1964 MPLJ 502 (DB).

(28) There being no obligation on plaintiff to unite claim for damages and mesne profits with a suit for possession, O. 20, R. 12 would not stand in the way of a separate suit for such claim. (1962) 66 Cal WN 692 (693) (DB).

(29) Suit for declaration of title and possession of land decree in plaintiff's favour

Order 20, Rule 12 — Note 1 (contd.)

— Separate suit for future mesne profits — O. 20, R. 12 has no application. AIR 1966 Madh Pra 186 (189): 1965 Jab LJ 1012 (1017).

(30) Suit for liquidated amount of mesne profits — Suit is not for accounts and is not excluded from cognizance by Court of Small Causes. AIR 1966 Madh Pra 186 (187): 1965 Jab LJ 1012.

(31) Action for main or substantial relief abating — Incidental relief for mesne profits not maintainable independently and must also fail. (1968) 81 Mad LW 213 (219): (1968) 2 Mad LJ 622.

(32) There could be a suit for possession and mesne profits accrued till date of suit and subsequent suit for mesne profits accruing after filing of suit. (1968) 81 Mad LW 213 (219): (1968) 2 Mad LJ 622.

(33) Partition suit — No allegation by plaintiff of ouster or exclusion — Plaintiff's claim for mesne profits is unsustainable — Direction for enquiry into mesne profits from date of suit to final decree is defective because of error of jurisdiction and must be set aside. 1963 BLJR 297 (299) (DB).

(34) Mesne profits against bona fide stranger — Mortgage decree and sale in execution thereof proved void against minor who was not properly represented by guardian-ad-litem — Possession of auction purchaser wrongful and he is liable for mesne profits from date of delivery of possession to him. AIR 1968 Pat 12 (22): 1968 BLJR 658 (DB).

(35) A pre-emptor has no claim to income of property which might have accrued to vendee from date of sale till the pre-emptor obtains possession. AIR 1968 Punj 110 (118): 69 Pun LR 743 (FB).

(36) Plaintiff dispossessed from office of hereditary pujari by defendant — Suit for declaration of his right and for mesne profits by plaintiff — Offering made at temple though voluntary and uncertain, no difficulty in assessing mesne profits — Mesne profits could be awarded. 1963 Raj LW 18 (20): ILR (1963) 13 Raj 47. (AIR 1920 Mad 137, Foll.)

(37) Suit for declaration that order for removal from Government service was unconstitutional — Nature of decree that can be passed — He can claim arrears of salary accrued due at time of suit — Future salary until reinstatement cannot be awarded. AIR 1963 Tripura 20 (31).

(38) It is only when a suit is competent for the recovery of possession of immovable property and for rent or mesne profits of the property, that the Court may pass a decree for future profits. (1968) 81 Mad LW 213 (219): (1968) 2 Mad LJ 622.

(39) Plaintiff's suit was decreed in trial Court which ordered entitlement of recovery of mesne profits upto the date of delivery of possession. In first appeal by defendant Court directed payment of a sum to the vendor of the land within thirty days but dismissed the appeal. Second appeal by defendant was also dismissed. When the plaintiff applied for ascertainment of mesne profits, it was contended by the defendant that plaintiff was entitled to mesne profits for period after expiry of thirty days after the deposit was made. It was held that the order of deposit in no way affected right to mesne profits from the date of institution of suit. 1968 Pat LJR 138 (139).

(40) Flats belonging to Housing Society given to third parties by members without consent from Society as required by law — As occupants failed to vacate flats matters referred to Registrar. **Held** Registrar was competent to entertain application for possession and also to decide claim for profits as dispute related to business of Society. (1965) 67 Bom LR 306: 1965 Mah LJ 523 (DB).

(41) The "decree" within the meaning of R. 12 is one which is executable against a person sought to be proceeded against. So far as a party to an appeal is concerned the decree must be the appellate decree, but for the person who was not a party to an appeal, it can only be the decree in trial Court to which he was a party. 1968 Ker LT 280 (284, 285): 1968 Ker LJ 307.

(42) Decree for costs should be in harmony with the decree for substantive relief. When in a case the decree in respect of substantive relief is served and severable, the decree for costs also must be construed likewise. (1968) 34 Cut LT 1131 (1148) (DB). (34 Cut LT 328 held not good law in view of AIR 1929 PC 300.)

2. Rule applies only where specific interest in land is claimed. — (1) The rule will not apply to a suit by a member of a Hindu joint family, for a partition of the joint property inasmuch as the plaintiff has no specific interest in such property until decree. (1886) 14 Cal 493 (509): 14 Ind App 37 (PC) °° AIR 1957 Andh Pra 766 (770). (Rule 18 applies to partition suit and not R. 12. AIR 1923 Mad 19, held not good law in view of AIR 1951 Mad 938 (FB).)

(2) Where the family has been living under a clear arrangement that the members are entitled, not as an ordinary Hindu family, but in specific and definite shares, the right to mesne profits will arise if the enjoyment of those shares is in any way, disturbed. (1889) 16 Cal 397 (412): 16 Ind App 71 (PC).

(3) Apart from this rule a member of a joint Hindu family who is excluded from participation in the profits of the family property may be entitled to an account of the management of the property from the persons in possession and to a share of such profits. Such a right is not a right to mesne profits received by a person in wrongful possession, but is appurtenant to the plaintiff's right under Hindu law in his share of the lands. AIR 1956 Pat 244 (248, 249) (DB) °° AIR 1923 Mad 147 (149, 150): 46 Mad 47 (DB).

Order 20, Rule 12 — Note 2 (contd.)

(4) The karnavan of a thouzhi cannot be said to have been in wrongful possession of the property until shares have been claimed in the suit for partition and therefore no decree for mesne profits can be given against him for any period prior to the suit. Nor can the claim for mesne profits for that period be treated as one towards maintenance refused where there had been no complaint from the plaintiffs till the suit that they had been kept out of enjoyment of the properties. AIR 1957 Ker 178 (180) (DB).

3. Enquiry as to mesne profits is no longer a proceeding in execution. — (1) The assessment of mesne profits is a proceeding in suit, and it has nothing to do with execution department. AIR 1956 Mad 685 (685) °° 1957-2 Andh WR 152 (154) °° AIR 1940 Mad 124 (126): ILR (1940) Mad 372 (FB) °° AIR 1934 All 465 (467) (DB).

(2) The enquiry is a continuation of suit which results in a final decree. AIR 1934 All 465 (467) (DB) °° AIR 1928 Bom 236 (237): 52 Bom 360 (DB) °° (1891) 13 All 53 (64, 65): 17 Ind App 150 (PC) °° (1892) 19 Cal 132 (136) (FB).

(3) No application for ascertainment of mesne profits can be entertained in execution department. (1911) 39 Cal 220 (225) (DB) °° AIR 1919 All 193 (194): 41 All 517 (DB).

(4) Where the Court passing decree erroneously gives a direction to plaintiff to apply for the ascertainment of mesne profits in execution, such a decree might be a wrong decree, but is valid so long as it is not corrected by proper proceedings. AIR 1934 Cal 472 (474) (DB) °° AIR 1948 Sind 124 (126): ILR (1947) Kar 194 (DB) °° AIR 1929 Bom 217 (218, 219) (DB) °° AIR 1956 Mad 685 (686).

[But see AIR 1918 Cal 742 (743) (DB) °° AIR 1938 All 445 (446): ILR (1938) All 658 (DB).]

(5) When once a preliminary decree has been passed the suit cannot be dismissed unless and until the decree is varied or reversed in appeal. AIR 1924 PC 198 (200): 4 Pat 61: 51 Ind App 321.

(6) A suit cannot be dismissed for default in prosecuting an application for the ascertainment of mesne profits under this rule. AIR 1940 Mad 124 (126, 127): ILR (1940) Mad 372 (FB) °° AIR 1928 Mad 522 (523) (DB) °° AIR 1926 Pat 141 (142): 5 Pat 223 (DB).

(7) After a preliminary decree, the practice is that the suit is adjourned to a definite date for further hearing. AIR 1928 Mad 1165 (1168) (DB).

(8) In an enquiry for mesne profits it is not open to go behind the preliminary decree which has become final. AIR 1959 Andh Pra 64 (71) (DB).

(9) Decree for mesne profits passed against several defendants — Decree being ambiguous executing court unable to determine whether liability under decree was joint and several — Executing Court, held was justified in looking into pleadings and judgment for ascertaining real intention. AIR 1966 Mad 319 (320): (1965) 2 Mad LJ 551.

(10) Failure to give a direction for enquiry under R. 12 (1) (c) (i) does not affect validity of decree as giving of direction is an act of ministerial nature. AIR 1966 Orissa 203 (204): 32 Cut LT 805.

[But see 1960 BLJR 559 (559) (DB). (AIR 1953 Pat 289: AIR 1960 Pat 260 and 8 Ind App 197, Followed.)]

4. Mesne profits. — (1) Object of awarding a decree for mesne profits is to compensate the person entitled to be in possession for his having been kept out of possession and thus deprived of the profits of the property. (1901) 23 All 252 (255) (DB).

(2) Mesne profits can be claimed only in respect of immovable property. AIR 1957 Manipur 9 (13).

(3) It is only a person who is entitled to actual possession that can claim mesne profits. AIR 1950 Ajmer 7 (8) °° AIR 1935 Lah 379 (380) (DB) °° 1960 All LJ 254 (259).

(4) The very foundation of the cause of action for mesne profits is wrongful possession of the defendant. AIR 1953 Mys 121 (121): ILR (1953) Mys 103 °° 1951 Ker L Tim 179 (183) (DB) °° AIR 1933 Mad 825 (830): 57 Mad 49 (DB) °° AIR 1917 Cal 107 (112) (DB).

(5) Decree for mesne profits cannot be passed against a person who is not in possession at all or who is in rightful possession. AIR 1946 Cal 357 (363): ILR (1946) 1 Cal 411. (Defendant not in possession.) °° AIR 1917 All 117 (118) (DB) (Do.) °° AIR 1921 Mad 609 (610) (DB). (Rightful possession.) °° AIR 1936 Bom 276 (277). (Do.).

(6) Possession through another, such as a "tenant", is sufficient to create liability for mesne profits if such possession is wrongful. AIR 1936 Cal 629 (637) (DB) °° AIR 1935 PC 49 (50): 62 Cal 499: 62 Ind App 53.

(7) Decree for ejectment — Judgment-debtor fraudulently putting his dummy into possession to cheat decree-holder — Dummy continuing in possession on his own and defying judgment-debtor for certain period — Judgment-debtor liable for mesne profits even for such period. AIR 1964 All 189 (190).

(8) Where lessor deliberately sets up third party in order to obstruct lessee from getting possession, the lessee is entitled to mesne profits from the date of obstruction to date of delivery of possession. AIR 1965 Pat 39 (43) (DB).

[See however AIR 1940 Mad 913 (914) (DB).]

(9) The possession of a possessory mortgagee so long as his right to possession subsists is rightful possession. AIR 1958

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Mys 121 (121): ILR (1953) Mys 103 •• AIR 1952 Trav-Co 517 (518) (DB).

(10) The possession of defendant aginst whom a conditional decree has been passed to the effect that on payment of a certain sum the plaintiff is to get possession and such payment has not been made is rightful possession. AIR 1943 Bom 278 (283) (DB) •• **AIR 1918 PC 118 (120): 41 All 63: 45 Ind App 284: 21 Oudh Cas 228.**

(11) The possession of a cosharer of joint property, in the absence of proof of ouster or exclusion of another cosharer is rightful possession. AIR 1955 Nag 300 (302): ILR (1956) Nag 247 (DB) •• AIR 1957 Nag 12 (14) (DB) •• **AIR 1931 PC 209 (211): 51 Ind App 299: 11 Pat 22.**

(12) The possession of a person who has entered on the land as a trespasser, but from whom the owner has accepted rent is rightful. **AIR 1924 PC 213 (215): 46 All 728: 51 Ind App 326: 27 Oudh Cas 208.**

(13) The posession of a lessee under a subsisting lease is rightful. AIR 1954 Trav-Co 10 (24) (DB).

(14) The possession of a tenant who was let into possession by a person whose title to the property was recognised by the plaintiff, though ultimately it turns out not to be well founded is rightful. AIR 1955 Andhra 36 (39).

(15) The possession of a person against whom a decree for possession has been passed is wrongful. AIR 1927 Nag 9 (10) •• AIR 1936 Mad 137 (137) •• AIR 1935 Cal 206 (208): 62 Cal 217 (DB).

(16) The possession of the vendee after the pre-emptor has become entitled to possession, that, is immediately on depositing the purchase-money is wrongful. AIR 1936 All 549 (553) (DB).

(17) The possession of a purchaser of equity of redemption against the wishes of the usufructuary mortgagee and without accepting the position of his being a tenant of the mortgagee is wrongful. AIR 1956 Madh B 110 (113, 114): ILR (1956) Madh B 92.

(18) The possession of a tenant holding over as tenant-at-will after the receipt of a notice to quit is wrongful. AIR 1953 Trav-Co 369 (370) (DB).

[See however AIR 1953 Mad 473 (475) (DB).]

(19) Possession of a mortgagee after the mortgagor has obtained a declaration of discharge under Section 9-A, Madras Agriculturists Relief Act is wrongful. AIR 1958 Andh Pra 507 (510) (DB).

(20) Where A sued B for setting aside a deed executed by A to B on the ground of undue influence and fraud it was held by their Lordships of the Privy Council that if the document was set aside, the defendant would be liable for mesne profits from the date when he got into possession under the deed, and not merely from the institution of the suit. **AIR 1932 PC 89 (91): 59 Ind App 147: 7 Luck 64.**

(21) It cannot be laid down as a general proposition that, where a person is in possession of property under a voidable transaction and a suit is brought against him to avoid the transaction and to get possession there is no right to claim mesne profits prior to the date of the suit and that it must depend upon the circumstances of each case whether the plaintiff has been guilty of such conduct as to disentitle him to past profits. AIR 1936 Mad 887 (893): ILR (1937) Mad 66 (DB) •• AIR 1960 Andh Pra 566 (568, 569): (1960) 2 Andh WR 143 (DB). (An alienee from a Hindu Mitakshara father where alienation was not for legal necessity is not, answerable for mesne profits from the date of sale.)

(22) Suit for possession and mesne profits on ground that alienation by member of joint family is not binding on plaintiff — Alienation being only voidable possession of alienee becomes wrongful only from date of its repudiation — Plaintiff is entitled to mesne profits only from the date of plaint. 1959 Ker LT 1160 (Mad.). (AIR 1922 Mad 112, Rel. on.)

(23) Where the consideration for a sale of joint family property is held to be binding on the family to a partial extent the transferee is entitled to be in possession till he is paid back the portion of the consideration so held binding. Hence, till such payment he is not liable for mesne profits. AIR 1943 Bom 278 (283) (DB).

(24) In a suit by a reversioner for recovery of possession of the property alienated by a widow mesne profits can be allowed against the alinee from the date of the widow's death, even though the decree passed against the alienee is conditional and the plaintiff cannot recover possession unless he pays a certain amount of money to the extent of which the widow's estate has been held to be benefited. **AIR 1952 SC 109 (114, 115): 1951 SCR 655.** (The Court should, while making the alienee liable for mesne profits, allow interests on the amount to be paid to him. **AIR 1918 PC 118 (120): 41 All 63: 45 Ind App 284: 21 Oudh Cas 228, Distinguished.**)

[See also ILR (1955) Nag 1042 (1044, 1045, 1046) (DB). (Transfer made by father in contravention of Section 15 (2), C. P. and Berar Relief of Indebtedness Act (14 of 1939) — Transfer is absolutely void and there is no necessity to have sale set aside before obtaining possession — Possession of alienee is wrongful from date of alienation — AIR 1921 Nag 132, **Overruled.**)

(25) One of several co-owners is entitled to sue for possession of the common property against a trespasser and also for the whole of the mesne profits which are payable by the trespasser and the other co-owners need not be joined as parties in such suit. AIR 1942 All 358 (360): ILR (1942) All 671 (DB).

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(26) In a suit for possession brought against four persons, the fourth of whom is a lessee of the first three, the lessee is not liable for mesne profits if it is shown that he has paid the rents to his lessors in pursuance and as per the terms of his lease. AIR 1957 Mad 94 (94).

(27) Where a minor son sues to set aside the alienation of his property made by guardian and the alienation is held to be fraudulent and null and void, the minor is entitled to mesne profits from the date of dispossession and not from the date of the suit. AIR 1959 Pat 278 (284): ILR 37 Pat 1078 (DB).

(28) Decree for compensation for wrongful possession cannot be granted. AIR 1964 Assam 102 (105): ILR (1964) 16 Assam 1 (DB).

(29) The expression "Mesne profits" used in Section 144, Civil P. C. has the same meaning given to it in Section 2 (12) of the Code. AIR 1959 Andh Pra 182 (184): (1958) 2 Andh WR 641 (DB).

(30) Redemption suit — Mortgagee withdrawing deposit and redepositing it in pursuance of preliminary decree — Held in circumstances of case that continuance of deposit till obtaining of possession was proof of readiness and willingness to pay and mortgagor was entitled to mesne profits from date of original deposit. AIR 1966 Mad 77 (81) : 78 Mad LW 205.

(31) Defendants obtaining decree for possession and obtained possession — Appeal — Appellate court holding decree to be without jurisdiction — Plaintiff regaining possession — Possession not being wrongful plaintiff held was not entitled to mesne profits. AIR 1959 Mys 25 (27): 36 Mys LJ 617.

(32) In a suit for specific performance of agreement of reconveyance even upon decree being passed no title passes until conveyance is actually executed. Until title passes defendant continues to be owner and is not liable for mesne profits. AIR 1966 Mys 215 (216): (1965) 1 Mys LJ 253.

(33) After passing of final decree in partitoin suit amongst co-sharers, it is not open to one of the contestants to bring a fresh suit for mesne profits against others in respect of excess land found in their possession upto date of final decree. As others are not in illegal possession a claim for accounts will not be strictly a claim for mesne profits. AIR 1961 Orissa 111 (112): 27 Cut LT 43 (DB). (AIR 1935 Bom 306 and AIR 1938 Bom 231 (FB), **Dissent. from.**)

(34) In a suit for partition, if a co-sharer makes some constructions over the joint family land in excess of his share, the other co-sharers are not entitled to claim mesne profits accruing from the constructions. The other co-sharers are however, entitled for proportionate mesne profits accruing from the ground rent of the land. AIR 1962 Orissa 71 (74).

(35) The expression 'mesne profits' as defined in Section 2 (12), Civil P. C., is restricted only to those profits which are derived by a person in wrongful possession of property belonging to another. It has no application to profits accountable by a person not in wrongful possession of the property such as by a co-sharer, before partition. AIR 1964 Orissa 94 (96): 30 Cut LT 386.

(36) Unauthorised possession of allotted plot along with building on that plot — Allottee is entitled to sue trespasser for recovery of damages for use and occupation. AIR 1965 Punj 119 (120): 66 Pun LR 1174.

4-A. Extent of liability.— (1) The period for which mesne profits can be awarded is clearly confined to the period during which the defendant was in possession. AIR 1953 Trav-Co 450 (454) (DB) °° AIR 1931 Cal 663 (664) (DB).

(2) Where the defendant is deprived of possession by virtue of an order of attachment under Section 146 of the Code of Criminal Procedure, or by an order of appointment of an interim receiver he cannot be held liable for period of such dispossession. AIR 1924 Cal 1010 (1012): 51 Cal 853 (DB). (Attachment under Section 146, Criminal P. C.) °° AIR 1951 Trav-Co 180 (181) (DB). (Interim receiver.)

(3) A defendant who is dispossessed by another trespasser, cannot be held liable for the period during which he had no possession. AIR 1923 Nag 103 (105): 18 Nag LR 195 °° AIR 1917 Cal 107 (109) (DB).

(4) A transferee from the defendant pendente lite is liable for mesne profits. (1911) 39 Cal 220 (226) (DB).

(5) Liability of transferee pendente lite for mesne profits starts only from the time when he entered into possession. AIR 1921 Pat 102 (102): 6 Pat L Jour 166 (DB).

(6) Where a preliminary decree gives the plaintiff mesne profits before suit but does not specify the exact date from which the mesne profits are to be assessed; the decree entitles the plaintiff to mesne profits before suit for such period as the law entitles him to, i. e., for three years before the suit. AIR 1938 Cal 563 (566) (DB).

(7) Bombay Tenancy and Agricultural Lands Act (LXVII of 1948), Section 29 — Mamlatdar's order is terminus a quo — Subsequent applications against order of Mamlatdar, either in appeal or revision, relate back to date of order of Mamlatdar — Plaintiff is entitled to mesne profits from date of order of Mamlatdar. (1966) 68 Bom 874: 1967 Mah LJ 51.

(8) Plaintiffs must pay mesne profits to defendants for the period during which they were in possession of lands under a decree which was later on reversed. AIR 1966 Pat 254 (258) (DB).

4-B. Principles relating to assessment.— **(1) Mesne profits are in the nature of dama-**

Order 20, Rule 12 — Note 4B (contd.)

ges which the Court may mould according to the justice of the case. (1900) 27 Cal 951 (967): 27 Ind App 110 (PC).

[See also AIR 1950 Pat 497 (499) (DB).]

(2) The assessment of mesne profits is a matter for the exercise of judicial discretion in each case. AIR 1931 Mad 650 (651, 652): 53 Mad 955 (FB) °° (1876) 1 Mad 69 (83, 84) : 3 Ind App 154 (PC) °° (1875) 2 Ind App 48 (57) (PC).

(3) The question to be decided in assessing mesne profits is the amount of profits which the wrongdoer while in possession received or which without wilful default he might have received. AIR 1930 Cal 308 (310) (DB) °° AIR 1927 Cal 182 (185, 189): 53 Cal 992 (DB) °° AIR 1921 Pat 102 (102, 103): 6 Pat L Jour 166 (DB).

(4) The test is not what the plaintiff has lost by his exclusion but what the defendant has or might reasonably have made by his wrongful possession. AIR 1954 Pat 447 (448) (DB) °° AIR 1952 Cal 47 (52) °° AIR 1930 PC 83 (83): 57 Ind App 105: 9 Pat 621 °° AIR 1929 PC 300 (302, 303): 56 Ind App 290: 57 Cal 1.

(5) A trespasser cannot say that he kept the land waste and that therefore he is not liable for mesne profits. AIR 1916 Mad 328 (330) (DB).

(6) The principles in awarding and assessing mesne profits are that the possession which has been wrongfully retained should not be a source of profit to the wrongful possessor, and that the person wrongfully kept out of possession is put in the same position financially as if right had been done. AIR 1917 Pat 421 (422) (DB).

[See also AIR 1957 Kerala 119 (121) (DB).]

(7) Where the trespasser is in actual possession, the mesne profits should be awarded on the basis of the actual profits received or which might have been received with ordinary diligence less certain deductions. AIR 1934 Cal 503 (505) (DB) °° AIR 1923 Nag 64 (64) °° (1882) 8 Cal 332 (335): 9 Ind App 1 (PC).

(8) Where property is let by a person to another and the latter remains in possession after the determination of the tenancy the mesne profits are to be assessed at the amount of the rent where the rent represents the fair value of the property but if the real value is higher than the rent then the mesne profits are to be assessed at the higher value. AIR 1953 Nag 186 (186) °° AIR 1966 Bom 266 (268): 1965 Mah LJ 688. (AIR 1955 Nag 234, Not foll.) °° AIR 1963 All 249 (250): 1963 All WR (HC) 452. (Rent fixed or controlled by Rent Control Act does not represent the real value of the accommodation.)

[See also 1968 All LJ 721. (Claim for mesne profits at the rate of monthly rent — Claim held should have been decreed by Lower Court.)]

(9) The fact that for previous years plaintiff has claimed in the plaint mesne profits at reduced rates does not estop him from claiming future mesne profits at a higher rate. It is no doubt a circumstance to be taken into account but the admission in the plaint is by no means conclusive. AIR 1954 Pat 447 (448) (DB).

(10) Where the trespasser is not in actual possession, but has himself leased the property to third persons, he will be liable only to the extent of the rent which he actually received from his lessee, unless it can be shown that he might, with oridinary diligence ,have received more rent. AIR 1929 PC 300 (303): 56 Ind App 290: 57 Cal 1 °° AIR 1955 Andhra 36 (37) °° AIR 1935 PC 49 (50): 62 Cal 499: 65 Ind App 53.

(11) B trespasses upon the land belonging to A and subsequently lets it out to C for a rental of Rs. 300 per annum. C gets a gross profit of Rs. 700 and the expenses of cultivation amount to Rs. 150. A sues B and C for possession and mesne profits. B will be liable to pay A Rs. 300, the rent which he received from C, and C will be liable for Rs. 250, the net profit realised by him after deducting the expenses of cultivation and after deducting the rent paid to B. But B and C cannot be made liable jointly and severally, for the total of the profits realised by both of them together. AIR 1929 PC 300 (303): 57 Cal 1: 56 Ind App 290. (Reversing AIR 1927 Cal 182: 53 Cal 992 on this point.) °° AIR 1955 Andhra 36 (37).

(12) Where two or more persons are in wrongful possession of the plaintiff's land, a decree for mesne profits may be passed jointly and severally against all the trespassers who may have jointly kept the plaintiff out of possession for any particular period leaving them to have their respective rights adjusted in a separate suit for contribution: or the respective liabilities of such trespassers may be ascertained in the plaintiff's suit against them, and a decree on the basis of such several liabilities may be passed as against the respective trespassers in plaintiff's favour. AIR 1932 Cal 600 (617): 59 Cal 859 (DB).

(13) It is fair to presume that the person in possession may by ordinary diligence get rent according to the prevailing rates. Therefore the plaintiff would be entitled to get the mesne profits calculated or arrived at on the basis of the prevailing rates or on the basis of what the person in occupation had actually received. AIR 1961 Andh Pra 428 (430): 1961 Andh LT 205.

(14) Execution of Kobala by widow mother of posthumous son when latter was in womb — Suit by son on attaining majority for setting it aside and for possession of property with mesne profits since birth — Kobala pleaded as voidable — Demand for possession made few months before suit — Consideration for Kobala found adequate —

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Claim for mesne profits decreed from three years before suit till recovery of possession though Section 6, Limitation Act held applicable. AIR 1964 Cal 354 (358): 67 Cal WN 1051 (DB).

(15) Plaintiff having no special means knowing exact income from the land during relevant period — Plaintiff held not estopped from claiming larger sum as mesne profits than what was claimed by him in the plaint. AIR 1963 Andh Pra 42 (44): (1962) 2 Andh WR 18. (ILR 9 Cal 172, Rel. on.)

(16) Transferee of ex parte decree for mesne profits — Application by JD for setting aside ex parte decree allowed without impleading transferee decree-holder — Orders passed on the application would not preclude the transferee decree-holder from prosecuting an application for determination of mesne profits filed by the decree-holder in his capacity as the transferee of the actionable claim. AIR 1964 Andh Pra 28 (31): (1963) 2 Andh WR 179.

(17) It is not right to make calculation of mesne profits on proportionate basis for every year. It may be that in a particular year it might be more and in another less. AIR 1959 Cal 76 (78): 63 Cal WN 334 (DB).

(18) Though mesne profits are in the nature of damages, it cannot be said that liability to pay mesne profits arises when a party comes into possession of property. The question of mesne profits arises only when a court decides that plaintift has proved his title and that the defendant is in wrongful possession. 1961 Ker LT 713 (714).

(19) In a suit for recovery of possession of property with future rent, if a decree for rent from the date of suit to the date of decree, can be given on decreeing recovery of the property, there is no reason why a like decree for rent for the same period should not be given on disallowing recovery of the property. If the trial has been prolonged, or been stayed by statutes like the Stay of Eviction Proceedings Act, 1957, and ultimately the plaintiff's right to recovery of property was taken away by legislation on agrarian reform or debt relief, there is no justification for refusing the plaintiff's claim for future rent also. 1961 Ker LT 573 (574).

(20) Assessment of Mesne profits based on estimated return on value of property is not sustainable. The normal measure of mesne profits is the value of the user of the land to the person in wrongful possession. AIR 1963 SC 1405 (1413): (1964) 1 SCR 515.

4-C. Deductions.— (1) In awarding mesne profits it is proper that the following deductions should be made from the gross profits of the defendant in possession: (1) Public charges such as Government rent, revenue or cesses which are made for the preservation of the estate. (2) The cost of cultivation. AIR 1938 PC 139 (142): 32 Sind LR 492 °° (1894) 21 Cal 142 (148): 20 Ind App 160 (PC) °° 1957 Jab LJ 384 (386). (Deduction of amount paid as land revenue and cess.) °° AIR 1934 Cal 503 (505) (DB) °° (1901) 23 All 252 (255, 256, 259) (DB) °° 1960 Ker LT 642 (643).

(2) Even where the dispossession is wanton and malicious, in calculating the amount of mesne profits, collection charges are to be deducted from the gross realization. AIR 1938 Cal 563 (568) (DB).

(3) Where there has been a gross and contemptuous trespass no deduction should be allowed for collection charges: but where the defendant is a tenant holding over after the expiry of the term of his lease under the mistaken impression that he was entitled to a renewal of the lease, he is entitled to claim a deduction on account of collection charges. AIR 1937 All 328 (333) (DB).

[See also ('50) AIR 1950 Pat 497 (499) (DB).]

(4) A mortgagee who is governed by Section 76 (1), T. P. Act, as amended in 1929, is not entitled after tender or deposit either to interest or to deductions for expenses in connection with the mortgaged property. The word 'expenses' includes the cost of cultivation. AIR 1957 Pat 123 (124).

(5) A deduction of 10 per cent. can be allowed as collection charges where there is no specific evidence on the point. AIR 1959 Andh Pra 64 (71) (DB) °° AIR 1942 Mad 487 (493): ILR (1942) Mad 562 (DB) °° AIR 1935 PC 49 (52): 65 Ind App 53: 62 Cal 499 °° AIR 1937 All 328 (333) (DB) °° AIR 1938 Cal 563 (568) (DB).

(6) Where the defendant has elected to let in evidence as to the actual charges of collection and the result of such evidence shows that the collection charges were less than 10 per cent., the defendant is not entitled to a deduction of 10 per cent. AIR 1948 Mad 302 (306) (DB) °° AIR 1938 PC 139 (142): 32 Sind LR 492.

(7) Under Section 2, sub-section (12) mesne profits will not include profits due to the improvements made by the person in wrongful possession. See AIR 1922 PC 91 (93).

(8) The mesne profits should be the net profits i. e., profits derived after making deductions towards the necessary expenditure for earning the said profits. Where the evidence to ascertain collection charges of profits was not available court could adopt rough and ready method to fix reasonable percentage of income as deduction towards collection charges. AIR 1959 Andh Pra 64 (71): (1958) 1 Andh WR 427 (DB). (Reversed on another point in AIR 1965 SC 1231.)

(9) Suit for possession and mesne profits against Archak of temple — Court directing enquiry into profits — When passing decree court ordering that remuneration and expenses incurred by Archak should not be taken into account — Decree held was illegal. (1968) 2 Andh WR 6 (33) (DB).

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4-D. Onus of proof.— (1) It is for the plaintiff who comes into Court with a claim for mesne profits to establish first his right to immediate possession. AIR 1959 Andh Pra 64 (67) (DB) (Reversed on another point in AIR 1965 SC 1231.) °° AIR 1921 Mad 42 (44, 46): 44 Mad 987 (DB).

(2) The onus of proving the amount of profits actually received is on the person receiving them; but the burden of proving the profits that the person in occupation might with ordinary diligence have received therefrom is on the person claiming them AIR 1953 Mys 139 (145): ILR (1953) Mys 244 (DB) °° AIR 1950 Cal 87 (89): ILR (1953) 2 Cal 506 (DB) °° AIR 1935 PC 49 (50): 62 Cal 499: 62 Ind App 53.

(3) If the plaintiff lets in prima facie evidence to show that the profits were somewhere about the sum he alleges, the burden of proving that they were less shifts to the defendant. 1951 Ker L Tim 179 (184) (DB) °° AIR 1924 Nag 117 (118): 20 Nag LR 52 °° (1882) 8 Cal 343 (351) (DB).

(4) The question of burden of proof will however become immaterial if both parties have adduced evidence and the Court is called upon to ascertain profits on basis of such evidence. AIR 1959 Andh Pra 64 (67): (1958) 1 Andh WR 427 (DB). (Reversed on another point in AIR 1965 SC 1231.)

5. Interest forming part of mesne profits.— (1) The definition in the Code includes interest as part of mesne profits. AIR 1943 Cal 1 (11): ILR (1942) 2 Cal 268 (DB) °° AIR 1938 PC 139 (142): 32 Sind LR 492.

(2) Court is not obliged, in every case, to award interest. It may refuse interest having regard to the circumstances of the case. (1884) 10 Cal 785 (791): 11 Ind App 88 (PC) °° AIR 1937 PC 143 (145, 146): 16 Pat 382: 64 Ind App 240: 31 Sind LR 360 °° (1900) 27 Cal 951 (967): 27 Ind App 110 (PC) °° AIR 1959 Andh Pra 64 (70) (DB).

(3) The executing Court is not empowered to ascertain the mesne profits and cannot award any interest where both the preliminary and the final decrees are silent on the matter. AIR 1954 Trav-Co 473 (486): ILR (1954) Trav-Co 627 (FB). (1946 Trav-LR 400, Overruled.) °° AIR 1931 Mad 650 (652): 54 Mad 955 (FB).

(4) If a decree is capable of sustaining a construction that the question of interest is left to the discretion of the executing Court, it may be open to that Court to exercise such discretion in favour of the decree holder. AIR 1954 Trav-Co 473 (486): ILR (1954) Trav-Co 627 (FB).

(5) If mesne profits are payable month to month or at intervals of other periods, then interest also should be calculated according to such periods. AIR 1953 Trav-Co 32 (33): ILR (1951) Trav-Co 352 (DB) °° (1903) 25 All 275 (276) (DB) °° AIR 1938 Cal 563 (569) (DB).

(6) The rate of interest usually awarded by Court is six per cent. AIR 1952 SC 201 (204): 1952 SCR 782 °° AIR 1937 PC 143 (146): 16 Pat 382: 64 Ind App 240: 31 Sind LR 360. (Rate of interest depends on variety of circumstances but in absence of special circumstances 6 per cent. is fair rate.) °° AIR 1935 PC 49 (52): 62 Cal 499: 62 Ind App 53. (Do.)

(7) In the absence of a statutory provision or a special contract there is no ground for awarding interest on mesne profits at a higher rate up to the date of delivery of possession and at a lower rate subsequently. AIR 1937 PC 143 (146): 16 Pat 382: 31 Sind LR 360: 64 Ind App 240.

(8) Preliminary decree awarding mesne profits — But amount ascertained subsequently — Interest to be calculated from the date of the preliminary decree. AIR 1924 All 801 (802): 46 All 842 (DB).

(9) Interest up to date of realisation of mesne profits can be allowed. AIR 1924 Pat 781 (783): 4 Pat 57 (DB).

(10) Where under a redemption decree accounts are directed to be taken as to the mesne profits payable by the defendant and it is also directed that the plaintiff should pay interest on the mortgage money from the date on which it fell due to the date on which it was deposited in Court, it is proper that the plaintiff should be charged with counter interested on the amount thus due as interest from him. AIR 1938 PC 139 (142): 32 Sind LR 492.

(11) Apart from definition of mesne profits as including interest, interest on rents and profits of property may also be awarded on equitabe grounds under the proviso to Section 1 of the Interest Act. AIR 1942 Mad 487 (492, 493): ILR (1942) Mad 562 (DB).

(12) Interest is payable under the proviso to Section 1, Interest Act, on compensation payable by one co-sharer to another for the exclusive use of their common land. AIR 1941 Pat 90 (94, 95): 20 Pat 162 (DB).

(13) Where the title of the devasthanam committee to the properties was disputed and suits had to be filed for the recovery of their possession, and litigation conducted which took 12 years to finish, and if during this period the former Mahant appropriated to himself the income from the property the Mahant will be liable for interest on the amount of mesne profits at the normal rate. Interest at 6 per cent is admittedly not per se an unreasonable rate. AIR 1965 SC 1231 (1237): (1965) 2 SCJ 9. (AIR 1959 Andh Pra 64, Reversed.)

(14) When a decree in silent about interest on mesne profits. decree-holder is not entitled to get it. 1958 Ker LT 83 (84).

6. Value of mesne profits, if affects jurisdiction.— (1) Person deliberately under-

Order 20, Rule 12 — Note 6 (contd.)
valuing mesne profits accruing before institution of suit — He cannot claim greater amount exceeding pecuniary jurisdiction of the Court. AIR 1937 Cal 761 (762): ILR (1937) 2 Cal 176 (DB).

7. Right to apply for ascertainment of future mesne profits, when arises.— (1) The right to apply for ascertainment of future mesne profits arises on happening of any one of the three events mentioned in Cl. (c) and not on the date of preliminary decree itself. AIR 1924 Pat 781 (782): 4 Pat 57 (DB) °° AIR 1959 Cal 76 (77, 78): 63 Cal WN 334 (DB). (AIR 1924 Pat 781, Doubted.)

(2) Where a decree for possession is made conditional on payment of a certain sum of money, the decree-holder will not be entitled to mesne profits until such payment is made. 1951 Ker L Tim 179 (181) (DB) °° AIR 1943 Bom 278 (283) (DB).

(3) Where right to future mense profits is negatived in preliminary decree, Court has no jurisdiction to award same in a final decree. AIR 1923 Mad 43 (43).

(4) Where decree is silent as to mesne profits there cannot be any application for ascertainment of mesne profits nor a final decree for such profits. AIR 1955 Mad 527 (530) °° AIR 1958 Pat 448 (450) °° AIR 1953 Pat 289 (291).

[But see AIR 1958 Andh Pra 517 (519): ILR (1957) Andh Pra 52 (DB).]

(5) Decree silent as to mesne profits — Mesne profits cannot be awarded in execution. (1875) 2 Ind App 219 (228) (PC) °° (1885) 7 All 197 (199) (DB) °° (1901) 6 Cal WN 672 (674) (DB).

(6) Where the decree simply, says "the claim in this suit be decreed with costs and mesne profits" the plaintiff will be entitled to such profits up to the date of his re-admission into the land. **AIR 1929 PC 300 (301): 56 Ind App 290.**

(7) Where a right to mesne profits is found in the judgment but no such direction is found in the decree there is nothing wrong in the Court assessing mesne profits on an application for such ascertainment without a formal amendment of the decree, and passing a final decree on such assessment. AIR 1943 Cal 1 (4, 5): ILR (1942) 2 Cal 268 (DB).

(8) A daughter who inherits the share of her widowed mother after the mother remarries is not only entitled to the share but also for mesne profits. AIR 1968 Bom 340 (344): 70 Bom LR 293.

(9) A court even though future mesne profits have not been claimed can if it thinks proper, grant future mesne profits, but these could be granted for only three years after the decree. (1967) 2 Andh WR 501 (514): (1967) 2 Andh LT 423.

(10) In a partition action even though there is no specific prayer for the ascertainment of profits subsequent to the institution of the suit and the preliminary decree did not contain any such direction, it is still competent for the Court to give the direction for the ascertainment of future mesne profits, provided a final decree has not been passed the Court can give dircetion in the partition suit itself or refer the parties to a separate suit. AIR 1960 Andh Pra 45 (47, 49) (DB). (AIR 1951 Mad 938 (FB) and AIR 1958 Andh Pra 517 and AIR 1958 Andh Pra 520, Followed.; Authority of AIR 1951 Mad 938 (FB), Held not shaken by AIR 1952 SC 358.) °° (1968) 9 Guj LR 220 (221) (DB) °° 1967 Ker LT 1017: 1967 Ker LR 852 (DB) °° AIR 1963 Mad 171 (174): 75 Mad LW 683. (AIR 1955 Mad 527: (1954) 2 MLJ 696, Dist.)

(11) Suit for partition with prayer for mesne profits, past, pendente lite and future — Suit decreed but claim for mesne profits omitted in preliminary as well as final decree — No appeal preferred — Application by plaintiff for determination of mesne profits till date of possession, made long after final decree and delivery of possession to plaintiff — **Held,** that as matter had become final, application was not maintainable — Although more than one interim final decree could be passed in appropriate cases, there could be only one final decree in a case. AIR 1967 Pat 131 (132) (DB). (AIR 1951 Mad 938 (FB), Rel. on.)

(12) Accidental omission to make order under Order 20, Rule 12 (1) (c) — Court should correct the mistake under Sec. 152 — Enquiry under Order 20, Rule 12 not necessary when Court accepts agreement between the parties. AIR 1963 Pat 158 (159): 1962 BLJR 512.

(13) Where in a suit for possession the plaintiff expressly claimed future mesne profits but neither the judgment nor the decree allowed the claim for mesne profits expressly or by implication, it must be deemed to have been refused and therefore the plaintiff is not entitled to make an application for ascertainment of mesne profits under Order 20, Rule 12. AIR 1960 Pat 260 (261, 262): 1959 BLJR 731.

(14) Plaintiff claiming only mesne profits — Court allowing this claim and keeping silent about future mesne profits — Plaintiff cannot apply for ascertainment of future mesne profits. AIR 1965 Pat 436 (441): ILR 45 Pat 180 (DB). (AIR 1962 Pat 46, **Reversed.**)

(15) No claim for mesne profits in the plaint — Mesne profits cannot be granted. AIR 1968 Pat 160 (165) (DB).

(16) Suit for ejectment, arrears of rent and mesne profits — Claim for mesne profits dismissed as not pressed by plaintiff — Subsequent suit for mesne profits maintainable as Court in prior suit was not bound under Order 20, Rule 12 to pass decree for mesne profits. AIR 1962 Cal 111 (112): 65 Cal WN 1067. (ILR 32 Cal 118, Foll.)

(17) Previous suit for partition, damages and mesne profits — Decree silent on point of damages and mesne profits — Subse-

Order 20, Rule 12 — Note 7 (contd.)
quent suit for future damages and mesne profits not barred by res judicata — Earlier claim being for the profits prior to the previous suit. (1962) 66 Cal WN 692 (693).

(18) Unless the plaintiffs' prayer for mesne profits had been specifically considered and refused, it was open to the Court to entertain a subsequent application for mesne profits after the passing of the preliminary decree and before the passing of the final decree. Where the preliminary decree provides for mesne profits and the final decree does not provide for mesne profits it would be open to the Court to pass another final decree after ascertainment of mesne profits. AIR 1968 Mad 431 (432): (1968) 2 Mad LJ 282.

(19) In a suit for partition and possession the third defendant was allotted her share. She however, had not asked for ascertainment of future mesne profits in her written statement. Her claim for past mesne profits was specifically negatived by the trial Court. She had not preferred any appeal. She assigned her decree and the assignee filed an application for ascertainment of mesne profits. It was held that as the 3rd defendant was not entitled to have mesne profits ascertained the assignee from her could not claim a higher right. (1965) 1 Mys LJ 1 (4): ILR (1964) Mys 691.

(20) It is not in every case that an express direction for future mesne profits need be given, when plaintiff's case that defendant was in unlawful and forcible possession is accepted, relief of future mesne profits directly flows from it. AIR 1966 Orissa 203 (204): 32 Cut LT 805.

(21) Decree for possession and rents — Enquiry into future mesne profits directed under Order 20, Rule 12 — Stay of delivery of possession pending appeal subject to deposit of certain amount by defendant — Amount withdrawn by plaintiff — Court-fee on amount withdrawn could not be levied as a full inquiry and a decree pursuant thereto were still to be made. AIR 1962 Andh Pra 372 (375).

(22) Court can order an enquiry not only into future mesne profits but also for three years preceding the suit. (1965) 1 Mys LJ 79 (90): (1965) 1 Law Rep 632 (DB).

8. Notice of relinquishment — Clause (e). — (1) The relinquishment of possession by judgment-debtor with notice to decree-holder through Court absolves him from further liability in respect of future mesne profits. AIR 1921 Cal 699 (706) (DB).

(2) The mere filing of a petition without notice is not enough to escape liability unless decree-holder waives notice. AIR 1921 Cal 363 (364, 365) (DB).

(3) Notice of relinquishment given at a time when it was too late for cultivation was held not sufficient to absolve defendant from liability. AIR 1916 Mad 895 (895, 896) (DB).

9. Three years from date of decree. — (1) The period of three years mentioned in sub-cl. (iii), cl. (c) should be reckoned from date of preliminary decree, and where the same has been appealed from, from date of appellate decree. AIR 1953 Trav-Co. 268 (269) (DB) °° AIR 1947 Mad 359 (359) °° (1903) 30 Cal 660 (665) (FB) °° (1901) 23 All 152 (158): 27 Ind App 209 (PC).

(2) Maximum period for which future mesne profits can be awarded is three years from date of decree finally passed. (1908) 35 Cal 1017 (1019) (DB) °° AIR 1915 Mad 226 (226) (DB).

(3) If the decree without specifying any period simply awards possession with wasilat from a particular date, the decree-holder is ordinarily entitled to mesne profits up to the date of re-delivery of possession to him unless the period of three years elapses before such re-delivery. AIR 1943 Mad 354 (355) (DB) °° AIR 1956 Trav-Co 103 (105): ILR (1955) Trav-Co 600 °° AIR 1925 PC 113 (113, 114).

(4) Compromise decree — Rule does not prohibit Court from decreeing future mesne profits for more than three years in accordance with terms of compromise. AIR 1955 Trav-Co 233 (234): ILR (1955) Trav-Co 331.

(5) A joint and several decree for possession and mesne profits from the date of institution of suit to date of decree and up to 3 years thereafter was passed against the defendants. Some of the defendants appealed and were exonerated. Execution of the decree for mesne profits was sought against the rest for a period upto 3 years after the appellate decree calculating the aggregate amount claimed at a lower rate from the one granted by the decree. When calculated at that rate the amount found due was actually less than that to which the decree-holder was entitled if it had been calculated for a period upto three years from the trial Court's decree. It was held that in the circumstances the amount claimed could be allowed. AIR 1953 Trav-Co 32 (33): ILR (1951) Trav-Co 352 (DB).

(6) Where the Court is dealing with a claim made by the plaintiffs on behalf of the trust and the decision in their favour has rendered it necessary to adjust equities between the trust and the respective alienees, alienations in whose favour have been set aside as invalid, the Court has jurisdiction to award mesne profits for more than 3 years by way of an equitable adjustment. **AIR 1962 SC 633 (643, 644): 1962 Supp (1) SCR 206.**

(7) Preliminary decree for possession directing enquiry into mesne profits from institution of suit till delivery of possession — Should be construed in accordance with, O. 20, R. 12 (1) (c), and decree-holder cannot get mesne profits beyond period of three years from the date of decree of High Court. **AIR 1965 SC 1325 (1333): (1965) 2 SCR 661. (AIR 1959 Andh Pra 607, Revers-**

Order 20, Rule 12 — Note 9 (contd.)
ed.) ** 1963 Ker LJ 812 (814): ILR (1964) 1 Ker 181 ** AIR 1962 Andh Pra 500 (503): (1962) 2 Andh WR 71 (FB). (AIR 1959 Andh Pra 607, Overruled.)

(8) The final decree contemplated will state the amount of mesne profits which have to be paid by the judgment-debtor, and will take into consideration the date upto which mesne profits are to be paid. Such date will be either the date of delivery of possession or the date of relinquishment of possession by the judgment-debtor or with notice to the decree-holder through the Court, or the date of the expiration of three years from the date of the decree whichever of these alternative dates happen to be the earliest. A decree for mesne profits till delivery of possession cannot be interpreted as a decree for the realisation of the mesne profits till the actual delivery of possession which may never take place. AIR 1959 All 242 (243): 1958 All LJ 734 (DB).

(9) When a decree is passed for payment of mesne profits until delivery of possession, there is always an implied term in the decree that mesne profits are not to be awarded for a period of more than three years in any case. AIR 1959 Bom 536 (537): 61 Bom LR 348.

(10) When once the rights and liabilities of parties are settled by the decree, there is no justification for not surrendering possession to the plaintiff, as decreed, specially when the judgment-debtor has no objection to the decree. He has no justification to wait for the decree being executed. The judgment-debtor therefore is liable for mesne profits, till he surrenders the possession. AIR 1959 Ker 249 (250, 251): 1959 Ker LT 304. (DB).

(11) Maximum period for which future profits can be awarded is only three years. AIR 1967 Andh Pra 64 (66): (1967) 1 Andh LT 104.

(12) A decree for mesne profits can be granted for the shortest of three periods mentioned in cl. (c) of O. 20, R. 12 (i). In all these periods the starting point is the date of the institution of suit and terminating point is delivery of possession or relinquishment with notice or expiration of three years from date of decree whichever event occurs first. (1967) 1 Mys LJ 182 (183): 9 Law Rep 394 (DB). ((1963) 1 Mys LJ 589, Overruled.)

(13) Redemption suit — Conditional decree for possession on payment — Amount to be paid varied in appeal — Mesne profits become due from date of deposit of varied amount and not from previous date of deposit of original amount. ILR (1963) Cut 681 (684).

10. Appeal. — (1) An order for ascertainment of mesne profits is not appealable. AIR 1948 Sind 124 (125): ILR (1947) Kar 194 (DB) ** 1958-1 Mad L Jour 99 (100, 101) ** AIR 1928 Bom 236 (238): 52 Bom 360 (DB) ** (1901) 23 All 152 (157): 27 Ind App 209 (PC).

(2) Suit for possession and mesne profits dismissed — Reversal in appeal — Appellate Court should not remand case for enquirsing into mesne profits but should pass a preliminary decree for possession directing an enquiry into mesne profits under this rule. AIR 1922 Mad 112 (114, 115): 45 Mad 449 (DB) ** (1870) 13 Moo Ind App 490 (496) (PC).

(3) Plaintiffs right to get past and future mesne profits not challenged before lower appellate Court — Even in memorandum of second appeal plaintiffs right to get mesne profits not questioned — Held, it was not open to appellant at stage of argument to disclaim altogether his liability for mesne profits. AIR 1953 Trav-Co 360 (361) (DB).

(4) Judgment-debtor is not precluded from contending in appeal from final decree that mesne profits could not be awarded for period exceeding three years from date of decree as neither Sec. 11 nor Sec. 97, Civil P. C. applies. AIR 1965 SC 1325 (1333): (1965) 2 SCR 661. (AIR 1959 Andh Pra 607, Reversed.)

(5) A plea that the decree for mesne profits passed by the lower Court is one that contravenes the provision in O. 20, R. 12 (c) (iii) and is therefore, invalid can be raised in an appeal even when it is not raised in the lower Court. AIR 1962 Andh Pra 500 (505, 506): (1962) 2 Andh WR 71 (FB). (AIR 1954 SC 340, Foll.)

(6) Where the executing Court has finally determined the right of the plaintiffs with regard to the period for which mesne profits should be recovered the order finally determines the rights of the parties with regard to the duration for which mesne profits could be claimed and so falls, within the definition of 'preliminary decree' within the meaning of S. 2 (2) of the Code. The order is appealable. AIR 1959 Pat 397 (398): 1959 BLJR 17 (DB). (AIR 1925 All 588 and AIR 1942 Sind 60, Dissented from.)

11. Revision — Review. — (1) In a suit by landlord against tenants for possession arrears of rent and mesne profits, a decree passed by Court directing landlord, to render account of over-payments made to him is an illegal decree passed with material irregularity. High Court can revise such decree. AIR 1969 SC 37 (39): (1969) 1 SCJ 100.

(2) Rejection of application for execution of decree on the ground that it was not a final decree within the rule — Failure to prefer appeal or to apply for review within limitation — Review under Sec. 151 not maintainable. AIR 1968 Delhi 215 (216).

12. Court-fees on Mesne Profits. — (1) Where the decree is neither clear not explicit, it is open to the executing Court to find out as to who is liable for the amount of costs and court-fee which the decree-holder

R. 13. Decree in administration suit.—(1) Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree, ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

[1882 and 1877, S. 213.]

Order 20, Rule 12 — Note 12 (contd.)

has to pay for realising the amount of mesne profits decreed. (1951) 1 Mad LJ 524 (526): 64 Mad LW 656 (DB).

(2) Mesne profits is only one of the incidents of a suit for partition and as such it is a component part of a decree passed in a suit for partition which for court-fee purposes need not be segregated and valued separately. (1968) Ker LJ 549 (551): 1968 Ker LR 598.

(3) Section 8 of the Mysore Court-fees Act merely requires that the decree for mesne profits shall not have executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor. It is left to the decree-holder to decide as to when he should pay the court-fee. All that he is required to do is that he should pay the court-fee before the execution of the decree. It is not open to Court to stipulate in the decree any date by which the court-fee should be paid. AIR 1959 Mys 168 (168): 36 Mys LJ 421.

(4) A final decree will be passed for mesne profits which will be ascertained in an application and this cannot be regarded as a proceeding in execution but it is a proceeding in continuation of the suit itself. If Court-fee is not paid on mesne profit the only effect will be that the decree could not be executed until it was paid. ILR (1963) Andh Pra 560 (564) (DB).

(5) Where on an application for ascertainment of future profits and a decree the Court gave a final decree but called upon the plaintiff to pay court-fees within a specified time, and on failure of the plaintiffs to comply with the order dismissed the application and where the plaintiff again approached the court with request agreeing to pay Court-fees or for extension of time, held that Court had no jurisdiction to call upon payment of court-fees before final decree was passed, and the Court should not require any application for ascertainment of profits which it can do suo motu. (1968) 2 Mad LJ 164 (170): 81 Mad LW 64.

(6) Where a deity allowed to sue as pauper wanted to execute a decree obtained by it, an objection was raised that execution could not be proceeded with unless Court-fee on the mesne profits was paid, it was held that payment of Court-fee could not be a condition precedent before execution could be proceeded with and court-fee would be a lien on the money realized in execution. 1968 All LJ 17 (18) (DB).

ORDER 20, RULE 13 — SYNOPSIS

1. Administration suits.
2. Hindu law.
3. Muhammadan law.
4. Who may file an administration suit.
5. Against whom administration suit can be filed.
6. Plaint in administration suits — See Schedule 1, Appendix A, Forms Nos. 41 to 44.
7. Decree in administration suits.
8. Estate insufficient to pay all the debts — Sub-rule (2).
9. Provable debts and liabilities under the Insolvency Act.
10. Barred debt.

1. Administration suits. — (1) "Administration" means the management of the estate of a deceased person who has left no executor. AIR 1953 Nag 276 (277): ILR (1953) Nag 565 (DB).

(2) Property acquired with the income derived from the estate of a deceased person is to be regarded as part of the estate. AIR 1954 Assam 33 (38): ILR (1953) 5 Assam 415 (FB).

(3) Administration consists in — (i) Payment of the funeral expenses of the deceased; (ii) collection, realisation and preservation of assets; (iii) payment of debts and legacies; (iv) acts in respect of adverse claims to assets; (v) dealings with creditors and

Order 20, Rule 13 — Note 1 (contd.)

legatees and (vi) distribution finally among the heirs and next of kin. AIR 1928 Mad 760 (762).

(4) An administration suit need not necessarily relate to the estate of the deceased person and distribution of the residue among the successors of a deceased person forms part of administration of an estate though it vests in the heirs at the time of the death of the propositus. AIR 1950 Lah 12 (16): Pak LR (1949) Lah 697 (DB).

(5) Enforcement of claims against strangers may not legitimately fall within the scope of an administration suit; but collection of the assets in the hands of persons who are properly joined as defendants in an administration suit is not outside its scope. Such persons are the heirs, legatees, creditors, executors etc. AIR 1953 Nag 276 (277): ILR (1953) Nag 565 (DB).

(6) The object of an administration suit is to have the estate administered under a decree of Court. In such a suit the whole administration and settlement of the estate are assumed by the Court, the assets are marshalled and a decree is made for the benefit of creditors and other persons entitled to the property. AIR 1950 East Punj 276 (277): ILR (1950) Punj 226 (DB) °° AIR 1943 Bom 273 (276) °° AIR 1931 Mad 683 (684): 55 Mad 21 (DB).

(7) Administration suit is, in essence, one for an account and application of the estate of the deceased, for the satisfaction of the dues of all the creditors. AIR 1952 Sau 30 (31), 32) °° (1958) 1958-2 Andh WR 149 (150, 151) °° AIR 1918 Cal 883 (885): 44 Cal 890 (DB).

(8) When the main purpose of a suit is to determine who is the rightful heir of a deceased person an administration suit is not the proper remedy. AIR 1940 Lah 179 (180).

(9) If the main object of the suit is to have an alienation by the deceased set aside or to obtain possession of property illegally withheld by one of the heirs, an administration suit is not the proper remedy. AIR 1950 East Punj 276 (278): ILR (1950) Punj 226 (DB).

(10) A suit for administration comprises two stages. The suit cannot be dismissed at the preliminary stage except where the plaint discloses no cause of action or the suit is premature. AIR 1931 Cal 45 (48): 57 Cal 1358 (DB).

(11) An administration suit is not a suit relating to immovable property and, therefore, the Court is not incompetent to administer properties or to deal with questions of title in respect of properties situate outside its jurisdiction. (1906) 33 Cal 180 (191, 192): 32 Ind App 198 (PC).

(12) Jurisdiction of Court, as to administration suit, does not depend upon the question whether the Succession Act applies to the estate of the deceased person. (1881) 1881 Pun Re No. 68, P. 153 (DB).

(13) Before Court takes upon itself administeration of property preliminary decree for administration should be passed. AIR 1930 Bom 336 (336) (DB).

(14) The Court may also make an order for grant of maintenance pendente lite but this power has to be exercised with caution. AIR 1918 Pat 338 (340) (DB).

(15) Where a preliminary decree has been passed under this rule, the Court can stay proceedings taken by another decree-holder and direct him to come in and prove his claim in the administration suit. AIR 1939 Mad 204 (207, 208).

(16) Where a receiver has been appointed under administration decree and a creditor brings to sale any property belonging to the estate in execution of his decree without obtaining leave of Court, the sale is not void. The status of such a receiver is not better than that of a receiver appointed under O. 40, R. 1. AIR 1943 Bom 273 (276, 277).

(17) A creditor who has neglected to come in under the administration decree cannot subsequently sue the creditors who have proved their debts and received dividends, for a re-distribution of the assets and for a pro rata refund by such creditors. AIR 1936 Bom 423 (428).

(18) In an administration suit Court can determine whether certain alienations were in fact made by deceased; it cannot, however, determine validity of such alienations. AIR 1950 East Punj 276 (278): ILR (1950) Punj 226 (DB).

[But see AIR 1963 Andh Pra 298 (299): ILR (1962) Andh Pra 84. (AIR 1935 Cal 39 and AIR 1937 Rang 497 and AIR 1950 EP 276, Diss.)]

(19) Where the alienation impleaded is not that of the deceased, but of his heirs, the Court can consider the validity of such alienation, in order to determine the estate of the deceased at the time of his death. The alienated properties can be included in the plaint schedule of properties. The alienee is therefore a proper party to the suit. AIR 1954 Trav-Co 399 (400): ILR (1954) Trav-Co 752.

(20) Power to entertain Administration suit is given by S. 9 and not by O. 20, R. 13 — Suit not barred expressly or impliedly — It must be entertained. (1964) 2 Andh WR 455 (457).

(21) Suit for administration of estate in the hands of heirs of deceased who died intestate — Creditor electing to proceed against estate of deceased — Suit for administration not barred. (1964) 2 Andh WR 455 (456).

(22) Where one legatee sues on behalf of himself and the others for administration of the estate, the plaintiff who is the dominus litis, is entitled to withdraw his suit on the payment of his legacy amount. It is only after a preliminary decree is passed under O. 20, R. 13, that the plaintiff would not be entitled to withdraw. AIR 1960 Andh

Order 20, Rule 13 — Note 1 (contd.)
Pra 572 (574): (1960) 1 Andh WR 456 (DB).

(23) Suit for share in estate left by deceased is an administration suit and O. 20, R. 13 would apply. AIR 1961 Andh Pra 335 (337): (1961) 1 Andh WR 241 (FB).

(24) Suit for accounts of property and due administration of estate left by deceased — Valuation made by plaintiff not shown to be wrong — Jurisdiction of Court to determine correct valuation not attracted. (1965) 6 Guj LR 402 (405): ILR (1965) Guj 495.

(25) Where the plaintiffs who were not next of kin of the deceased prayed for partition of certain immovable properties but did not pray for administration of movable property, and besides they prayed for an injunction restraining certain defendants from executing their decrees and getting the properties sold in execution, such a suit was not a suit for administration but one for partition. The plaintiffs could not file a suit for administration. ILR (1964) Guj 284.

(26) First suit by widow for administration of her deceased husband's estate under O. 20, R. 13 having been withdrawn second suit for recovery of dower debt against heirs is not barred as causes of action for both were different. AIR 1962 Punj 50 (51): 63 Pun LR 775.

(27) There is no bar to bring a suit for administration in respect of the assets of more than one person. AIR 1960 Assam 183 (185) (DB).

2. Hindu law. — (1) If the property of a Hindu passes by survivorship there is no estate of the deceased left for administration and a suit for administration is not maintainable. AIR 1939 Mad 552 (553): ILR (1939) Mad 820. (AIR 1937 Mad 785, **Reversed**; AIR 1937 Mad 99, **Overruled**; 32 Bom 381, Rel. on.)

3. Muhammadan law. — (1) Under the Muhammadan law, the funeral expenses of the deceased should be defrayed first from out of the assets, then his debts and then the legacies. The residue is to be thereafter distributed amongst the heirs of the deceased. (1882) 8 Cal 20 (24) (DB).

(2) A suit by the heirs or the creditors or the legatees of a deceased Muhammadan for the enforcement of their claims against the estate of the deceased, becomes essentially a suit for administration. AIR 1915 Cal 655 (657) (DB) °° (1882) 8 Cal 370 (374) (DB).

(3) Suit to enforce claim against estate of deceased Muhammadan — Partition of estate may be an incident thereof. AIR 1928 Mad 760 (762, 763).

(4) Even the heirs of the deceased who are not parties to such a suit are bound by the proceedings and cannot claim anything but what remains after the debts of the deceased have been paid. (1894) 21 Cal 311 (317, 318) (DB).

4. Who may file an administration suit. — (1) The following persons may maintain a suit for administration:

(a) Any person entitled to a share in the deceased's estate, such as next of kin. AIR 1928 Mad 760 (762).

(b) A legatee or an annuitant. AIR 1952 Sau 30 (31, 32).

(c) A creditor of the deceased on behalf of all the creditors. AIR 1951 Mad 296 (307): ILR (1950) Mad 607 (DB) °° (1884) 10 Cal 713 (734) (DB).

(d) On a combined reading of Form 14 App. A and Form 17 App. D it can be inferred that a creditor is one of the persons who is entitled to get a decree so it follows that creditor can sue for administration decree. AIR 1960 Mys 53 (56): 37 Mys LJ 506 (DB).

(e) An executor or administrator, where there are disputes between the heirs or the legatees and where there is a doubt as to the manner in which he should administer the estate. (1909) 33 Bom 429 (433) (DB).

(f) The legal personal representative of the deceased. AIR 1932 PC 146 (151).

(2) It is not obligatory on Court to pass a decree for administration, if defendant before decree satisfies plaintiff's claim. It may dismiss the suit. AIR 1914 Mad 646 (647) (DB).

(3) To maintain an administration suit in regard to estate of a deceased debtor, on basis of a decree obtained against him during his lifetime, the decree must be capable of enforcement at the date of the suit. AIR 1941 Pat 70 (77): 20 Pat 223 (DB).

(4) Administration decree is discretionary relief — No one is entitled to such relief as of right. AIR 1960 Mys 53 (56): 37 Mys LJ 506 (DB).

(5) Suit by receiver appointed in Administration suit is not maintainable, if plaintiff in Administration suit is found to have no title. ILR (1960) 2 Cal 282 (DB).

5. Against whom administration suit can be filed. — (1) A suit for administration is maintainable against persons who were in possession of property during lifetime of deceased as agents or managers and who continued to be in possession after his death. AIR 1952 Sau 30 (31, 32).

(2) In an administration suit where a legatee sues the executor for payment of a legacy and for administration of the estate of the deceased, the executor, if there is one, is the only necessary party and not the other legatees. AIR 1932 Cal 337 (338): 58 Cal 77.

(3) Next of kin and intermeddler with estate of deceased are proper parties to administration suit. AIR 1933 Mad 74 (79): 56 Mad 273 (DB).

6. Plaint in administration suits. — See Schedule I, Appendix A, Forms Nos. 41 to 44.

7. Decree in administration suits.— (1) In drawing up decrees in administration suits

Order 20, Rule 13 — Note 7 (contd.)
forms prescribed in Code should be followed as far as possible. (1905) 32 Cal 561 (566) (DB).

(2) In a suit by a creditor for administration, it cannot be held that other creditors are represented by plaintiff in the sense that they are, in effect, parties to suit. AIR 1931 Mad 683 (684): 55 Mad 21 (DB).

(3) A decree for administration of estate of a deceased person is a decree in favour of all creditors and persons entitled to the effects of the deceased. A creditor who has attached the property of the deceased is not entitled to any priority in respect of his claims. AIR 1943 Bom 273 (276) °° (1888) 15 Cal 202 (209, 210) (SB).

(4) Pendency of an administration suit will not debar a secured creditor from enforcing his security. (1881) 7 Cal 733 (735) (DB).

(5) A preliminary decree in administration suit cannot be in a hypothetical form making defendant personally liable "for mal-administration". It must first be decided on allegations specifically and properly made of mal-administration whether any of the charges has been made out. It is only thereafter that the Court can direct an account on that basis. AIR 1951 Mad 296 (305): ILR (1950) Mad 607 (DB).

(6) After the passing of the preliminary decree it is not proper for the Court to sanction a compromise to which all parties to the suit are not parties. (1905) 32 Cal 561 (565, 566) (DB).

(7) A supplementary decree cannot be passed after preliminary decree. Only final decree can be passed. AIR 1938 Rang 372 (374) (DB).

(8) Inquiry into assets of deceased at time of his death should be undertaken only after preliminary decree. For this purpose properties alienated by heir of deceased would be included in assets and Court would have jurisdiction to implead the alienee as a party to suit after passing of preliminary decree. AIR 1954 Trav-Co 399 (400): ILR (1954) Trav-Co 752.

(9) Although a Court in pursuance of a decree in an administration suit is competent to direct one of the parties to sue to restore or hand over to the administrator or receiver assets belonging to the estate which are in the possession of such party, it is not open to Court to direct a debtor to pay a debt disputed by the alleged debtor to the administrator or the receiver. AIR 1936 Lah 365 (365).

(10) The Code makes no provision as to when a final decree in an administration suit should be passed or as to the contents of such decree; this must depend upon the circumstances in each case. AIR 1936 Lah 879 (883) (DB).

(11) The administration suit to collect the assets of Chitty does not bar the foreman from dealing with his creditors. An honest and real adjustment and satisfaction of any of the claims, could be recognised in the administration of the estate. AIR 1960 Ker 222 (223): 1959 Ker LT 1318 (DB).

8. Estate insufficient to pay all the debts — Sub-rule (2). — (1) Where estate of the deceased is insufficient to pay all debts of deceased in full, sub-rule (2) will apply. AIR 1951 Mad 296 (307): ILR (1950) Mad 607 (DB).

(2) The object of sub-rule (2) is not to apply all rules of insolvency to insolvent estates. AIR 1943 Bom 273 (276) °° AIR 1919 Cal 908 (910, 912): 45 Cal 653.

[See however AIR 1914 Mad 281 (282): 38 Mad 500 (503) (DB). (This rule is inapplicable to suits against Administrator-General.)]

9. Provable debts and liabilities under the Insolvency Act.— (1) The dividends due to creditors should, in an administration suit, be calculated on amount of debt at the date of preliminary decree and not at date of proof. (1871) 6 Beng LR App 140 (141).

(2) Unsecured creditors are entitled to interest up to the date of preliminary decree and not up to the date of payment. AIR 1929 Mad 242 (243).

(3) Secured creditors are entitled to interest from proceeds of sale of secured property up to the date of payment. AIR 1929 Mad 242 (243).

(4) Creditors of an estate under administration will, on due cause shown, be let in at any time, while the fund is in Court, except where they have been guilty of remissness in the assertion of their claim and other creditors are prejudiced thereby. (1905) 9 Cal WN 167 (169, 170).

(5) According to the insolvency law in force in Travancore as applied to administration suits, a set-off effected, even before the institution of the administration suit cannot be taken into account in adjusting the rights of the parties. AIR 1951 Trav-Co 97 (98) (DB).

10. Barred debt. — (1) A creditor whose claim is barred before preliminary decree cannot come in and claim to be paid out of the estate. AIR 1931 Mad 683 (684): 55 Mad 21 (DB).

(2) If a debt is due to the deceased by the next of kin, but is barred by limitation, an executor can retain a share, inasmuch as the debt still existed though only the remedy is barred. (1881) 7 Cal 644 (647).

(3) The mere institution of an administration suit to collect the assets of the chitty conducted by the defendant's tarwad will not have the effect of suspending the law of limitation so far as the creditors are concerned. After the date of the preliminary decree, the affairs of the chitty assets are in the hands, of the Court and hence the claims of the creditors will not be barred by the operation of the law of limitation. Prior to that date, those claims may get time barred. AIR 1960 Ker 222 (223): 1959 Ker LT 1318 (DB).

R. 14. Decree in pre-emption suit.—(1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall—

(a) specify a day on or before which the purchase-money shall be so paid, and

(b) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct,—

(a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and

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ORDER 20, RULE 14 — SYNOPSIS

1. Pre-emption.
2. Pre-emption under Mahomedan law.
3. Pre-emption by custom.
4. Pre-emption by contract.
5. "Shall specify a day on or before which purchase-money shall be paid."
6. Extension of time.
7. Plaintiff's title, when accrues.
8. Payment into Court.
9. Tender of money, if sufficient.
10. Right to rents and profits.
11. Vendor's title in pre-emption suits.
12. Set-off of costs against purchase money.
13. Rival pre-emptors — Sub-rule (2).
14. Appeal.

1. Pre-emption. — (1) The right of pre-emption is not a right of "repurchase" involving any new contract of sale; but is simply a right of substitution, entitling the pre-emptor to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. AIR 1957 Pat 545 (547): 36 Pat 114 (DB).

(2) The right of pre-emption may be defeated by waiver or acquiescence of the claimant. (1908) 35 Cal 402 (411): 35 Ind App 60 (PC).

(3) The doctrine of pre-emption does not apply to execution sales. (1905) 27 All 670 (677) (DB) °° AIR 1932 Nag 44 (45): 28 Nag LR 11.

(4) The right of pre-emption arises only on a sale of immovable property. AIR 1957 Pat 545 (547): 36 Pat 114 (DB) °° (1892) 14 All 333 (335). (Gift.) °° (1905) 32 Cal 988 (991) (DB). (Sham sale.)

(5) Where a plaintiff having a right to pre-empt joins with himself, in a suit for pre-emption, a stranger, he forfeits his right to pre-empt. (1897) 19 All 324 (326) (DB).

(6) Right to pre-empt is not forfeited if persons joined are members of plaintiff's family. (1897) 19 All 311 (311) (DB).

(7) Guardian of minor is competent to exercise or refuse to exercise on behalf of the minor a right of pre-emption. (1901) 23 All 129 (130) (DB).

(8) Price alleged in deed of sale not true contract price — Vendor and vendee concealing real price — Court should ascertain the market price at the time of the sale. (1887) 9 All 471 (473) (DB).

(9) Sale to two, one of whom alone is liable to be pre-empted — Interest separable —Pre-emption only of his interest allowable. (1897) 19 All 148 (152) (DB).

(10) Land sold to the stranger, subsequently re-sold by stranger before suit to a co-sharer having equal rights with those seeking pre-emption — No right of pre-emption. (1898) 20 All 100 (102) (DB).

(11) Right to pre-empt must subsist both at the time of sale and at the time of the institution of suit. (1899) 21 All 374 (379) (FB).

(12) When a tenant in possession purchases his tenancy land, a pre-emptor who obtains a pre-emption decree cannot evict the vendee tenant. (1968) 70 Pun LR (Delhi Section) 11 (12).

(13) A direction under O. 20, R. 14 relating to deposit of sale price or market value of land in litigation has no relevancy in determining the forum of suit or appeal in pre-emption suit relating to agricultural land and the forum is governed by the jurisdictional value under the Suits Valuation Act (1887). AIR 1960 Punj 467 (470): 62 Pun LR 333 (FB). (16 Pun Re. 1908: 146 Pun LR 1908 (FB), Overruled.)

(b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

[1882 and 1877, S. 214.]

HIGH COURT AMENDMENTS

Bombay: Dadra and Nagar Haveli[a]

In Order XX, Rule 14, substitute a colon for the fullstop appearing at the end of clause (b) of sub-rule (1) and add thereafter the following proviso:—

"Provided that if there are crops standing on the property, possession of the property shall not be delivered to the plaintiff until such crops have been reaped. The plaintiff shall, however, be entitled to simple interest not exceeding 6 per cent per annum at the discretion of the Court on the amount deposited by him in respect of the period between the date of payment into Court by him of the purchase money and the costs (if any) and the date on which delivery of possession to him by the defendant takes place." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965.]

Mysore

Add the following proviso to Rule 14 (1) (b):—

"Provided that if there are crops standing on the property the Court may postpone the delivery of property to the plaintiff till after the crops have been reaped and direct that the plaintiff be paid by the defendant simple interest at such rate as may be fixed not exceeding 6 per cent per annum on the amount deposited by the plaintiff in Court in respect of the period between the date of deposit into Court of the purchase money and costs, if any, and the date to which delivery of possession has been postponed." (30-3-1967.)

Order 20, Rule 14 (contd.)

2. Pre-emption under Mahomedan law.— (1) The Mahomedan law is the only system of law which provides substantive rules relating to pre-emption. (1883) 5 All 110 (113, 117) (DB).

(2) In the Madras Presidency, the right of pre-emption under the Mahomedan law is not recognised on the ground of its being opposed to public policy. (1870) 6 Mad HCR 26 (31) (DB).

3. Pre-emption by custom. — (1) A right of pre-emption is recognized by custom among Hindus in Bihar, Gujarat and the United Provinces. (1912) 39 Cal 915 (922): 39 Ind App 101 (PC) (Bihar.) °° (1869) 6 Bom HCR (AC) 263 (264) (DB) (Gujarat.) °° (1890) 12 All 234 (254, 258) (FB) (U.P.)

4. Pre-emption by contract. — (1) Pre-emption can be claimed on basis of a contract between the person claiming to pre-empt and the vendor, if the vendee has notice of such contract. (1898) 2 Cal WN 575 (576) (DB) °° (1909) 4 Ind Cas 743 (744) (DB) (Cal).

(2) A right of pre-emption in respect of a property may be conferred on a mortgagee thereof. (1900) 22 All 238 (240, 242) (DB).

(3) Right of pre-emption cannot be enforced against an execution purchaser of the equity of redemption. (1910) 34 Bom 567 (570) (DB).

5. "Shall specify a day on or before which purchase-money shall be paid. — (1) The decree should specify a day before which the purchase-money shall be paid. AIR 1955 Punj 140 (141) °° AIR 1950 All 663 (664).

(2) It is not a compliance with the rule to say that the money should be paid within a certain period. AIR 1926 All 158 (158) (DB) °° (1906) 1906 Pun Re No. 48, p. 172 (176, 182, 186) (FB) °° AIR 1921 Lah 6 (9) (FB).

[See however (1954) 1954 Raj LW 80 (82) (DB).]

(3) Where the vendee has paid off encumbrances on the property the amount should be included in the "purchase-money" unless he has paid off the encumbrance in bad faith or improvidently. AIR 1924 Oudh 1 (1, 5, 6) (DB).

6. Extension of time. — (1) Section 148 does not enable the Court to enlarge the period fixed by the decree for paying the purchase-money. ILR (1955) Madh B 67 (70) °° AIR 1950 All 663 (664) °° (1910) 13 Oudh Cas 28 (30, 31) (DB).

[But see AIR 1916 Pat 268 (269): 1 Pat L Jour 92 (DB).]

(2) Where the last day allowed to plaintiff to deposit purchase-money is a holiday, the money may be deposited on the next court-day on general principles of law. AIR 1924 All 218 (220): 46 All 328 (FB). (Overruling AIR 1922 All 278 and AIR 1918 All 13: 41 All 47.)

(3) The time for payment fixed by a pre-emption decree is not extended by the fact that an appeal has been preferred against the decree. (1955) ILR (1955) Madh B 67 (70) °° AIR 1950 All 663 (664) °° (1896) 18 All 223 (226) (SB).

(4) Appellate Court may, if it thinks fit, enlarge the time fixed by pre-emption decree. AIR 1954 SC 50 (51): ILR (1953) Hyd 455 °° ILR (1955) Nag 267 (271) (DB).

Order 20, Rule 14 — Note 6 (contd.)

(5) When a decree for pre-emption is passed fixing a certain period from the date of the decree for payment of pre-emption money and no payment is made within the period so fixed, and when in an appeal by the judgment-debtor from that decree no order staying execution of the decree is passed and the decree is affirmed without any order fixing a fresh period for payment, the period for payment should be calculated from the date of the original Court's decree and not from the date of the Appellate Court's decree. AIR 1958 Madh Pra 7 (8, 9) (DB).

(6) Where the Appellate Court increases the sum to be paid by the plaintiff in a pre-emption suit and he deposits the excess amount ordered within a reasonable time after the appellate decree, the payment is a valid one. AIR 1914 All 248 (248): 36 All 514 (DB).

(7) On plaintiff's default in paying purchase-money within time allowed, suit should be dismissed, though the decree does not contain a specific provision to that effect. AIR 1954 SC 50 (51): ILR (1953) Hyd 455 °° ILR (1955) Madh B 67 (70) °° (1896) 18 All 223 (227) (DB).

(8) If plaintiff has appealed against the very condition in the decree that he should pay the purchase-money within a certain period, Appellate Court should not dismiss suit simply on ground of non-payment within time so fixed. (1912) 17 Ind Cas 868 (868) (DB) (All).

(9) Where a suit for pre-emption by a son in his own individual capacity is dismissed owing to his failure to pay purchase-money within time allowed, a fresh suit by his father, for pre-emption in assertion of his own individual right is not barred. 1885 Pun Re No. 1, p. 1 (1) (DB).

7. Plaintiff's title, when accrues. — (1) The pre-emptor's title to property accrues from date of payment of purchase-money into Court and not from date of sale or of decree. AIR 1953 Punj 163 (165): ILR (1954) Punj 15. (24 Mad 449, held no longer good law.) °° AIR 1949 Nag 338 (339) °° AIR 1930 Lah 273 (277): 11 Lah 128 (FB). (Overruling 1908 Pun Re No. 25.)

(2) A registered instrument is not necessary for passing the title. AIR 1949 Nag 338 (339) °° AIR 1929 All 237 (238) (DB).

(3) Where, at the time of the deposit in Court, there are crops on the land, they also pass to the pre-emptor. AIR 1923 Nag 327 (329).

(4) Where the pre-emptor under a pre-emption decree acquires title to the equity of redemption on payment of purchase-money and the money is withdrawn by the vendee the title cannot be defeated on the ground of adverse possession by the mere fact that symbolical possession was not taken by the pre-emptor under O. 21, R. 36 or by reason of the failure to obtain mutation or to secure correction of the papers. AIR 1945 Oudh 200 (206): 20 Luck 856 (DB).

(5) Where the property is in the possession of a usufructuary mortgagee delivery of possession to plaintiff on deposit of money in Court is not necessary. AIR 1923 All 507 (508): 45 All 482 (DB) °° AIR 1935 Lah 523 (525): 16 Lah 1065 (DB).

(6) Where the pre-emptor is already in possession of the property, provision as to delivery of possession does not apply. AIR 1914 All 440 (441) °° (1897) 20 Mad 305 (310) (DB).

(7) Statutory right of pre-emption though not an interest in land is a right that attaches to the land. Statutory right of pre-emption under Sec. 15 (1) (a) of Punjab Pre-emption Act (1 of 1913) is a heritable right and a decree can be passed in favour of legal representatives of deceased pre-emptor. If pre-emptor dies during pendency of appeal his legal representatives can be legally substituted. AIR 1968 SC 1205 (1207): 70 Pun LR 823 °° AIR 1966 Punj 348 (350): 68 Pun LR 29 (DB).

(8) Pre-emptor acquires his title from the date of payment of purchase-money. Even if he is required to pay additional price as a result of appeal that makes no difference. (1964) 66 Punj LR 988 (991): 1964 Cur LJ 427.

(9) Since the pre-emptor takes over the entire bargain from the vendees, he should pay the expenses bona fide incurred by the vendees on registration, stamp duty, etc., as a part of that bargain. (1964) 66 Pun LR 988 (991): 1964 Cur LJ 427.

(10) In a pre-emption suit once the purchaser takes a plea that he is only ostensible purchaser, the Court must find out the truth of the plea and if true make real purchaser a party. The pre-emptor can succeed only if he has better title than the real purchaser. 68 Punj LR 611 (615): ILR (1966) 2 Punj 894.

(11) There is no failure of public policy underlying Sec. 17-A of Punjab Security of Land Tenures Act (10 of 1953) when a tenant voluntarily allows a decree for pre-emption to be passed and hands over possession of land on receiving pre-emption money. ILR (1965) 2 Punj 590 (599) (DB).

(12) Title passes to pre-emptor on deposit of purchase-money in terms of decree — Delivery of possession not necessary. AIR 1964 Punj 260 (266, 268): 66 Pun LR 251 (FB).

(13) A pre-emptor must maintain his qualification to pre-empt to the date of the decree of the first court only whether that decree is one decreeing or dismissing his suit. His loss of qualification after the date of decree will not affect his claim in such suit. AIR 1966 Punj 374 (377): 68 Pun LR 345 (FB).

(14) (i) The title of a pre-emptor in respect of pre-empted property accrues from the date on which purchase-money and costs

Order 20, Rule 14 — Note 7 (contd.)

are paid by him; (ii) On such title accruing to him the pre-emptor is entitled to delivery of possession; (iii) Any demise of the property or of any interest therein created by the vendee does not affect the rights of the pre-emptor; (iv) A tenant inducted by vendee does not become pre-emptor's tenant. AIR 1968 Punj 110 (119): 69 Pun LR 743 (FB).

8. **Payment into Court.** — (1) Government promissory notes are not "money" and the deposit thereof is not valid. 1890 Pun Re No. 70, p. 187 (FB) °° 1963 Jab LJ 871 (873). (Payment should be by legal tender.)

(2) A payment made out of Court to vendee is sufficient compliance provided vendee certifies to Court within period allowed for payment the fact of his receipt of the money but not otherwise. AIR 1921 All 159 (160) (DB) °° AIR 1916 Lah 249 (250): 1916 Pun Re No. 73 °° AIR 1963 Punj 133 (136): ILR (1962) 1 Punj 512. (Observations in AIR 1916 Lah 249, held dissented from in AIR 1958 Raj 311.)

[But see AIR 1958 Raj 311 (314): ILR (1958) 8 Raj 666.]

(3) Considerations as to payment outside the Court to the vendee and certification by him prima facie do not appear to be sufficient compliance of the decree both because the provisions of law in that respect are mandatory and also because the vendee cannot be called a decree-holder in a suit for pre-emption. Under the terms of statute payment into court of the required sum before the fixed date has the effect of bringing into existence a certain right in the property in suit and any variation in the condition is bound to affect rights of either party. (1963) Jab LJ 871 (873, 874).

(4) A payment is not valid if it is not a payment of the full amount stated in the decree, however small may be the sum by which it falls short. AIR 1923 Lah 250 (251). (One rupee.) °° (1913) 18 Ind Cas 600 (601) (Lah). (One anna.)

(5) Where decree directs payment of purchase-money and costs within a specified time, both must be deposited within that time. AIR 1924 Lah 359 (359).

(6) Where, though costs are awarded, no time limit is fixed for their payment they need not be deposited in time. (1913) 18 Ind Cas 994 (996): 1913 Pun Re No. 3.

(7) The plaintiff does not forfeit his right of pre-emption by raising the purchase-money by a mortgage of the property sought to be pre-empted. AIR 1917 All 156 (157) (DB).

(8) On payment into Court the money stands to the credit of the vendee and the pre-emptor's rights are not affected by the fact that a creditor of his attaches the money and is allowed by the Court to remove it. (1897) 19 All 256 (258) (DB) °° 1902 Pun Re No. 21, p. 85 (88) (DB).

(9) Compromise decree in pre-emption suit — Plaintiff required to hand over certain land to defendant within a certain period — Ceasing to cultivate with a view to hand over possession was held sufficient compliance. AIR 1917 Lah 400 (401) (DB).

(10) The provisions of Order 20, Rule 14 do not apply to a decree in a pre-emption suit based on a compromise. Where by means of a compromise pre-emption decree the pre-emptor pays the money to the vendee in the presence of the Court in pursuance of the terms of the compromise and the Court thereupon actually passes a final decree for pre-emption, then such decree is not contrary to law and a nullity. ('59) 61 Punj LR 774 (778).

(11) Where a pre-emption decree directs payment of a fixed date, such payment out of court is sufficient compliance with decree provided payment is made before stipulated date. Such payment can be pleaded as defence in execution of decree. AIR 1963 Punj 133 (136): ILR (1962) Punj 512.

(12) Compromise decree in pre-emption suit — Person with superior right of pre-emption to get possession subject to payment of purchase money to vendees by specified date — Payment to vendees outside Court before specified date, amounts to proper compliance — Failure to get payment certified by Court before due date is immaterial. AIR 1964 Punj 305 (307): 66 Pun LR 261 (DB).

9. **Tender of money, if sufficient.** — (1) A tender of purchase money to Court within time limited is sufficient compliance with decree, although through laxity of Court officials or other such cause actual deposit is made later on. AIR 1916 Lah 77 (77, 78) °° AIR 1915 Oudh 171 (172).

[See also AIR 1955 Punj 140 (141).]

(2) A tender to Court after its usual working hours is not valid. AIR 1920 Oudh 25 (28, 29): 23 Oudh Cas 254.

(3) Tender implies the physical act of offering. The law insists upon an actual, present, physical offer, it is not satisfied by a mere spoken offer. (1957) 59 Pun LR 204 (211).

(4) Decree-holder applying to Court for making deposit 15 minutes before the rising of the Court on the last date — Further, decree-holder not taking the money with him — Term in the decree, held, not fulfilled. (1968) 70 Pun LR 81 (82): 1968 Cur LJ 6. (1967 Pun LR 204, Foll.)

10. **Right to rents and profits.**— (1) Under a pre-emption decree the right to possession of property and the consequential right to mesne profits accrue to pre-emptor only from the date of deposit. Till then the original purchaser retains possession and is entitled to the rents and profits. AIR 1944 Pesh 11 (11, 12) °° AIR 1916 PC 179 (181): 44 Cal 675: 44 Ind App 80 °° (1890) 12 All 234 (237) (FB).

(2) See the following case decided under the Proviso to O. 20, R. 14 (1) (b) added

Order 20, Rule 14 — Note 10 (contd.)
by Madhya Pradesh amendment. (1958) Nag L Jour 276 (278). (Pre-emptor plaintiff placed in possession after deposit of purchase price fixed by trial Court — Price raised in appeal by defendant who had withdrawn amount deposited — Pre-emptor depositing further amount to make up amount decreed by appellate Court — Plaintiff held not entitled to interest on part of purchase-money deposited by him in the first instance — Defendant held entitled to mesne profits till the crops, though sown by plaintiff, had been harvested as his right to possession had revived on passing of appellate decree.)

11. Vendor's title in pre-emption suits.— (1) A pre-emptor is bound to take the title which the vendee was ready to take. AIR 1915 All 154 (155): 37 All 529.

12. Set-off of costs against purchase-money. — (1) The rule does not provide for cases where costs, instead of being awarded against pre-emptor, were awarded in his favour by decree. Under the doctrine of equitable set-off, he is entitled to deduct such costs when depositing purchase-money. AIR 1922 Lah 142 (143): 2 Lah 294 (DB) °° ('84) 6 All 351 (357) (DB) °° AIR 1939 All 228 (229): ILR (1939) All 261 (DB).

(2) When the decree directs the purchase-money to be deposited within a specified time but does not require the costs awarded to the defendant to be deposited, the plaintiff is not bound to deposit such costs although he deducts from the purchase-money the costs awarded to him. AIR 1939 All 228 (230): ILR (1939) All 261 (DB). (Reversing on Letters Patent Appeal AIR 1937 All 756.)

13. Rival pre-emptors — Sub-rule (2). — (1) Sub-rule (2) is new and enables rival claimants to pre-emption to join as plaintiffs in a suit for pre-emption and to obtain in that suit a decision not only as to their right to pre-empt but also as to their rival claims. AIR 1929 PC 58 (60): 56 Ind App 80: 51 All 267.

(2) Where the plaintiffs do not ask the Court to adjudicate upon their respective rights inter se, a joint decree may be passed and if the amount is deposited in compliance with the decree, the defendant has no concern in the way in which the property is to be shared by the plaintiffs; but the mere fact that a joint decree is passed in favour of all has not the necessary result of passing title to all the joint decree-holders even if only one of them pays the amount. In order to determine in what proportion the joint plaintiffs are to share the property, the circumstances under which the payment was made must in each case be enquired into. AIR 1929 All 953 (954): 51 All 998 (DB).

(3) Where pre-emption is sought in respect of an undivided share in property which has been sold, the pre-emptor's suit is a suit for possession of that share and when such a suit is decreed, it is a final decree without more and is perfectly capable of execution according to law. This is equally true of the suit where rival claims for pre-emption have been set up and the suit has been decreed according to the proportionate share of the parties in law. Where the decree-holder wants separate possession of the property decreed in his favour, the proper course for him, is to file a suit for partition by separate possession, and it is in such a suit that all the equities raised by the parties as to what would be a just and fair partition can be properly decided. AIR 1959 Raj 136 (138, 139, 140): 1959 Raj LW 212.

14. Appeal. — (1) A plaintiff, who has obtained a decree for pre-emption conditional on his paying a certain sum within a certain period, may appeal against the decree whether or not he has deposited the money in Court within the time limited. ('91) 13 All 376 (378) (FB) °° 1895 Pun Re No. 67, p. 333 (336) (DB).

(2) A vendee does not forfeit his right of appeal against a pre-emption decree merely because he has withdrawn the money deposited by the plaintiff. ('07) 1907 Pun Re No. 16, p. 74.

(3) A plaintiff depositing purchase-money in Court under a pre-emption decree is entitled to a refund of the amount on the reversal of the decree in appeal. ('13) 19 Ind Cas 1 (1, 2) (DB) (All). (But not to interest.)

(4) A decree with a condition that unless the purchase-money is paid within the time fixed the suit shall stand dismissed, is a complete decree and a subsequent order dismissing the suit is not a decree against which an appeal can be preferred. AIR 1920 Oudh 25 (27): 23 Oudh Cas 254. (Dissenting from AIR 1914 Oudh 147: 17 Oudh Cas 14.)

(5) Order passed on an application for payment of pre-emption money in compliance with a decree under R. 14 is not appealable under S. 47. ('82) 4 All 420 (422) (DB).

(6) Appellate Court is competent to pass pre-emption decree for amount in excess of its pecuniary jurisdiction. AIR 1960 Punj 434 (437).

[But see ('98) 1898 Pun Re No. 38, p. 134.]

R. 15. Decree in suit for dissolution of partnership — Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

[1882 and 1877, S. 215.]

ORDER 20, RULE 15 — SYNOPSIS

1. Scope.
2. Preliminary decree for accounts.
3. Mode of taking accounts.
4. "Fixing the day on which the partnership shall stand dissolved."
5. Defendant's right to what is found due to him.
6. Appeal.

1. Scope. — (1) The passing of preliminary decree is in the judicial discretion of the Court. It will be an improper exercise of the discretion to pass a preliminary decree where the shares of the parties in, and the fact and date of dissolution of, the partnership are admitted. AIR 1914 Oudh 399 (404): 17 Oudh Cas 193 (DB).

(2) Where shares and the fact and date of dissolution are not admitted, the Court ought to pass a preliminary decree defining and declaring the rights of the parties before giving a final adjudication in the suit. (1841) 3 Moo Ind App 175 (197, 198) (PC).

(3) Where the Court has passed an order defining and declaring the rights, the fact that no formal decree has been drawn up in those terms will be a mere irregularity not vitiating the trial. AIR 1914 Lah 339 (341) (DB).

(4) In a suit for dissolution of partnership, the partnership assets have to be valued, the accounts have to be taken, the liabilities have to be ascertained, their discharge has to be provided for and the balance of the partnership assets should be directed to be divided between the partners according to their shares. Where this is not done and the plaintiff is directed to a separate suit, the direction is wholly erroneous in law. AIR 1957 Andh Pra 974 (974).

(5) A "sub-partner" who is a perfect stranger, cannot be foisted on other partners. In absence of an agreement, the duration of sub-partnership is not co-extensive with the main partnership. Hence, a sub-partner can sue his partner for recovery of his share-money or for accounts before the dissolution of the main partnership. 1958-2 Mad L Jour 233 (234, 235, 237).

(6) In a partnership at will, a partner can call for dissolution of firm by giving notice under Sec. 43 (1), Partnership Act (1932) without intervention of Court, but if he wants to go to court to effect dissolution of firm he will be bound by procedure laid down in O. 20, R. 15. AIR 1963 SC 1165 (1169): (1964) 1 SCR 316.

(7) Partnership for wholesale business in tobacco—One of the partners alone and not the firm, holding licence in his name under Central Excises and Salt Act to do such business — Partnership is illegal — Suit for its dissolution or rendition of accounts therefore cannot lie. AIR 1967 Raj 280 (281): 1967 Raj LW 451.

(8) In a suit for dissolution of partnership a receiver can also be appointed before the final adjudication if the circumstances of the case justify such measure. AIR 1965 Pat 144 (146): 1965 BLJR 252 (DB).

(9) Unless relief of rendition of accounts cannot be given without a dissolution of partnership, as when general accounts of partnership are demanded that it would be necessary to sue for dissolution of partnership; but when suit relates to incidental matters it will not be necessary to sue for dissolution. 1967 Raj LW 324 (326): ILR (1967) 17 Raj 417.

(10) Suit for dissolution of partnership — Decree must conform to the provisions of R. 15. AIR 1963 Raj 241 (245): 1963 Raj LW 497.

(11) The words "and other acts to be done" in R. 15 refer to directions with regard to doing of other acts, than taking of accounts. Rule of "ejusdem generis" cannot apply. (1965) 67 Pun LR 951 (953).

2. Preliminary decree for accounts. — (1) Besides making the declarations as to the rights of the parties Court should, in the preliminary decree, direct an account to be taken of the dealings and transactions of the partnership, of the credits, property and effects due and belonging to it, and should, if need be, appoint a receiver for realising the partnership property. (1897) 20 Mad 313 (315, 316) (DB).

(2) In a suit for accounts of a dissolved partnership the decree should direct the taking of accounts for the period during which the partnership lasted. Madh B LJ (1955) HCR 621 (622) (DB).

(3) Though it is desirable that the preliminary decree should state who is to be the accounting party, yet the Court can, even subsequently, decide the question. AIR 1936 Lah 78 (80) (DB).

(4) Form No. 21 in Appendix D should ordinarily be followed unless there is any special reason for modifying it. AIR 1939 All 535 (539): ILR (1939) All 563 (DB).

(5) Form No. 21, Appendix D is also applicable where the Court is asked to declare that a dissolution has taken place and

R. 16. Decree in suit for account between principal and agent.—In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.

[1882, S. 215A.]

Order 20, Rule 15 — Note 2 (contd.)

an account is still required. AIR 1938 Lah 758 (759): ILR (1939) Lah 178.

(6) Preliminary decree for accounts — Court cannot dismiss the suit subsequently, whatever default there may be in subsequent stages of suit. AIR 1968 Andh Pra 289 (289).

(7) Suit for dissolution of unregistered partnership — Decree can direct taking and rendition of account. AIR 1960 Ker 286 (286): 1960 Ker LJ 453 (DB).

(8) Neither O. 20, R. 15 nor form No. 21 Sch. I, Civil P. C. indicate, that accounts should be taken up-to-date. In a partnership which was dissolved by efflux of time, when a preliminary decree is passed in a suit for dissolution, claim for accounts could only be made for period during which partnership lasted. (1966) 2 Mys LJ 402 (403): (1966) 8 Law Rep 268.

3. Mode of taking accounts. — (1) The Court may itself take the accounts of the partnership or appoint a commissioner for the purpose. In the latter case the Court may give directions, if any are required, as to the mode of taking accounts. It may call upon either party to furnish a statement of particulars relating to the business and transactions. (1881) 7 Cal 428 (433) (DB).

(2) All the account books and other documents relating to the partnership and in the possession of either party should be produced. AIR 1914 PC 33 (33).

(3) Sufficient time should be given to the parties for production of documents relating to partnership, and evidence should be taken if necessary. AIR 1918 Lah 166 (169) (DB).

(4) Commissioner taking accounts has no power to decide questions relating to the terms of the partnership, its duration or the shares of the partners. AIR 1937 Bom 81 (89).

(5) As to the power of the Court to go into the accounts of firm anterior to a date on which there has been a settlement of accounts between the parties, see AIR 1938 Lah 758 (759): ILR (1939) Lah 178 (DB).

4. "Fixing the day on which the partnership shall stand dissolved." — (1) The fixing of the day is a judicial act and should not be done arbitrarily. Ordinarily, if a notice of dissolution has been given by one of the partners, the dissolution will be declared as and from that date. Otherwise and in the absence of any other circumstance, the dissolution should be ordered to date from the plaint. It can be ordered to date from the judgment only in exceptional cases. AIR 1918 Mad 264 (264) (DB).

5. Defendant's right to what is found due to him. — (1) If, on taking of accounts, it is found that any balance is due to defendant, Court can pass a decree in his favour for the amount. AIR 1924 All 854 (855): 46 All 858 (DB) °° (1907) 34 Cal 892 (893, 895) (DB).

6. Appeal. — (1) An appeal lies from a preliminary decree passed under this rule. (1896) 23 Cal 406 (408, 412) (DB) °° (1901) 1901 Pun Re No. 13 p. 47 (50) (DB).

(2) Mere directions given to the commissioner in the matter of taking accounts are not decrees and are not appealable. AIR 1940 Pat 204 (208): 19 Pat 1 (DB) °° AIR 1928 Sind 100 (100, 101): 23 Sind LR 87 (DB).

ORDER 20 RULE 16 — SYNOPSIS

1. Scope.
2. "Shall....pass a preliminary decree."
3. Suit by principal — Right of agent to the amount found due to him.
4. Appeal.

1. Scope. — (1) The rule applies to suits for accounts between principal and agent. AIR 1921 Sind 42 (43): 15 Sind LR 16 (DB).

(2) Suits in which it is necessary that an account should be taken in order to ascertain the amount due to or from any party are governed by this rule. AIR 1950 East Punj 92 (102, 103): ILR (1949) East Punj 547 (FB) °° AIR 1937 All 276 (278) (DB).

(3) The purpose of a preliminary decree is merely to ascertain whether the defendant is liable to account to the plaintiff. AIR 1926 Nag 393 (396).

[See also AIR 1957 Pat 713 (714, 715): 36 Pat 624 (DB).]

(4) The preliminary judgment need not be exhaustive or specify all details. AIR 1931 Cal 358 (359) (DB).

(5) Where a person liable to account is not alive at the time the account has to be taken and his legal representative, in view of the inheritance of the property, has to render accounts, there is an initial burden on the plaintiff who asks for accounts to show that the individual liable to account has not discharged his burden in regard to sums of money that have come into his hands. AIR 1957 Mad 100 (100) (DB).

(6) In a suit for recovery of money the plaintiff has to state the precise amount and in the case of money to be found on

Order 20, Rule 16 — Note 1 (contd.)

taking accounts the plaintiff has to state the approximate amount. In case of suit for recovery of money no question of preliminary decree can arise. AIR 1959 All 546 (549) (DB).

(7) Where an item in an account appearing in a decree of lower Court is reduced by Appellate Court, the respondent without filing any memorandum of cross-objection can support the decree passed by trial Court. AIR 1968 Mad 394 (405): (1969) 1 Mad LJ 456 (DB).

(8) Where one co-sharer of joint property collected rents, paid taxes and carried out repairs of property in a suit for accounts, he is entitled to claim a set-off in respect of amounts spent on taxes and repairs. AIR 1963 Pat 145 (146).

(9) Under sub-section (6) of Sec. 44A of the Banking Companies Act 1949 once a scheme of amalgamation is sanctioned, the transfer takes place by operation of law and no vesting order is required. So in case of transfer or vesting in the Banking Company which under scheme of amalgamation is to acquire the business of the amalgamated company the provisions of Order 21, Rule 16 are applicable. (1968) 70 Bom LR 373 (375): 1969 Mah LJ 49.

2. "**Shall .... pass a preliminary decree.**"— (1) Where the plaintiff has established that the defendant was his agent, it is the duty of the Court to pass a preliminary decree directing an account to be taken of the transactions between the parties. (1887) 14 Cal 147 (153, 158): 13 Ind App 123 (PC) °° (1905) 27 All 374 (377) (DB) °° AIR 1925 Cal 1069 (1072): 52 Cal 766 (DB).

(2) Suit by principal against agent for accounts — Allegation that the account-books had been handed over by the agent to the principal who had suppressed and not produced them — Agent not absolved from liability to account — Proper course is to pass preliminary decree for accounts and in rendering accounts agent may prove his allegation and Court may draw proper inference from such proof — Plaint should not be dismissed on ground of want of detailed statement of accounts. 1958-1 Mad L Jour 396 (399).

(3) Liability to account not established — Preliminary decree need not be passed AIR 1929 Cal 418 (421) (DB).

(4) Preliminary decree need not be passed, if the necessity for accounts is not made out. AIR 1940 Nag 207 (208): ILR (1940) Nag 569 (DB) °° AIR 1925 Cal 1069 (1074): 52 Cal 766 (DB) °° 1964 Raj LW 242 (245): ILR (1964) 14 Raj 833 °° AIR 1963 Punj 187 (195, 196): 65 Pun LR 236 (DB). °° AIR 1961 Andh Pra 143 (155): (1960) 2 Andh WR 115 (DB).

[See also AIR 1956 Madh B 77 (80) (DB).]

(5) When the principal's suit against the agent is one for recovery of a stated amount found out after accounting no preliminary decree for accounts is necessary to be passed on such a claim. (1962) 28 Cut LT 411 (413): ILR (1962) Cut 299 (DB).

(6) A preliminary decree in a suit contemplated by this rule finally declares the liability of the defendant for such sum as may be found due. (1912) 13 Ind Cas 374 (375) (DB) (Cal.).

(7) Preliminary decree does not terminate the suit. AIR 1931 Lah 268 (269).

(8) In a suit for accounts, it is a better practice for the Court to express its directions specifically in the decree rather than to insert a general reference to its judgment in the decree. AIR 1944 Nag 7 (14): ILR (1944) Nag 63 (DB) °° ('36) AIR 1936 PC 325 (329).

(9) The proceedings under a preliminary decree for accounts to obtain a final decree for money are proceedings in the suit and not proceedings in execution. AIR 1937 PC 163 (164): 18 Lah 502: 64 Ind App 191: 31 Sind LR 367.

(10) For the procedure to be observed in taking accounts, see the undermentioned cases. AIR 1956 Madh B 77 (79) (DB) °° AIR 1953 Him Pra 110 (117) °° (1892) 19 Cal 174 (178 to 181): 19 Ind App 33 (PC) °° (1887) 14 Cal 147 (158): 13 Ind App 123 (PC).

(11) Preliminary decree for accounts when passed can only be reversed on appeal and cannot be vacated by the Court, whatever default there may be in subsequent stages of suit. AIR 1968 Andh Pra 289 (289): (1967) 2 Andh WR 13.

(12) Rules 12 to 18 in Order 20 do not give exhaustive list of all classes where preliminary decree or judgment may be given. Where in a suit to recover money for work done, issues were decided and the matter was referred to a referee with certain directions given by trial Judge (Original side) the order amounted to a preliminary decree. AIR 1960 Cal 190 (194): ILR (1960) 2 Cal 187 (DB).

(13) Where no claim for sales tax in respect of work done by the plaintiff in pursuance of a contract of construction of quarters is claimed in the plaint nor is an issue framed in the suit brought by the plaintiff for recovery of money for work done, a direction in the preliminary decree to calculate sales tax according to the Bengal Sales Tax Act cannot be sustained. AIR 1960 Cal 190 (196): ILR (1960) 2 Cal 187 (DB).

(14) Plaintiff claiming certain amount as loan due — Defendant admitting acceptance of amount and relationship as partners but not as creditor-debtor — Plaintiff failing to prove his case — No claim by plaintiff for alternative relief — Plaintiff entitled to preliminary decree for accounts on basis of defendant's admission. AIR 1965 Madh Pra 100 (102): 1964 Jab LJ 30 (DB).

(15) A preliminary decree particularly in a suit for accounts decalres the rights and

R. 17. Special directions as to accounts.—The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as prima facie evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

[R.S.C., O. 33, R. 3.]

Order 20, Rule 16 — Note 2 (contd.)
liabilities of parties leaving the actual results to be worked out in further proceedings. AIR 1967 Punj 163 (166): (1966) 68 Pun LR (D) 214 (DB).

(16) A suit for accounts is an extraordinary remedy only available under special circumstances. This remedy is not confined to suits between principal and agent or between partners. The test to be applied is whether having regard to the terms of agreement between parties and the nature of work done by plaintiff it was possible for the plaintiff to bring a suit for specific amount or the amount could only be determined after accounts with defendant are examined. AIR 1960 Punj 415 (416).

(17) Where the plaintiff can be given relief only after accounting the fact that ordinarily the plaintiff would not be able to file a suit for accounts against the defendant is no bar to a suit based on S. 213, Contract Act (1872). As commission of an insurance agent is fluctuating a suit for accounts by an insurance agent against Insurance Company is maintainable. AIR 1960 Punj 607 (608): (1961) 31 Com Cas (Ins.) 27.

3. Suit by principal — Right of agent to the amount found due to him.— (1) If in a suit by the principal, accounts between him and the agent are taken and nothing is found due to the principal but something is found due to the agent, a decree can be passed in the defendant's favour for the amount, on his paying the necessary court-fee. (1907) 34 Cal 892 (894, 895) (DB) °° AIR 1937 All 276 (279) (DB).

4. Appeal.— An appeal lies from a preliminary dercee in a suit for accounts. AIR 1921 Sind 42 (44): 15 Sind LR 16 (DB).

Order 20, Rule 17

1. Scope.— (1) It is in the discretion of the Court to give special directions or not under this rule. AIR 1921 Sind 42 (43): 15 Sind LR 16 (DB) °° AIR 1915 Bom 42 (44): 39 Bom 422.

(2) If with a view to restrict the scope of enquiry the High Court gave direction to Commissioner for assessing compensation for additional work on basis of rates approved by plaintiff's witnesses, no serious error is committed in incorporating the direction which would justify interference in appeal by special leave. AIR 1966 SC 1034 (1036): (1961) 3 SCR 663.

(3) In suit by landlord against tenant for possession, arrears of rent and mesne profits in decree passed Court gave direction that landlord do render account of over-payments made to him — Held, Court acts illegally and with material irregularity — High Court in revision can give directions as it thinks fit. AIR 1969 SC 37 (39): (1969) 1 SCJ 100.

(4) In a suit for dissolution of partnership and taking accounts the Court should issue directions in the matter of taking accounts in the light of Order 20, Rule 17. The Court is in error in directing the Commissioner, in taking accounts, not to go into the correctness or otherwise of the entries in the book where the parties are at dispute about it. (1961) 1 Mad LJ 358 (360): 1960 Mad WN 726.

2. Omission to give directions in preliminary decree.— (1) Though the necessary directions in the matter of taking accounts are generally given in the preliminary decree, yet the omission of such directions in the decree will only amount to a mere irregularity. AIR 1921 Sind 42 (43): 15 Sind LR 16 (DB).

(2) The rule contemplates such directions being given subsequent to preliminary decree. AIR 1940 Pat 204 (209): 19 Pat 1 (DB).

(3) In a decree directing accounts to be taken, it is a better practice for the Court to express its directions specifically in the decree rather than to insert a general refeence to its judgment in the decree. AIR 1936 PC 325 (329).

3. Settled accounts.— (1) Where accounts are settled between the parties and the parties agree to take a gross sum as the balance then the settled account is binding on the parties and it cannot be repened on any ground except fraud or mistake — The Court is not right in directing the plaintiff to produce his account books when the defendant has not pleaded any fraud or mistake in the settlement of accounts. AIR 1958 Madh Pra 320 (321).

R. 18. Decree in suit for partition of property or separate possession of a share therein.—Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;

(2) if and in so far as such decree relates to any other immoveable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

HIGH COURT AMENDMENT

Kerala: Laccadive, Minicoy and Amindivi Islands.

For Rule 18, the following rule shall be substituted, namely:—

"**18. Decrees in suits for partition of property or separate possession of a share therein.**—Where the Court passes a decree for the partition of property or for the separate possession of a share therein, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required." (9-6-1959): Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3.

ORDER 20, RULE 18 — SYNOPSIS

1. Scope.
2. Jurisdiction of Court and Collector.
3. Moveable property.
4. Preliminary decree.
5. "Giving such further directions."
6. Final decree.
7. Appeal.

1. Scope.— (1) Sub-rule (1) does not contemplate the passing of a preliminary and of a final decree. (1949) 55 Mys HCR 240 (250) (DB).

(2) Under sub-rule (1) the Court has merely to pass a decree declaring the rights of the several parties interested in the property, the actual partition so as to affect the Government revenue, being left to be made by the Collector. AIR 1946 Nag 353 (353) °° 55 Mys HCR 240 (250) (DB).

(3) Where the decree does not contain any direction as required by sub-rule (1) the decree is defective, and unless the defect is rectified the parties cannot ask for the transmission of the proceedings to the Collector. AIR 1935 Sind 192 (DB).

(4) Where in a suit for partition, a decree has been passed under sub-rule (1), an application to the Court by the parties for the transmission of the papers to the Collector is not one for execution. AIR 1945 Bom 338 (340): ILR (1945) Bom 799 (FB). °° AIR 1965 Mys 73 (75): (1964) 1 Mys LJ 278. (AIR 1935 Sind 192. **Held no longer good law.**)

[See also AIR 1958 All 673 (675, 676).]

(5) The requirement in the rule that the decree must declare the rights of the several parties interested in the property necessarily involves that all the interested parties must be before the Court. AIR 1940 All 399 (400) °° AIR 1960 Mad 391 (DB).

(6) Decree for partition passed — Decree not produced before court — It should be presumed that decree was passed in accordance with procedure laid down in this rule. AIR 1945 Oudh 1 (3) (DB).

(7) Even if a suit is brought only for declaration of title and possession the Court can give relief to the parties by directing a partition of the properties in order to avoid unnecessary litigation and waste of time of the Court. (1949) 55 Mys HCR 240 (249) (DB).

(8) A partition suit is not covered by the provisions of Order 20, Rule 12 but only by the provisions of Order 20, Rule 18. AIR 1957 Andh Pra 766 (770).

(9) Though an application is taken out under Order 20, Rule 12 still it does not necessarily mean that the application should be dealt with by the Court only under that order and rule. The Court can decide the matter under the correct provision of law, namely, Order 20, Rule 18. AIR 1957 Mad 184 (184).

(10) A suit for a share in a deceased person's assets is in the nature of suit for a share in a partition or an administration suit and the provisions of Order 20, Rule 18 would apply and in such a case there has necessarily to be a preliminary decree and later on a final decree. AIR 1961 Andh Pra 335 (337): (1961) 1 Andh WR 241 (FB).

Order 20, Rule 18 — Note 1 (contd.)

(11) Partition suit — Construction by co-sharer on joint property in excess of his share — No right of such co-sharer to claim compensation for construction which has fallen to share of another co-sharer. AIR 1962 Orissa 71 (73).

(12) Mere inclusion of claim for partition of agricultural land in a suit for declaration of title to share in land will not oust the jurisdiction of civil court. Civil Court must follow procedure laid down in O. 20, R. 18. AIR 1964 J and K 34 (37): 1963 Kash LJ 279 (DB).

(13) Subsequent enjoyment of shares by co-partners in common — No agreement to obliterate partition — Re-union not established — Partition suit not maintainable. (1968) 14 Law Rep 238 (242): (1968) 2 Mys LJ 266.

(14) Requirements of — Preliminary decree for partition — Failure to embody direction to effect division under Section 54, cannot affect validity of decree — Orders containing directions can be subsequently passed. AIR 1965 Mys 73 (74, 75): (1964) 1 Mys LJ 278.

(15) In a suit for partition, if a co-sharer makes some construction over the joint family land in excess of his share the other co-sharers are entitled to claim mesne profits accruing from the construction. AIR 1962 Orissa 71 (74).

(16) The rule as a whole deals with a decree for partition of property or separate possession of the share therein. Secondly, it is quite clear that the directions are with reference to the preliminary decree declaring the rights of parties interested in the property to be partitioned and, therefore, if any further direction is at all to be given, the direction can be given only in that preliminary decree and not afterwards. (1968) 9 Guj LR 220 (231).

(17) Partition suit — Plaintiff's title and possession disputed by defendants — Intervener claiming title and possession with himself — Intervener, held, ought to be impleaded — Question of title has to be gone into. 1968 Pat LJR 433 (437): 1969 BLJR 264.

(18) In a scheme decree as under a partition decree all the parties may have rights and all of them may be in a position of plaintiffs or defendants. AIR 1960 Cal 718 (721): 1959 Cal LJ 237 (DB).

(19) The mere fact that there is a decree for partition, does not lead to the conclusion that what the decree decided is finally given effect to, and the subsequent state of affairs must be presumed to accord with that decree. 1968 Cur LJ 259 (261): ILR (1968) 2 Punj 246.

(20) Where partition has not been made or commenced by Collector, the Court can recall instructions and vary them. This can be done even by the appellate Court. AIR 1965 Mys 46 (47): (1964) 1 Mys LJ 29.

2. Jurisdiction of Court and Collector.— (1) Where the Collector disregards the directions in the decree, the Court has power to interfere and set right his action. AIR 1956 Bom 345 (346) (DB).

(2) Court has inherent power to direct sale of property by public auction apart from the provisions of the Partition Act. (1968) 72 Cal WN 837 (843) °° (1966) 7 Guj LR 121 (126): ILR (1966) Guj 143.

[But see AIR 1968 Ker 282 (283): 1968 Ker LT 70. (ILR (1966) Guj 143, Dissented.)]

(3) Civil Court passing preliminary decree in partition suit ordering "a commissioner or a surveyor be appointed" and not directing collector to effect partition — No objection taken to preliminary decree neither was it appealed against — Final decree passed cannot be challenged when limitation for appeal against preliminary decree had expired. (1968) 9 Guj LR 220 (227) (DB).

(4) Order 20, Rule 18 and Section 54, Civil P. C. constitute Collector exclusive authority to effect partition and there is no provision in Civil P. C. which confers any power on civil Court to sit in judgment over partition effected by Collector. (1968) 1 Mys LJ 491 (495): (1968) 14 Law Rep 368.

(5) Where a Collector effects a partition under directions of Civil Court under O. 20, R. 18 and in accordance with Bombay Land Revenue Code, he need not report to Civil Court nor seek approval to the action taken though normally a report is sent. AIR 1964 Mys 31 (33): (1963) 2 Mys LJ 451 (DB). (AIR 1959 Mad 336 (FB), Dissented.)

[But see AIR 1964 Mys 169: (1963) 2 Mys LJ 346 (DB). (AIR 1945 Bom 338 (FB), Dissented.)]

See also Notes under S. 54.

3. Moveable property.— (1) Where in a suit for partition of moveable property the plaintiff files a list of properties and the defendant either denies that they are liable to partition or that they exist, it is incumbent on the Court, before passing a preliminary decree, to determine the following points: (1) whether such properties exist, and if so in whose possession; (2) whether they are partible; and (3) what is their value. AIR 1919 Oudh 208 (210).

4. Preliminary decree.— (1) In case coming under sub-rule (2), the Court may pass a preliminary decree. It is not obligatory to do so in every case. (1949) 55 Mys HCR 240 (250) (DB).

(2) Where a partition cannot be conveniently made without further enquiry, a preliminary decree may be passed declaring the rights of the several parties interested in the property leaving the actual partition to be made later on. AIR 1914 All 272 (273): 36 All 461 (DB) °° AIR 1929 Oudh 117 (119) (DB).

(3) Question whether certain property in defendant's possession is available for parti-

Order 20, Rule 18 — Note 4 (contd.)

tion or not should be left to be decided at the enquiry subsequent to the preliminary decree. AIR 1925 Pat 433 (433) (DB).

(4) After a preliminary decree has been passed in a partition suit, the proper course for the plaintiff desiring an absolute separation of his share is to apply for a final decree and not to bring a fresh suit for that purpose. AIR 1929 Oudh 456 (457): 5 Luck 280 (DB).

[See however AIR 1957 Andh Pra 40 (41).]

(5) There is no limitation for an application for final decree inasmuch as the rule does not contemplate any such application being made by the party. AIR 1929 Oudh 456 (457): 5 Luck 280 (DB).

(6) Court cannot, after a preliminary decree has been passed, dismiss suit for default in depositing the fee for a commissioner to make a final partition. AIR 1925 Pat 433 (433, 434) (DB) °° AIR 1932 Mad 519 (522) (DB).

(7) Where an order dismissing the suit for default has been passed after the passing of preliminary decrée, it cannot be ignored unless it is set aside in due course of law. AIR 1936 Lah 875 (876).

(8) Any party to the suit in whose interest it is that further proceedings be taken, may move the Court to pass a final decree. AIR 1924 PC 198 (198): 4 Pat 61: 51 Ind App 321 °° AIR 1966 All 601 (602).

(9) As to the form and contents of "preliminary decree", see AIR 1942 Cal 300 (303): ILR (1941) 2 Cal 410.

(10) If in a suit for partition, litigation and execution proceedings are pending in respect of some of the properties, these have to be kept joint and their partition can be effected only after the termination of the proceedings when the rights of the parties in these properties are finally ascertained. AIR 1956 Ajmer 6 (7).

(11) Partition suit in respect of land containing graves of members of family — Form of decree. AIR 1959 All 78 (78): 1957 All LJ 807 (DB).

(12) Commissioner for partition also partitioning shares of defendants as between themselves — Court however refusing claim of defendants for having their shares partitioned — **Held**, there was no difficulty in maintaining allotment to plaintiff vis-a-vis defendants all combined. AIR 1968 Cal 380 (381): 72 Cal WN 128 (DB).

(13) Where a compromise is entered into between the parties after the passing of the preliminary decree and which has a vital bearing upon the allotment of the properties among the sharers it is certainly open to the parties to request the Court to take this altered circumstance into consideration for the purpose of allotting shares to the parties at the stage of the final decree. AIR 1965 Mad 305 (306, 307): (1965) 2 Mad LJ 533 (DB).

(14) In a suit for partition the Court set aside certain alienation subject to payment to alienee in a certain time. The payment was not so made and extension of time asked for was refused. With the application for final decree the amount was deposited. **Held**, the court could have extended time and former dismissal of extension application does not act as res judicata. 1963 Mys LJ (Supp) 81 (85) (DB).

(15) A decree under Order 20, Rule 18 (1) directing partition by Collector is not a preliminary decree. So far as Civil Courts are concerned it is final for all purposes. AIR 1959 Mys 233 (234): 37 Mys LJ 103 (DB).

5. "Giving such further directions".— (1) The words 'giving such directions' include also directions for inquiry as to future mesne profits. See AIR 1951 Mad 938 (939, 940): ILR (1952) Mad 173 (FB).

(2) A Court can pass a final decree for mesne profits in a partition suit although there has been no preliminary decree in respect of such profits. AIR 1951 Mad 938 (943): ILR (1952) Mad 178 (FB). (AIR 1919 Mad 998: 42 Mad 296; 1931 Mad WN 846; AIR 1945 Mad 222 and AIR 1947 Mad 109, **Overruled.**) °° AIR 1958 Andh Pra 520 (522) (DB) °° AIR 1956 Pat 244 (249) (DB) °° 1967 Ker LT 1017 (1021): 1967 Ker LR 852 (DB) °° AIR 1967 Pat 131 (133) (DB). (When the matter had become final, application was not maintainable) °° ILR (1966) 1 Mad 151 (156) (DB) °° AIR 1963 Mad 171 (174): 75 Mad LW 683 °° AIR 1960 Andh Pra 45 (47) (DB).

(3) Where a preliminary decree on compromise in a suit for partition omits to make any mention of mesne profits, still it is open to the Court to direct an enquiry into mesne profits where it finds that the intention of both the parties is that mesne profits should be paid to each other. AIR 1938 Oudh 103 (105) (DB).

(4) It is not competent to one of the parties to make petition for enquiry into mesne profits at the time when the properties are being delivered to him in pursuance of the final decree. AIR 1957 Mad 184 (185).

(5) Suit by purchaser from coparcener for partition and separate possession of share-purchased — Question of mesne profits must be determined in the partition suit itself and not by a separate suit. AIR 1935 Pat 80 (82) (DB).

(6) Where the preliminary decree in a partition suit directs accounts to be taken but is silent as to interest, it is competent to the Court to award by its final decree, interest in a proper case. AIR 1925 Bom 406 (408, 409): 49 Bom 282 (DB).

(7) The 'further directions' mean directions which relate to the working out of the preliminary decree for partition and cannot be invoked as conferring on the Court a substantive power of sale apart from partition. AIR 1952 Cal 893 (897): ILR (1953) 2 Cal 228 (DB).

Order 20, Rule 18 — Note 5 (contd.)

[See also AIR 1957 Andh Pra 25 (25).]

(8) In a partition suit where there is no allegation by plaintiff of ouster or exclusion a claim for mesne profit is unsustainable. 1963 BLJR 297 (299) (DB).

6. Final decree.— (1) A preliminary decree for partition passed under this rule, cannot be made effective without a final decree. AIR 1935 PC 12 (13) °° AIR 1952 Trav-Co 428 (430) (DB).

(2) If subsequent to preliminary decree, quantum of shares of co-sharers increases or decreases by a subsequent event, Court may take this into account for passing final decree. AIR 1956 Pepsu 97 (98) °° AIR 1921 Pat 296 (297) (DB).

[See also AIR 1955 Mys 6 (7): ILR (1955) Mys 12.]

(3) If it transpires that preliminary decree necessitates change in shares, Courts can and should do so. Change should be done before passing of final decree. **AIR 1967 SC 1470 (1473): (1967) 3 SCR 153.** ((1913) ILR 35 All 159 and AIR 1945 Oudh 312 and AIR 1961 Punjab 120, **Overruled.**)

(4) In working out preliminary decrees for partition, the Court may, instead of making an actual division of all the property, give one coparcener a charge over the share of another for any difference in favour of the former. **AIR 1957 SC 577 (581, 582, 583): 1957 SCR 775** °° AIR 1930 Mad 988 (990) (DB).

(5) A decree for partition is a joint decree in favour of all the share-holders and therefore execution proceedings taken by one of them are sufficient to keep the decree alive in favour of all. (1878) 3 Cal 551 (552) (DB).

(6) Where, along with the preliminary decree in a partition suit, the Court passes an executable order for costs in favour of the plaintiff, it is open to the latter to apply to have such order incorporated in the final decree although limitation for the execution of such order independently may have expired. AIR 1938 Pat 188 (189) (DB).

(7) After a preliminary decree has been passed, it always open to the parties before the final decree, upon proper procedure, to bring in further property for partition. AIR 1935 PC 12 (12, 13).

(7-A) A suit for partition even when the report of the Commissioners is confirmed and a decree is directed to be drawn in accordance therewith is a pending litigation until the Court signs the final decree. AIR 1969 Pat 284 (286). (On death of plaintiff, his heirs could be substituted.)

(8) A partition suit in which a preliminary decree has been passed is still a pending suit and the rights of parties who are added after the preliminary decree have to be adjusted at the time of the final decree. AIR 1940 PC 11 (16): 67 Ind App 11 °° AIR 1956 Pepsu 97 (98).

(9) Where after a preliminary decree, the parties amicably settle their disputes and effect a partition without the help of the Court there is nothing to be done under the preliminary decree. AIR 1952 Cal 579 (584) (DB) °° ILR (1967) 1 Mad 136 (146): 79 Mad LW 395.

(10) The final decree proceedings under this rule only relate to matters provided in the preliminary decree. AIR 1953 Mad 723 (726) (DB).

(11) Where a decree-holder mistakenly treats the preliminary decree as a final decree he will not be estopped from moving for the passing of a final decree at any subsequent stage. AIR 1952 Trav-Co 428 (431) (DB).

(12) Suit for partition — Defendants' application for final decree by separation of their share — They have to pay court-fees and stamp-duty, if any. AIR 1966 All 601 (602).

[But see 1961 Jab LJ 326 (328).]

(13) So long as suit for partition is not terminated by effective final decree an application for pre-emption which is a statutory right continues. AIR 1968 Cal 380 (382): 72 Cal WN 128 (DB).

(14) Defendants claiming partition of their respective shares — Some defendants not depositing costs for partition — One defendant withdrawing cash deposited by him — Shares of defendants should not be partitioned between themselves. AIR 1968 Cal 380 (382): 72 Cal WN 128 (DB).

(15) Partition suit between Muhammadan co-sharers — Property in dispute in the hands of alienees — Preliminary decree passed in appeal in ignorance of death of one of co-sharers (who was pro forma respondent) — Decree not nullity — Validity cannot be assailed collaterally in proceedings for final decree. AIR 1963 Madh Pra 282 (284): 1964 MPLJ 648 (DB).

(16) A final decree passed in a partition suit, against the defendants, two of whom were dead at the time of the passing of the final decree, is a nullity. At the stage of final decree, when the rights of the parties have to be declared, opportunities should be given to the legal representatives of the deceased parties to agitate their rights. AIR 1961 Orissa 140 (141).

(17) Notice of final decree proceedings mandatory. AIR 1968 Orissa 140 (141): 34 Cut LT 560. (AIR 1949 Pat 68, **Diss.**) °° 1962 BLJR 695 (697).

(18) Transfer made after preliminary decree should not be ignored at the time of allotment. AIR 1969 Pat 7 (7).

(19) A preliminary decree passed in a partition suit is not a tentative decree but must be regarded as conclusive. **AIR 1963 SC 992 (995): (1963) Supp 2 SCR 616.**

(20) Suit for partition — Claim for accounts from co-sharer — Amount found not mesne profits — Such claim should be adjusted in final decree. **AIR 1964 Orissa 94 (96): 30 Cut LT 386.**

R. 19. Decree when set-off is allowed.—(1) Where the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

(2) **Appeal from decree relating to set-off.**—Any decree passed in a suit in which a set-off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

(3) The provisions of this rule shall apply whether the set-off is admissible under Rule 6 of Order VIII or otherwise.

[1882 and 1877, S. 216; 1859, S. 195.]

HIGH COURT AMENDMENT

Allahabad

In sub-rule (1), substitute a comma for the full stop at the end, and add the following:—

"but no decree shall be passed against the plaintiff unless the claim to set-off was within limitation on the date on which the written statement was presented."

Order 20, Rule 18 (contd.)

7. Appeal.— (1) An order on an application for the appointment of a commissioner to work out the shares in a decree for partition is not appealable. AIR 1916 Mad 809 (810) (DB) °° (1913) 35 All 159 (162) (DB). **(Overruled on another point in AIR 1967 SC 1470.)**

(2) Where after a preliminary decree but before a final decree in a suit for partition of property, the Court, even when there is no application to that effect, directs a sale because in its opinion the property is not capable of convenient division and enjoyment in separate shares, the order is one which should be regarded as a decree open to appeal. AIR 1957 Andh Pra 25 (26).

Order 20, Rule 19

1. Appeal from decree relating to set-off. — (1) A preliminary order disposing of a claim of set-off made by the defendant is not a decree and is not appealable by itself but can be attacked in an appeal from the decree. AIR 1917 Lah 261 (265): 1917 Pun Re No. 62 (DB).

2. Decree for defendant claiming set-off. — (1) Where the amount due to the defendant by the plaintiff is found to exceed that due to the plaintiff by the defendant the Court may not only dismiss the suit, but may pass a decree in favour of the defendant against the plaintiff. (1905) 32 Cal 654 (659) (DB) °° AIR 1934 All 543 (545): 56 All 912 (DB).

(2) Where the plaintiff fails to substantiate his claim at the trial and no decree can be made in the plaintiff's favour for any amount, this rule does not deprive the defendant of his claim for set-off. (1951) 88 Cal L Jour 90 (98).

(3) A decree may be passed under O. 20, Rr. 15 and 16 in favour of the defendant in a suit for accounts, where, on taking accounts, it is found that the balance is in defendant's favour. AIR 1924 All 854 (854, 855): 46 All 858 (DB) °° AIR 1931 Cal 358 (358, 359) (DB).

[See however AIR 1920 Mad 819 (821): 42 Mad 873 (DB).]

(4) Where a bank which had allowed its customer facility to overdraw in the current account filed a suit for a sum stated to be due on over-draft account and the defendant while acknowledging the liability claimed return of shares deposited with the bank as security or in the alternative claimed the value of shares minus the amount due and paid court-fees on his claim.

Held, that it was proper for the Court to have ascertained the value of shares and passed a decree in the suit itself in terms of O. 20, R. 19 (1). AIR 1966 Andh Pra 246 (251): (1964) 1 Andh WR 352.

(5) A set-off and a counter claim are distinct remedies. Set-off is a ground of defence, a shield which if established affords an answer to plaintiff's claim; counter claim is no defence but a weapon of offence. 18 STC 163 (176) (DB) (Guj).

3. Applicability of rule to equitable set-off — Sub-rule (3). — (1) The rule applies also to equitable set-off and provides for a decree being passed giving effect to such set-off. AIR 1954 Trav-Co 243 (245): ILR (1954) Trav-Co 281 (FB) °° AIR 1917 Mad 253 (259): 39 Mad 939 (DB).

R. 20. Certified copies of judgment and decree to be furnished.—Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

[1882 and 1877, S. 217; 1859, S. 198.]

HIGH COURT AMENDMENTS

Bombay: Dadra and Nagar Havelia

In Order XX, for the existing Rule 20 and its marginal note, substitute the following as Rule 20 and marginal note:—

"**20. Certified copies of judgment and decree to be furnished.**—(1) Certified copies of judgment and decree shall be furnished to the parties on application to the Court having custody of the record, and at their expense.

(2) The application may be made by the party himself or by his recognised agent or by his pleader and may also be sent by post." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965].

Madhya Pradesh

For the existing Rule 20, substitute the following:—

"**20. Certified copies of judgment and decree shall be furnished to the parties on application and at their expense.**—Applications for copies may be presented in person or by an agent or a pleader or sent by post to the head copyist of the office at the place where the record from which the copies are applied for, will eventually be deposited for the safe custody. When copies from a record in the temporary custody of a Court at a station where there is no record room are required, applications may be presented in person or by an agent or a pleader to the Senior Judge at that station:

Provided that the Judge shall neither comply with applications received by post nor send copies by post." (16-9-1960.)

HIGH COURT AMENDMENT

Rule 21

Allahabad

Add the following:

"21. (1) Every decree and order as defined in Section 2, other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular, or in English, if the Court so orders. As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly, what is the error, defect, or variance alleged, and shall be signed and dated by the person making it.

[As amended on 1-11-1941.]

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rules 7 and 8.

Order 20, Rule 20 — Note 1

(1) An offence committed in connection with an application under this rule comes within the purview of Secs. 195 and 476 of the Criminal Procedure Code. AIR 1928 Lah 759 (761, 762).

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rules 7 and 8.

(5) When the Judge signs the decree, he shall make an autograph note stating the date on which the decree was signed."

ORDER XXI

EXECUTION OF DECREES AND ORDERS

[See Sections 36 to 74.]

PAYMENT UNDER DECREE

R. 1. Modes of paying money under decree.—(1) All money payable under a decree shall be paid as follows, namely:—

(a) into the Court whose duty it is to execute the decree; or

(b) out of Court to the decree-holder; or

(c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (a) of sub-rule (1), notice of such payment shall be given to the decree-holder.

[1882 and 1877, S. 257; 1859, S. 206.]

ORDER 21, RULE 1 — SYNOPSIS

1. Scope and applicability.
2. Payment into Court.
3. Who should make payment.
4. Effect of payment.
5. Decree directing payment to decree-holder.
6. Payment out of Court to decree-holder.
7. Notice of payment.

1. Scope and applicability. — (1) The judgment-debtor is bound to pay the decretal debt in one of the modes specified in the rule. AIR 1933 Mad 523 (524) °° 1961 Jab LJ 756 (757).

(2) He is entitled to choose between the two methods of payment, either directly to the decree-holder or into the Court in the absence of a special direction. (1956) 69 Mad LW 913 (914).

(3) The rule does not apply to decrees that are inexecutable. AIR 1929 All 207 (207): 51 All 527 (DB).

[See however AIR 1935 Pat 385 (393): 14 Pat 488.]

(4) The rule does not apply to money payable under an order, though such orders are executable, under the provision of S. 36, like decrees. (1889) 12 Mad 120 (122).

(5) 'Money payable under a decree' — Word 'payable' does not imply that amount should have been ascertained sum. AIR 1966 Mad 460 (461): 79 Mad LW 276.

(6) Application for restitution of costs of enquiry under Sec. 74, Registration Act already paid as per District Registrar's order — Realisation to be in accordance with provisions of O. 21, C. P. C. — Munsiff's Court can entertain application. 1963 Ker LJ 253 (254).

2. Payment into Court. — (1) Where a payment under a decree has to be made only into Court, as in the case of pre-emption decrees under O. 20, R. 14, and the Court is closed on the last day for making such payment, the payment can be made on the day the Court re-opens. (1881) 3 All 850 (851) (DB) °° AIR 1925 All 687 (687) (DB) °° (1880) 5 Cal 906 (909) (DB) °° AIR 1962 Andh Pra 308 (311): ILR (1960) 2 Andh Pra 440 (DB).

(2) The rule mentioned in point 1 will apply even where the decree amount may be paid to the decree-holder or into Court. AIR 1949 Nag 141 (144): ILR (1948) Nag 612 (DB). (AIR 1938 All 199 and AIR 1929 All 207, Dissent.) °° 1957 MPLJ 721 (721, 722) °° (1910) 35 Bom 35 (37) (DB) °° AIR 1927 Mad 1196 (1196, 1197) (DB) °° (1968) 70 Pun LR 274 (275, 276).

[But see AIR 1929 All 207 (207): 51 All 527 (DB) °° AIR 1938 All 199 (200): ILR (1938) All 337 °° AIR 1946 Oudh 156 (158): 21 Luck 353 (DB) °° 1961 All LJ 889 (891, 892): 1961 All WR (HC) 685. (Compromise decree.) °° (1956) 69 Mad LW 913 (914).]

(3) Where according to the Government notification the Courts were enjoined to undertake all urgent work even during the vacation and it was possible for the judg-

HIGH COURT AMENDMENTS

Allahabad

In clause (b) of sub-rule (1) of Rule 1, add after the word "decree-holder" the following:—

"through a bank or by postal money order or evidenced by a document"

(1-6-1957.)

Assam and Nagaland

Same as that of Calcutta. See Act 27 of 1962, Ss. 13 and 15 (1-12-1963).

Bombay: Dadra and Nagar Haveli

In Order XXI, for the existing rule 1 and its marginal note, substitute the following as rule 1 and marginal note:—

"1. **Modes of paying money under decree or order.**—(1) All money payable under a decree or order shall be paid as follows, namely:—

(a) by deposit in or by postal money order to the Court whose duty it is to execute the decree or order; or

(b) out of Court to the decree-holder; or

(c) otherwise as the Court which made the decree or order directs.

(2) Where any payment is made under clause (a) of sub-rule (1), notice of such payment shall be given by the judgment-debtor to the decree-holder either through Court or direct by registered post at the registered address of the decree-holder and upon proof of such notice, interest, if any, on the decretal amount so deposited or paid shall cease to run from the date of service of the notice." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965].

Order 21, Rule 1 — Note 2 (contd.)

ment-debtor to deposit the amount on the due date which fell during the vacation but he failed to do so and deposited the same on the opening day after the vacation it was held that the payment could not be deemed to have been made within time. AIR 1957 Raj 378 (380): ILR (1957) 7 Raj 276.

(4) An arbitrator is not an officer of the Court and a payment to him is not a payment into Court. AIR 1924 Rang 263 (264): 3 Rang 147 (DB).

(5) Where a receiver appointed in an administration suit was not authorized to receive certain payments to be made by X but the latter made the payments to the receiver who misappropriated them, X is not discharged from liability, by reason of such payments. AIR 1932 PC 191 (193): 59 Ind App 311: 7 Luck 382.

(6) Payment made to a process-server when serving the process in the execution case, is a payment under this rule read with Rule 38. AIR 1957 Orissa 224 (225): ILR (1957) Cut 474.

(7) The words "all money payable under a decree" do not mean the entire amount payable under the decree. AIR 1933 Pat 89 (90): 11 Pat 796 (DB).

(8) Where, under the rules, all moneys payable into Court, were to be deposited in the Imperial Bank, a tender by the judgment-debtor made to the Bank on the due date before termination of the working hours but after 2 P. M. is a valid tender and there is no default on the part of the judgment-debtor. AIR 1944 Lah 470 (471, 472) (DB). (Reversed on facts in AIR 1948 PC 17.)

[See also 1963 Jah LJ 871.]

(9) The decree is not satisfied by the furnishing of security under O. 41, R. 5 because the furnishing of security does not amount to a payment into Court within the meaning of this rule. AIR 1951 Hyd 95 (96): ILR (1952) Hyd 91.

(10) Tender for payment of decretal amount presented to Court by judgment-debtor before final date — Amount deposited in Bank after final date through no fault of his — Tender made held was tantamount to actual payment on that date. 1968 Raj LW 226.

3. Who should make payment. — (1) A payment into Court under this rule can be made only by the judgment-debtor, his agent, or his representative. AIR 1917 Mad 739 (741) (DB).

(2) A payment made by the mortgagee of a party liable to pay is effective, though he is not a party to the suit. AIR 1924 PC 133 (135): 51 Ind App 236: 48 Bom 404.

4. Effect of payment. — (1) A payment into Court towards a decree debt operates as a discharge of the decree debt to that extent. (1897) 20 Mad 224 (229) °° (1873) 20 Suth WR 131 (131) (DB).

[See also AIR 1968 Bom 363 (365): 70 Bom LR 151.]

(2) Where interest has been awarded on the decree amount, it will cease to run on the sum deposited from the date of notice of deposit to the decree-holder. AIR 1957 Trav-Co 241 (245): ILR (1956) Trav-Co 575 (DB) °° AIR 1918 All 234 (234, 235): 40 All 125 (DB) °° AIR 1933 Lah 126 (126).

[See Note 7.]

(3) If, after having made the payment, the judgment-debtor prevents the sum reaching the hands of the decree-holder, he

Calcutta: Andaman and Nicobar Islands

(1) For clause (a) of sub-rule (1), substitute the following clause:—

"(a) By deposit in or by postal money order sent to the Court whose duty it is to execute the decree; or".

(2) In sub-rule (2)—

(i) Read the number 2 as 2 (a).

(ii) After the words "the decree-holder", add the words "or the person in whose favour the order is made."

(iii) Add the following as clause (b):—

"(b) the costs of giving such notice shall be borne by the person making payment who shall have the option of having the notice served either by a process-server of the Court or by a registered post. No such notice shall issue until the said cost shall have been paid." (3-2-1938.)

Delhi and Himachal Pradesh

Same as that of Punjab. See Act 27 of 1966, Ss. 7 and 17 (31-10-1966 and 1-5-1967).

Gujarat

For the existing sub-rule (2) substitute the following:—

"(2) Where any payment is made under clause (a) of sub-rule (1), notice of such payment shall be given to the decree-holder either by the judgment-debtor or at his instance by the Court, and upon proof of such notice, interest, if any, on the decretal amount shall cease to run from the date of service of the notice." (17-8-1961.)

Order 21, Rule 1 — Note 4 (contd.)

will be liable for interest until the money becomes available to the decree-holder. AIR 1943 Mad 334 (335) (DB) °° AIR 1929 Nag 227 (228).

(4) Where, the judgment-debtor asks the Court to require the decree-holder to furnish security before the money deposited by him is paid to the decree-holder, on the ground that the decree-holder is a minor, the judgment-debtor is not liable to pay interest on the deposit to the decree-holder. AIR 1943 Mad 334 (335) (DB).

(5) Where the decree-holder owing to this being unable to furnish security failed to withdraw the decretal amount deposited by the judgment-debtor as a condition precedent to obtaining stay of execution of decree pending his appeal it was held that the decree-holder by such failure did not cease to be entitled to interest subsequent to the date of the deposit. AIR 1950 Mad 807 (808) °° AIR 1960 Mad 278 (280, 281): (1959) 2 Mad LJ 506. (Overruled on another point in AIR 1963 Mad 45 (FB).)

(6) The security furnished under O. 41, R. 5 does not amount to a payment under the decree and has not the effect of discharging the decree. AIR 1951 Hyd 95 (96): ILR (1952) Hyd 91

(7) Where the decree provided that if a certain portion of decretal amount be paid within a certain date the decree should be deemed as fully satisfied, and the judgment-debtor paid the amount after the date fixed, stating that he was doing so in full discharge of the decree and the decree-holder withdrew the amount, it was held that the withdrawal did not mean that he accepted the amount in full satisfaction of his decree. AIR 1949 Nag 385 (386, 387): ILR (1949) Nag 295.

(8) Compromise decree ⟶ Decree-holder agreeing under compromise to accept less than decretal amount if paid before fixed date ⟶ Delay in depositing amount ⟶ Withdrawal of deposit by decree-holder ⟶ Decree-holder must be deemed to have condoned delay and accepted payment in full satisfaction of his claim. AIR 1961 All 91 (92).

5. Decree directing payment to decree-holder. — (1) Even where the decree directs the payment to be made to the decree-holder, payment into Court is a valid compliance with the decree. ('10) 35 Bom 35 (37) (DB) °° AIR 1925 Mad 743 (744) °° AIR 1923 Nag 246 (246, 247): 19 Nag LR 116 °° 1961 Jab LJ 756 (757) °° (1956) 69 Mad LW 913.

6. Payment out of Court to decree-holder.— (1) A payment to the decree-holder out of Court also discharges the decree. (1887) 9 All 9 (10) (DB)

[See (1959) 25 Cut LT 303.]

(2) Where payment is made outside Court the decree-holder is not bound to accept a sum in part satisfaction of his decree and the refusal to receive it will not deprive him of his right to interest. (1867) 7 Suth WR 20 (20) (DB).

(3) Where a payment out of Court is made through post before a certain fixed date but does not reach the decree-holder

Madhya Pradesh

Substitute—

(a) "decree or order" for "decree" wherever it occurs in the rule, and in the marginal note;

(b) "by deposit in, or by postal money order to" for the word "into" occurring in clause (a) of sub-rule (1);

(c) "shall be given by the judgment-debtor to the decree-holder either through Court or direct by registered post" for "shall be given to the decree-holder" occurring in sub-rule (2). (16-9-1960.)

Orissa

Same as that of Patna.

Patna

For Rule 1, substitute the following:—

"1. (1) All money payable under a decree or order shall be paid as follows, namely:—

(a) by deposit in or by special postal money order to the Court whose duty it is to execute the decree or order; or

(b) out of Court to the decree-holder; or

(c) otherwise as the Court which makes the decree or order shall direct.

(2) Where a judgment-debtor makes any payment under clause (a) of sub-rule (1), he may give notice thereof to the decree-holder—

(a) either through the Court, on payment of the fees laid down in the rules framed by the High Court under clause (1) of S. 20 of the Court-fees Act, 1870 (Act VII of 1870), or

(b) Notwithstanding anything contained in Order 48, Rule 2, by registered post direct.

Order 21, Rule 1 — Note 6 (contd.)

within that date, the payment is not effective. AIR 1918 All 403 (404, 405) (DB).

(4) Payment out of Court may be made to the decree-holder's agent or representative, or family, to the manager of the Hindu joint family. (1911) 12 Ind Cas 503 (505) (DB) (Mad) °° AIR 1930 All 659 (660) (DB).

7. Notice of payment. — (1) Where no interest has been awarded by the decree and the decretal amount is paid into Court, it operates as a discharge of the decree, even if no notice is given to the decree-holder. AIR 1924 Pat 118 (119): 2 Pat 754 (DB) °° AIR 1968 Bom 363 (365): 70 Bom LR 151.

(2) If the decree awards interest, then the decree-holder is entitled to interest till the date of notice. AIR 1956 Trav-Co 46 (46): ILR (1955) Trav-Co 991 °° AIR 1955 Madh B 126 (127) (DB) °° AIR 1955 Sau 103 (104) (DB) °° AIR 1969 Ker 8 (9): 1968 Ker LT 136.

[But see AIR 1939 Nag 191 (192).]

(3) Notice of payment must be in writing and be served on the decree-holder in the way prescribed for the service of summons. AIR 1925 Nag 52 (54).

(4) Where a decree is attached in execution of another decree the attaching decree-holder who is executing the decree is competent to accept notice of the deposit. AIR 1957 Trav-Co 241 (245): ILR (1956) Trav-Co 575 (DB).

(5) Even if the judgment-debtor fails to give notice of the fact of payment, it is the duty of the Court to inform the decree-holder about it when he next applies for execution of the decree. AIR 1955 Sau 103 (104) (DB) °° AIR 1921 Nag 148 (149).

[But see AIR 1956 Trav-Co 46 (48): ILR (1955) Trav-Co 991.]

(6) Sub-rule (2) casts no special duty on the Court to issue notice on its own initiative and it is the duty of the judgment-debtor to give notice of the deposit to the decree-holder through Court or otherwise. AIR 1957 Trav-Co 241 (245): ILR (1956) Trav-Co 575 (DB).

(7) Sub-rule (2) of this rule does not apply to redemption decrees. AIR 1924 Mad 102 (102) (DB).

[But see AIR 1952 Trav-Co 236 (236) (DB).]

(8) Application for execution to recover balance under decree made more than 3 years after notice of payment under sub-rule (2) but within 3 years from the date the amount was withdrawn by the judgment-creditor — Payment is received by decree-holder at the date when deposit was made — Application held barred under Art. 182, Limitation Act of 1908 — Period not extended under Sec. 20, Limitation Act. AIR 1968 Bom 363 (365): 70 Bom LR 151.

Where interest is payable under the decree or order, such notice shall, if duly proved, operate as a bar to the accrual of such interest, upon the amount so paid, after the date of receipt of such notice by the decree-holder." (28-7-1938.)

Punjab, Haryana and Chandigarh

Add the following explanation to sub-rule (1):—

"Explanation.—The judgment-debtor may, if he so desires, pay the decretal amount, or any part thereof, into the Court under clause (a) by postal money order on a form specially approved by the High Court for the purpose". (11-7-1938): See Act 31 of 1966, Ss. 29 and 32 (1-11-1966).

R. 2. Payment out of Court to decree-holder.—(1) Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree.

[1882 and 1877, S. 258; 1859, S. 206.]

ORDER 21, RULE 2 — SYNOPSIS

1. Scope and applicability.
2. "Money payable under a decree".
3. "Decree of any kind."
4. "Is paid out of Court."
5. Adjustment of decree.
6. Adjustment in part.
7. Oral adjustments.
8. When and with whom payment or adjustment should be made.
9. Payment to one of joint decree-holders. See O. 21, R. 15.
10. Adjustment by guardian. See O. 32 (General).
11. Certification by decree-holder.
12. Effect of certifying without payment or adjustment being made.
13. Certification by one of joint decree-holders. See O. 21, R. 15.
14. Application by judgment-debtor.
15. "Judgment-debtor," meaning of.
16. Certification, form of.
17. Limitation for certification.
18. Recording of adjustment.
19. Notice.
20. Court to which certification should be made. See Note 14.
21. Uncertified payment or adjustment.
22. Court acting under O. 21, R. 16.
23. Court dealing with application under O. 21, Rr. 90, 95, 97 and 98.
24. Suit by judgment-debtor based upon an uncertified payment or adjustment.
25. Suit by decree-holder based on uncertified payment or adjustment.
26. Fraud.
27. Effect on limitation.
28. Operation as estoppel.
29. Remedies of judgment-debtor.
30. Suit for damages.
31. Restitution of uncertified payment on reversal of decree in appeal.
32. Criminal proceedings.
33. Appeal and revision.

1. Scope and applicability. — (1) The object of this rule is to ensure that the Court executing the decree shall not be troubled with any disputes between the parties with regard to any payment or adjustment unless the same has been duly certified or recorded. AIR 1957 All 622 (632, 634): ILR (1957) 2 All 1 (DB) °° AIR 1922 Bom 380 (380, 381): 46 Bom 226 (DB).

(2) Sub-rule (1) contemplates a certification by the decree-holder and a record by the Court of the payment or adjustment; sub-rule (2) contemplates an application by the judgment-debtor. In this case notice is to be given to the decree-holder and the Court should give a judicial decision whether the payment or adjustment should be recorded as certified. AIR 1929 PC 19 (22, 23): 3 Luck 684: 56 Ind App 30.

(3) The two essential conditions of O. 21, R. 2 (2) are that intimation should be given

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Bombay: Dadra and Nagar Haveli[a]

In Order XXI, Rule 2, for the existing sub-rule (2), substitute the following as sub-rule (2) :—

(2) The judgment-debtor also may inform the Court by an application in writing supported by an affidavit of such payment or adjustment and apply to the Court to issue a notice to the decree-holder to show cause on a day to be fixed by the Court why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Delhi and Himachal Pradesh

Same as that of Punjab, See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Kerala: Laccadive, Minicoy and Amindivi Islands

In sub-rule (2) for the words "The judgment-debtor" substitute the words "Any party to the suit or his legal representative or any person who has become surety for the decree-debt" [9-6-1959]; Reg. 8 of 1965, S. 3.

Jurisdiction of Kerala High Court has been extended to the Union territory of Laccadive, Minicoy and Amindivi Islands by S. 60 of Act 37 of 1956.

Order 21, Rule 2 — Note 1 (contd.)

to the Court within the specified time and that the decree-holder is given an opportunity to put his case before Court. A prayer for recording adjustment is not an essential ingredient of R. 2 (2) of O. 21. AIR 1959 Andh Pra 632, (634, 635, 636): (1959) 2 Andh WR 194 (FB). (AIR 1957 All 622, **Dissented from.**)

(4) Sub-rule (3) imposes a bar upon the Court executing the decree and prevents it from recognising any payment or adjustment which has not been certified or recorded as certified as required by the rule. AIR 1952 Trav-Co 561 (562) °° AIR 1929 PC 19 (22): 3 Luck 684: 56 Ind App 30 °° AIR 1925 Bom 309 (309): 49 Bom 548 (FB). (34 Bom 575, **Overruled.**) °° AIR 1928 Oudh 195 (198): 3 Luck 170 (FB).

(5) The prohibition under sub-rule (3) will apply only when the parties to a transaction entered into for the purpose of satisfying or adjusting a decree stand to one another, at the date of such transaction, in the relation of judgment-debtor and judgment-creditor. AIR 1951 Trav-Co 216 (216) (DB) °° AIR 1931 Mad 399 (400): 54 Mad 184 (DB) °° AIR 1927 Cal 694 (696) (DB).

[See however AIR 1937 Cal 31 (36).]

(6) There is nothing in the wording of this rule to limit the payment to the decree-holder only. AIR 1923 All 271 (271): 45 All 304 (DB).

(7) This rule does not apply to a compromise which is entered into between the parties to a mortgage suit after a final decree, and which is pleaded in bar of an application for a personal decree against the mortgagor under O. 34, R. 6. The reason is that there is no adjustment of the mortgage decree in such a case; nor is the Court to which the application for personal decree is made, a Court executing the mortgage decree. AIR 1941 Rang 316 (317): 1941 Rang LR 774 (DB) °° AIR 1936 Mad 34 (37): 59 Mad 188 (FB).

(8) Section 71 of the Dekkhan Agriculturists' Relief Act (now see Bombay Agricultural Debtors Relief Act (28 of 1947)) expressly excludes the application of sub-rule (3) of this rule to payments out of Court made in proceedings under the Act. AIR 1921 Bom 142 (142, 143): 45 Bom 1128 (DB) °° AIR 1932 Bom 255 (256).

(9) This rule does not apply to proceedings under the Bengal Tenancy Act. (1868) 9 Suth WR 372 (373) (DB).

[But see (1874) 22 Suth WR 204 (204) (DB).]

(10) Sub-rule (3) of this rule has been repealed, so far as the Punjab is concerned, by Sec. 36 of the Punjab Relief of Indebtedness Act, VII of 1934. AIR 1938 Lah 602 (603) °° AIR 1938 Lah 126 (127): ILR (1938) Lah 264 (DB).

(11) The Court conducting an inquiry under S. 19 of the Madras Agriculturists' Relief Act of 1938 in connection with an application under the Act for scaling down a decree debt is not an executing Court and so is not subject to the prohibition contained in sub-rule (3) of this rule. AIR 1942 Mad 597 (598): ILR (1943) Mad 138 (DB).

(12) This rule clearly contemplates a stage in the execution proceeding when the matter lies only between the judgment-debtor and the decree-holder and when no other interests have come into being. AIR 1928 Nag 265 (272): 24 Nag LR 127 (FB). (AIR 1922 Nag 248: 18 Nag LR 134, **Overruled.**) °° AIR 1931 PC 33 (35): 27 Nag LR 95: 58 Ind App 50. **(Overruling AIR 1922 Nag 248: 18 Nag LR 134).**

Madras and Pondicherry

Substitute the following for the existing sub-rule (2):

"Any party to the suit or his legal representatives or any person who has become surety for the decree debt also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly" [R. O. C. No .4955 of 1930]; [Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-1968].

Orissa

Same as that of Patna (i).

Patna

(i) In sub-rule (2) for the words "and if after service of such notice," substitute the following:

"and where certification has been made by an endorsement of such payment or adjustment by the decree-holder or by any person authorized by him in that behalf upon the process issued by the Court, the Court shall issue such notice of its own motion. If after service of the notice,"

(ii) Delet the existing sub-rule (3) of Rule 2 [5-4-1961].

Punjab, Haryana and Chandigarh

Omit sub-rule (3) — Punjab Relief of Indebtedness Act, 1934 (Punj. Act VII of 1934), S. 36 [19-4-1935] read with Punj. Act XLIV of 1960, S. 3 [30-12-1960]; see Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

Order 21, Rule 2 — Note 1 (contd.)

(13) Where the adjustment has been made before the sale and an application for recording the adjustment is made after the sale, the adjustment may be recorded and the sale may be set aside. AIR 1952 Mad 582 (584): ILR (1952) Mad 531 (DB).

(14) An adjustment cannot be recorded under this rule when such recording will defeat the rights of the Government to court-fees under O. 33, R. 10. AIR 1935 Sind 111 (112): 29 Sind LR 317.

(15) After a decree has been satisfied and the decree-holder has certified such satisfaction, there is no subsisting decree and a sale held in ignorance of the satisfaction is void and liable to be set aside. AIR 1945 Mad 161 (164): ILR (1945) Mad 827 (FB) °° AIR 1929 Cal 374 (376): 57 Cal 403 (FB) °° AIR 1955 Pat 158 (161) (FB).

[But see AIR 1918 Oudh 109 (111).]

(16) This rule applies only to the adjustment of a decree or order. AIR 1936 Mad 840 (841).

(17) The executing Court is not precluded from recognizing a compromise entered into between the parties after the decree, though such a compromise does not amount to an adjustment of the decree. (1937) 32 Sind LR 415 (424) (PC).

(18) O. 21, R. 2 contemplates adjustment of the decree consent, express or implied. Where there is no evidence of any consent on the part of the appellant who was never willing to take back the wife and resume conjugal relations, O. 21, R. 2 does not apply. **AIR 1967 SC 1193 (1194, 1195): (1967) 1 SCR 147. (AIR 1960 Punj 437, Overruled.)**

(19) O. 21, R. 2 does not apply where the decree which is being executed itself directs that certain payments made by the judgment-debtor shall be taken into account during execution. AIR 1964 All 373 (374).

(20) Decree for declaration that respondent was entitled to keep possession of house till realisation of costs — S. 47 and not this rule applied. AIR 1967 Manipur 33 (37).

2. "Money payable under a decree." — (1) A mortgage decree is a decree for the payment of money even though it contains a further direction for the sale of the mortgaged properties on default of payment. (1910) 7 Ind Cas 258 (259, 260) (DB) (Cal) °° AIR 1920 Pat 731 (733): 5 Pat L Jour 672 (DB) °° AIR 1923 Nag 20 (20) (DB).

(2) Where a mortgagee decree-holder is in possession of the mortgaged properties under the original contract of mortgage or by virtue of the terms of the decree, income received by the mortgagee from the mortgaged property is not "money payable under a decree" and does not therefore require to be certified. AIR 1918 Mad 1154 (1155): 39 Mad 1026 (DB).

(3) Where, in a suit for possession by A against B, his tenant set up a right to hold the land under a mirasi tenure, and the Court declared in favour of B and directed payment of rent as before, it was held that rents paid by B to A out of Court were not "money payable under the decree." (1894) 18 Bom 690 (692) (DB).

Order 21, Rule 2 — Note 2 (contd.)

(4) The words "money payable under a decree" do not mean any money which the party may pay if he chooses, but money which is recoverable by a party in execution against the party liable to pay it. AIR 1926 Mad 749 (751): 49 Mad 716 (DB).

(5) 'Money payable under a decree' — Word 'payable' does not imply that amount should have been ascertained sum — Court executing the decree. AIR 1966 Mad 460 (461): 79 Mad LW 276.

3. "Decree of any kind." — (1) The provisions of this rule are not confined to money decrees but apply to every kind of decree. AIR 1952 All 814 (816) (DB) °° AIR 1935 Pat 385 (389): 14 Pat 488 (DB) °° AIR 1943 Nag 339 (340) (DB) °° AIR 1963 Mys 79 (80): 1962 Mys LJ (Sup) 299.

[See however AIR 1967 Orissa 59 (60): 32 Cut LT 1076. (Rule not applicable to decree for mere eviction.) °° AIR 1951 Mad 853 (854) °° AIR 1958 Andh Pra 705 (707) (DB) °° AIR 1926 Mad 749 (750, 751): 49 Mad 716 (DB) °° AIR 1918 Mad 751 (754) (DB).]

4. "Is paid out of Court." — (1) This rule deals only with voluntary payment out of Court. Where a judgment-debtor pays the amount decreed to the officer of the Court under pressure of process, the payment does not require to be certified under this rule. (1868) 9 Suth WR 462 (462) (DB).

(2) Where in the execution proceedings the parties agree in the presence of Court or out of Court that the decree may be executed in a particular manner, there is nothing to prevent the Court from recording the adjustment of parties. AIR 1952 All 169 (171).

(3) Pre-emption suit referred to arbitration and award made — Money to be paid to vendee within certain period — Pre-emptor depositing amount in Court and notice issued to vendee — Tender held good — Order 21, R. 2 has no application. AIR 1934 Oudh 135 (136, 137) (DB).

(4) Executing Court authorising decree-holder to realise debt due to judgment-debtor from third person — Payment by third person in Court passing decree against him — Payment is not outside Court. AIR 1938 All 141 (143): ILR (1938) All 294 (DB).

(5) Contention that decree has been satisfied by the decree-holder having been in possession of the judgment-debtor's property and enjoyed the usufruct is equivalent to contending that decree has been paid or adjusted out of Court and Court cannot recognise such payment or adjustment without certification under this rule. AIR 1940 Pat 56 (57) (DB).

5. Adjustment of decree. — (1) An adjustment of a decree is an agreement which extinguishes the decree as such in whole or in part, and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree. AIR 1957 Cal 308 (309) °° AIR 1933 Pat 576 (577) (DB) °° AIR 1935 Bom 303 (305) °° AIR 1965 Cal 209 (211, 212) (DB).

[See (1910) 35 Mad 75 (91): 9 Ind Cas 875 (885) (DB) °° AIR 1926 Mad 184 (185).]

(2) An agreement not to execute the decree is an adjustment of the decree within the meaning of the rule. AIR 1957 Cal 308 (309).

[See also AIR 1969 Orissa 32 (34): 34 Cut LT 1121.]

(3) A transaction by which the parties agree to vary the mode by which the reliefs granted by the decree are to be realised in execution in that suit, or the time when the decree becomes executable, is not an adjustment of the decree. AIR 1958 Madh-Pra 333 (337, 338) (DB) °° AIR 1928 Cal 527 (529) (DB) °° AIR 1935 Mad 429 (430) (DB) °° AIR 1959 Pat 258 (260) (DB).

(4) An agreement between the parties to a decree by which arrangements are made to enable the decree-holder to collect moneys due to the judgment-debtor and credit them towards his decree, and which provides for a temporary suspension of execution proceedings, is not such an adjustment of the decree as is contemplated by this rule. (1885) 7 All 424 (431) (DB).

(5) Where the parties agree that certain new or different rights not given by the decree should be included therein and be enforceable in execution, the arrangement is not an adjustment of the decree, but a variation of the decree. Nor can such an arrangement be given effect to by enforcement in execution. AIR 1937 PC 256 (259): 64 Ind App 302. (AIR 1935 Cal 396: 62 Cal 28, Reversed.) °° AIR 1957 Cal 308 (310) °° AIR 1961 All 1 (14): 1960 All LJ 967 (FB) °° AIR 1959 Pat 258 (260) (DB).

(6) Where the parties to a decree agree to vary or modify the same, they can ask the Court to record the same and the Court will then have jurisdiction to execute the decree as modified by agreement. AIR 1948 Nag 35 (37, 38): ILR (1947) Nag 197 (DB)

[See however AIR 1958 Madh Pra 333 (337, 338) (DB).]

(7) Where during the execution of an ejectment decree the parties entered into a compromise on certain conditions the breach of which was to result in an executable ejectment decree and the compromise was recorded by the Court, it was held that the compromise was an adjustment and did not give rise to a new contractual relationship of Landlord and tenant. 1958 All L Jour 640 (641) (DB) °° (1963) 4 Guj LR 710.

(8) Where an agreement is entered into between the parties to a decree touching the manner or time of its enforceability, such agreement can be given effect to in execution proceedings provided that if it is held to be an "adjustment" of the decree, it is recorded under this rule. AIR 1952 All 169 (171) °° AIR 1956 Him Pra 63 (63) °° (1966) 1 Andh WR 121: (1965) 2 Andh LT 400

Order 21, R. 2 — Note 5 (contd.)

°° AIR 1961 Punj 439 (441): ILR (1962) 1 Punj 8 °° AIR 1960 Punj 459 (460).

(9) To constitute an "adjustment," it is not necessary that the judgment-debtor must have carried out all the terms of the arrangements made by him with the decree-holder; a completed contract by which he promises to do something at a future date can be accepted by the decree-holder as a legal and immediate adjustment in satisfaction of the decree. 1954 Ker L Tim 14 (15) °° AIR 1952 All 814 (815) (DB) °° AIR 1941 Lah 149 (151, 152): ILR (1941) Lah 383 (FB). (AIR 1931 Lah 608, **Overruled.**) °° AIR 1938 Rang 202 (203): 1938 Rang LR 385 (FB).

[But see AIR 1925 Mad 206 (207) °° AIR 1930 Mad 410 (411) (DB). (Note: **Dissented from in** AIR 1933 Mad 28: 56 Mad 198.) °° AIR 1936 Sind 191 (195): 30 Sind LR 249 (DB).]

(10) Agreement to do something in future amounts to adjustment — Its non-registration will not affect its operation — Registration Act (1908), S. 18. AIR 1964 Andh Pra 458 (459): (1964) 2 Andh WR 216 (DB).

(11) But an inchoate agreement which, if completed, would bar the execution of the decree, cannot be pleaded as an adjustment within the meaning of this rule. AIR 1948 Nag 35 (36): ILR (1947) Nag 197 (DB) °° AIR 1941 Lah 149 (152): ILR (1941) Lah 383 (FB) °° AIR 1933 Mad 28 (32): 56 Mad 198 (DB).

(12) Where the decree-holder has agreed to accept the doing of certain acts by the judgment-debtor as satisfaction of the decree, the adjustment is not complete till such acts are done. AIR 1938 Rang 202 (203): 1938 Rang LR 385 (FB) °° AIR 1935 Mad 581 (582) (DB) °° 42 Cal WN 313 (314).

[See however AIR 1930 Mad 429 (429).]

(13) An award obtained without the intervention of Court in respect of the subject-matter of any pending proceedings before the Court of law, can be given effect to as an adjustment under this rule or under O. 23, R. 3 only if the parties interested give their consent. AIR 1955 All 353 (361): ILR (1955) 1 All 500 (FB) °° AIR 1958 Andh Pra 679 (681) (DB).

(14) The parties to an execution proceeding can be permitted to refer their disputes to arbitration and the award of the arbitrators in such a case may amount to an adjustment of the decree which can be recorded under this rule. AIR 1955 Sau 88 (90) °° AIR 1941 Bom 20 (22) (DB).

(15) There is no question of the adjustment of a decree when it is transferred to one of the judgment-debtors. AIR 1938 Oudh 106 (106) (DB).

(16) Where there is a dispute as to whether a decree has or has not been adjusted by a compromise, the executing Court will have to determine whether there was a compromise, whether the compromise amounted to an adjustment and what the effect of the adjustment is on the decree. AIR 1955 Bom 64 (67): ILR (1955) Bom 57 (DB) °° AIR 1940 Oudh 381 (381): 15 Luck 712 (DB).

(17) The question whether a decree is adjusted by an alleged compromise is a question of fact. But the question whether such a compromise should be certified under this rule is a question of law. ILR (1943) Kar (PC) 83 (84) (PC).

(18) The acceptance of the decree-holder is necessary for an adjustment under this rule. AIR 1935 All 513 (514) °° AIR 1937 Cal 211 (212): ILR (1937) 1 Cal 781 (DB).

(19) An arrangement which although not consented to by the decree-holder, is binding upon him by operation of law cannot be an adjustment under this rule. AIR 1937 Cal 211 (212): ILR (1937) 1 Cal 781 (DB).

(20) An adjustment of a decree pending an appeal from it is not a 'pre-decree' arrangement but an 'adjustment' within the meaning of this rule. AIR 1936 Mad 494 (495).

(21) A scheme of composition sanctioned by the Insolvency Court, in a case where the creditor's claim is a judgment-debt, is not an adjustment of a decree within the meaning of this rule. (1946) 50 Cal WN 307 (310).

(22) Compromise postponing execution — Judgment-debtor agreeing to pay higher rate of interest than decretal one — Compromise enforceable in execution proceedings. **AIR 1968 SC 1087 (1089): (1968) 3 SCR 158 (DB).**

(23) When the execution court added the compromise decree to the original decree held that the decree holder will have to bring a fresh suit to realise amount under Compromise decree. 1961 Jab LJ 1498 (1500).

(24) Judgment-debtor agreeing to pay higher rate of interest than decretal rate — Cannot be enforced in execution. AIR 1961 All 1 (6, 11, 14): 1960 All LJ 967 (FB).

6. Adjustment in part. — (1) A decree may be adjusted in part and the judgment-debtor is entitled to apply for a certificate of part satisfaction. AIR 1954 All 739 (742) °° AIR 1951 Mad 853 (854).

(2) Where there is a money decree against two or more defendants, an agreement discharging one or some only of the judgment-debtors is an adjustment of the decree in part and should be certified. AIR 1954 Cal 620 (622) (DB) °° AIR 1933 Pat 576 (577) (DB).

(3) Where a decree has been adjusted in part, it can be executed as to the remaining portion. AIR 1933 Bom 100 (101) (DB).

(4) The entrustment of attached moveables to a person suggested by the plaintiff is not tantamount to a part satisfaction of the decree to the extent of the value of that property. AIR 1956 Mad 201 (203).

(5) Payment of part of decretal amount and adjustment regarding balance — It is

Order 21, Rule 2 — Note 6 (contd.)
adjustment of decree within Rule 2. AIR 1963 Mys 175 (176): 40 Mys LJ 1009.

(6) Adjustment of decree in part — Time given to pay balance — Attachment to continue — Additional sum borrowed — Execution of balance of decretal amount is maintainable — Fresh loan to be recovered by fresh suit. AIR 1960 Madh Pra 257 (258): 1960 MPLJ 95.

7. Oral adjustments. — (1) Evidence to prove an oral adjustment subsequent to the decree is not inadmissible by reason of Section 92 of the Evidence Act. AIR 1943 Cal 634 (634, 635): ILR (1943) 1 Cal 195 •• AIR 1941 Lah 149 (151): ILR (1941) Lah 383 (FB) •• AIR 1935 Bom 303 (305) •• AIR 1935 Mad 860 (861): 58 Mad 994 (FB). (AIR 1927 Mad 911 and AIR 1930 Mad 673, Overruled.)

[But see AIR 1922 All 13 (15, 16): 44 All 258 (DB). (Per Walsh J.)]

8. When and with whom payment or adjustment should be made.— (1) The adjustment under the rule must be to the satisfaction of the decree-holder and, therefore, an adjustment to which the decree-holder is not a party cannot be recorded by the executing Court. AIR 1941 Cal 253 (253) (DB) •• AIR 1939 Pat 411 (412, 413): 18 Pat 318 (DB).

(2) The term "decree holder" in this rule includes his assignee and the latter can certify a payment even before his transfer is recognized under Order 21, Rule 16. (1912) 17 Ind Cas 617 (618) (DB) (Mad).

(3) The judgment-debtor also can apply to record a payment made by him to the transferee even before the transfer is recognised under Rule 16. (1912) 14 Ind Cas 702 (103) (DB) (Mad.)

[But see AIR 1935 Nag 230 (234): 31 Nag LR Sup 111 (DB) °° AIR 1937 Mad 605 (606).]

(4) Where after the assignment of a decree satisfaction whereof under this rule is entered on the admission of the original decree-holder on the basis of a payment to the original decree-holder before the assignment, it has been held that the finding is not binding on the assignee. AIR 1948 Mad 6 (7) (DB) °° ('44) 48 Cal WN 419 (419).

(5) There is nothing in this rule to prevent the holder of a decree which is attached, to enter satisfaction of his decree after the attachment, if the payment or adjustment had been made before the attachment. AIR 1919 Mad 198 (199).

(6) Where the decree has been attached it is lawful for the attaching decree-holder to take payment outside the Court and certify the same under this rule. 1956 Andh LT 925 (933).

(7) Where a decree is attached in execution of another decree, the attaching decree-holder is, under Order 21, Rule 53 to be deemed as a representative of the holder of the attached decree. But this representative capacity will apply only to the execution of the decree and will not entitle the attaching decree-holder to certify satisfaction of the decree by accepting a smaller amount than that payable under the decree. AIR 1940 PC 167 (170, 172): ILR (1940) 2 Cal 493: 67 Ind App 360: ILR (1940) Kar PC 321.

(8) Payment outside the Court made by the judgment-debtor of the attached decree to the attaching decree-holder, on being certified has the effect of satisfying the decree to the extent of such payment. AIR 1964 Madh Pra 221 (223, 224): 1963 Jab LJ 710. (AIR 1940 PC 167, Rel. on.)

(9) When a judgment-debtor of an attached decree makes a payment to the attaching decree-holder whose decree is no longer in force, he must be deemed to have done it at his own risk and full satisfaction of the decree against him cannot be granted. 1956 Andh LT 925 (936).

(10) The expression 'to the satisfaction of the decree-holder' in Order 21, Rule 2 (1) means the entire body of the decree-holders where a decree is joint and indivisible. (1959) 63 Cal WN 570: ILR (1960) 1 Cal 479.

(11) Property of judgment-debtor attached in execution and entrusted to sureties — Payment of decree amount by one of the sureties and decree-holder certifying payment — Executing Court cannot reject satisfaction — Judgment-debtor or Official Receiver on his adjudication cannot oppose record of satisfaction made by decree-holder. AIR 1963 Ker 52 (53): 1962 Ker LJ 683.

(12) Consent decree — In absence of direction in decree that money was to be paid to defendant personally, payment into Court must be deemed to be satisfaction of decree. AIR 1959 Madh Pra 352 (353): 1957 MPLJ 721.

9. Payment to one of joint decree-holders — See O. 21, R. 15.

10. Adjustment by guardian. — See O. 32, (General).

11. Certification by decree-holder.—(1) It is the duty of the decree-holder to report to the Court any payment or adjustment made out of Court. AIR 1927 Mad 947 (948) °° AIR 1926 Nag 164 (166). (As per O. 21, R. 11.) °° AIR 1965 Cal 473 (475) (DB).

[See also AIR 1963 Cal 473 (478, 479) (DB). (Tabular statement by decree-holder about default in payments in terms of consent decree — Held, he had not given information in compliance with Order 21, Rule 2.)]

(2) When once a Court is seised of an application to enter up satisfaction of a decree, it is bound to make an enquiry and see whether the decree has been satisfied. AIR 1919 Mad 198 (199).

[But see AIR 1942 Bom 59 (61): ILR (1942) Bom 132 (DB).]

Order 21, R. 2 — Note 11 (contd.)

(3) Statement of adjustment made in Col. 5 of execution application is proper certification. AIR 1966 All 556 (557): 1966 All LJ 1133.

12. Effect of certifying without payment or adjustment being made.— (1) Where a decree-holder admits and certifies to the Court satisfaction of the decree, he cannot afterwards apply to execute the decree on the ground that he was induced to certify by means of fraud or corercion or that the certification was made under a mistake. (1870) 1870 Pun Re No. 1, p. 1 (4) ** AIR 1934 Nag 143 (144): 31 Nag LR 21.

(2) In a partition between a father and his son, a decree obtained by the father fell to the share of the son, who sought thereafter to execute it. The judgment-debtor pleaded satisfaction of the decree by payment to the father prior to the partition. The father supported the judgment-detbor's plea by filing a memorandum of full satisfaction. It was found by the Court that no money was really paid by the judgment-debtor to the father. It was held that as the decree had been found to be really not satisfied by payment and as the father ceased to have any interest in the decree after the partition he had no locus standi to file the memorandum of full satisfaction and therefore it was of no avail. AIR 1948 Mad 6 (7) (DB).

13. Certification by one of joint decree-holders.— See O. 21, R. 15.

14. Application by judgment-debtor.— (1) Where a judgment-debtor pays the amount due under the decree out of Court, he is not bound to wait till the decree-holder fails to certify the payment or till the decree is actually drawn up, but may himself inform the Court of such payment and apply for its being recorded as certified. AIR 1940 All 441 (441) ** (1902) 12 Mad L Jour 94 (95) ** AIR 1924 Cal 1064 (1065) (DB).

(2) Where an application by the judgment-debtor for the payment to be recorded as certified is resisted by the decree-holder on the ground that no such payment or adjustment was made, the Court cannot straightway dismiss the application. (1885) 11 Cal 166 (168) (DB) ** (1917) AIR 1917 Mad 409 (410, 411) (DB) ** 1961 Jab LJ 308 (309).

(3) Upon an application by the judgment-debtor for recording satisfaction of the deree, when the decree-holder resists it, the Court is bound to investigate and decide any question upon which the parties may not be agreed upon such materials as they may legally place before it. AIR 1929 All 79 (80) ** AIR 1919 All 303 (304): 41 All 443 (DB) ** AIR 1922 Pat 276 (277, 278): 1 Pat 644 (DB).

(4) An application by the judgment-debtor alleging adjustment of the decree and praying for dismissal of the execution, cannot be treated both under Section 47 and under Order 21, Rule 2, so as to have the benefit of both. AIR 1957 Cal 808 (810).

(5) The words "to show cause" do not mean merely to allege cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court. (1885) 11 Cal 166 (168) (DB) ** AIR 1917 Mad 409 (410, 411) (DB).

(6) See also the following case. AIR 1951 SC 189 (192, 193): 1951 SCR 929. (AIR 1949 Mad 238, Reversed.)

(7) The dismissal for default of an application under sub-rule (2) does not bar a fresh application by the judgment-debtor for the same purpose, and he is entitled to have an adjudication on the merits subject, of course, to any objection that may be open to the decree-holder. AIR 1931 Lah 505 (505).

(8) A certificate of payment or adjustment should be filed in the Court which has to execute the decree. AIR 1951 Him Pra 60 (61) ** AIR 1935 Bom 158 (159, 160): 59 Bom 345 (DB) ** AIR 1922 Pat 276 (277): 1 Pat 644 (DB).

(9) Any court which is possessed of jurisdiction to entertain an application cannot be described as a court whose duty it is to execute the decree. AIR 1963 Andh Pra 452 (455): (1963) 1 Andh WR 261 (DB).

(10) It there is an adjustment of the decree while an appeal from the decision of the executing Court is pending, the appellate Court before which such an appeal is pending can itself record the compromise. AIR 1952 All 169 (171).

(11) Where an agreement or adjustment has been brought to the notice of the Appellate Court by the judgmen-debtor when an appeal from the decree is pending before it and the same is not objected to by the decree holder, there is a sufficient compliance with the provisions of sub-rule (2). AIR 1928 Cal 527 (530) (DB) ** (1912) 13 Ind Cas 63 (67) (DB) (Cal).

[But see (1913) 21 Ind Cas 639 (641) (DB) (Mad.).]

(12) Court to which certification should be made — Appeal against decision of trial Court pending — Certification should be made to appellate Court and not to trial Court. AIR 1962 Mys 100 (103): 40 Mys LJ 70. (AIR 1922 Mad 66, Dist. AIR 1928 Cal 327 and 13 Ind Cas 63 (Cal), Rel. on.)

(13) Where a decree has been transferred to another Court for execution, the transferee Court is the only Court which has the power to enquire into an application under this rule by the judgment-debtor. AIR 1940 Rang 236 (238): 1940 Rang LR 356 ** AIR 1932 Bom 202 (203) (DB) ** (1894) 16 All 228 (231).

[See however AIR 1963 Mys 175 (177): 40 Mys LJ 1009.]

(14) Application by judgment-debtor raising a question relating to execution, discharge or satisfaction of decree must be

Order 21, Rule 2 — Note 14 (contd.)
tried by executing Court though decree-holder has not applied for execution. AIR 1967 SC 1193 (1194, 1195): (1967) 1 SCR 147. (AIR 1960 Punj 437 (438), Overruled.)

(15) Transfer of decree for execution to another Court — Application by J. D. under Order 21, Rule 2 (2) to transferor Court filed after limitation prescribed by Art. 174, Limitation Act — Parent Court has jurisdiction to decide question and grant relief. AIR 1962 Punj 293 (296): 64 Pun LR 203.

(16) Where the first application under Order 21, Rule 2 was dismissed by an express order saying that it could not be entertained by the Court as the decree had not been transferred to that Court for execution, a second application under O. 21, R. 2 made to that Court beyond limitation after the decree was transferred to it, cannot be regarded as an application for revival of the previous application. AIR 1959 Madh Pra 397 (398): 1959 MPLJ 903.

(17) Power of Court to which precept under Section 46 is sent — Has no jurisdiction to entertain application by judgment-debtor under this rule. AIR 1959 Madh Pra 397 (398): 1959 MPLJ 903.

15. "Judgment-debtor," meaning of.— (1) The word "judgment-debtor" in this rule includes persons claiming through him. A transferee of the equity of redemption in the suit property from a judgment-debtor in a mortgage-decree is a "judgment-debtor" for the purposes of this rule. (1907) 30 Mad 537 (540) (DB) °° AIR 1919 Mad 358 (359).

(2) A surety for a judgment-debtor can plead an uncertified payment or adjustment made by him (the surety) with the decree-holder. AIR 1926 Sind 105 (106, 107): 20 Sind LR 362 °° AIR 1928 Lah 61 (63).

(3) The surety cannot plead an uncertified satisfaction or adjustment by the judgment-debtor. AIR 1932 Cal 729 (730): 59 Cal 1354 (DB).

16. Certification, form of — Certification by decree-holder.— (1) There is no particular form in which the decree-holder is required to certify a payment or adjustment. AIR 1952 All 715 (716): ILR (1952) 2 All 772 (FB) °° 21 Pat L Tim 650 (652) (DB) °° AIR 1937 Mad 511 (513, 514) (DB).

(2) The certification may be done:

(a) Orally. AIR 1917 Cal 466 (467) (DB) °° AIR 1917 Low Bur 164 (165).

(b) By statement made in a subsequent execution application. Madh B LJ 1954 HCR 141 (142) °° AIR 1934 Bom 370 (374): 58 Bom 610 (DB) °° AIR 1934 Pat 380 (381) (DB) °° AIR 1919 Mad 123 (125) (DB).

(c) In a statement in answer to the objections of the judgment-debtor. 1888 All WN 115 (116).

(d) In a petition filed by him. (1869) 12 Suth WR 358 (358).

(e) By way of admissions. AIR 1954 Cal 620 (623) (DB) °° AIR 1935 Lah 194 (196): 15 Lah 910 °° 1884 Bom PJ 202 °° 1888 All WN 115 (116) °° AIR 1937 Mad 511 (513, 514) (DB).

(3) The statement by the decree-holder in the petition for execution of the decree for partition and other reliefs, that the panchayatdars had met and divided the properties though with a qualification that the division was not completed, would amount to a certificate of adjustment under O. 21, R. 2 of the C. P. Code. AIR 1960 Mad 121 (122): (1959) 2 Mad LJ 467.

(4) An intimation by the decree-holder to the Court that the decree is satisfied is also a sufficient certification. (1911) 35 Bom 516 (523) (DB).

(5) Where a decree for sale was passed in favour of a mortgagee in possession but the decree failed to provide for the taking of accounts of the profits that might thereafter be received by the mortgagee, and the decree-holder intimated to the Court in his application for sale that the net profits should go in reduction of the decree amount, it was held that the application could be treated as an expression of intention to certify adjustment of the decree and that an enquiry may be directed as to the amounts collected by him. AIR 1916 Mad 795 (799, 800) (DB).

[See however (1900) 2 Bom LR 901 (905) (DB).]

(6) The certification must be of payment of money due under the decree. Hence, an admission that certain sums of money were received coupled with a statement that they were received on account of interest not allowed by the decree itself but paid in consequence of a separate agreement entered into after the passing of the decree, does not amount to a certification within the meaning of this rule. AIR 1939 All 581 (583, 584).

[See however AIR 1929 Mad 783 (783).]

(7) To be a certification of payment by the decree-holder the statement or admission by him must be to the effect that the payment was made to him against the amount due under the decree and not an admission of payment against any other claim, which is disputed by judgment-debtor. AIR 1964 Madh Pra 57 (61): 1963 MPLJ 624 (DB).

Application by judgment-debtor. — (8) An application by the judgment-debtor to certify payment or adjustment cannot be said to comply with the rule where there is no prayer for the issue of a notice to the decree-holder to show cause why the payment or adjustment should not be recorded as certified. AIR 1957 All 622 (632, 634): ILR (1957) 2 All 1 (DB) °° AIR 1918 Cal 62 (63) (DB) °° AIR 1929 All 674 (675).

(9) Where a judgment-debtor contests, an application for execution on the ground of payment or adjustment the statement of objection can be treated as an application under sub-rule (2) provided it is made with-

Order 21, Rule 2 — Note 16 (contd.)

in 90 days of such payment or adjustment. AIR 1957 All 622 (626, 632, 634): ILR (1957) 2 All 1 (DB) °° AIR 1935 Bom 303 (304) °° AIR 1930 Pat 526 (527) (DB) °° (1965) 78 Mad LW 447: ILR (1966) Mad 442.

[See however AIR 1936 Pat 253 (254). °° AIR 1938 Pat 204 (205).]

[But see (1912) 13 Ind Cas 944 (945) (DB) (Cal) °° (1912) 17 Ind Cas 752 (753) (DB) (Mad).]

17. Limitation for certification.— (1) The period of limitation for an application by the judgment-debtor under sub-rule (2) is 90 days from the time when the payment or adjustment was made. AIR 1967 Orissa 59 (61): 32 Cut LT 1076 (1082).

(2) Where a judgment-debtor alleges that the decree-holder had fraudulently kept him from exercising his right to apply under sub-rule (2) by promising that he would himself certify the payment or adjustment, the judgment-debtor cannot claim an extension of time under Section 18 of the Limitation Act (IX of 1908). AIR 1915 Cal 73 (73) (DB) °° AIR 1923 Rang 103 (106): 11 Low Bur Rul 363 (DB) °° AIR 1936 Pat 270 (273): 15 Pat 422 (DB).

(3) An order granting a time-barred application to record satisfaction of a decree is not a nullity, but is valid and binding unless set aside in appeal or other appropriate proceedings. AIR 1917 Low Bur 164 (165).

(4) An application under this rule filed within time by the judgment-debtor during the course of the execution does not stand automatically dismissed with the dismissal of the execution petition. AIR 1955 Hyd 64 (64): ILR (1955) Hyd 307 (DB).

(5) There is no express article of the Limitation Act applicable to certification by the decree-holder. AIR 1952 All 715 (716): ILR (1952) 2 All 772 (FB) °° AIR 1929 PC 19 (22, 23): 56 Ind App 30 °° AIR 1928 All 629 (631, 632): 51 All 237 (FB) °° AIR 1966 All 556 (557): 1966 All LJ 1133 °° AIR 1962 Mys 100 (103): 40 Mys LJ 70.

(6) Even if the document by which the decree-holder certifies is styled as an application, and is in the form of a petition, it cannot alter the real nature of the procedure and convert what is really no more than a certificate into an application within the meaning of Article 181. AIR 1929 PC 19 (23): 3 Luck 684: 56 Ind App 30.

(7) A certification by the decree-holder is not an application to the Court to take some step-in-aid of execution, within the meaning of Article 182, Cl. (5) of the Limitation Act. AIR 1952 Trav-Co 365 (366): ILR (1952) Trav-Co 235 (DB) °°AIR 1931 Cal 719 (725): 59 Cal 760 (FB). (Overruling AIR 1919 Cal 677: 46 Cal 22; AIR 1916 Cal 356; 3 Ind Cas 43; 3 Ind Cas 391; 20 Cal 696 and 12 Cal 608) °° AIR 1932 Oudh 148 (151): 7 Luck 590 (FB).

(8) Although there is no period of limitation for a certification by the decree-holder under this rule, when once it is brought to the notice of the executing Court that a certain alleged payment or adjustment has not been certified or recorded under this rule, the Court must refuse to recognize such payment or adjustment and the defect cannot be cured by the decree-holder subsequently certifying the payment or adjustment. AIR 1928 All 629 (632): 51 All 237 (FB) °° AIR 1934 All 534 (535): 156 All 921 (DB).

(9) Where certain payments were certified by decree-holder but there was nothing on record to show that acknowledgment of payment was made by judgment-debtor in his own handwriting or in writing signed by him within period of limitaton mere certfied payments cannot extend limitation. AIR 1959 Raj 107 (111, 112): ILR (1958) 8 Raj 1091.

(10) It is open to decree-holder to certify at any time and therefore it could not be laid down as a matter of law that certification is in itself a step-in-aid of execution so as to afford fresh starting point of limitation. AIR 1959 Raj 107 (111): ILR (1958) 8 Raj 1091.

18. Recording of adjustment.— (1) Where a decree-holder certifies a payment or adjustment, the Court is bound to record it in accordance with his statement, it has no power to proceed to satisfy itself before recording the satisfaction that such statement is true. AIR 1954 Trav-Co 124 (126) (DB) °° AIR 1933 Mad 523 (524) °° AIR 1925 Pat 822 (823) (DB).

[See however AIR 1936 Mad 468 (468).]

(2) The Court is bound to satisfy itself that the arrangement to be recorded is a legal adjustment. AIR 1942 Bom 59 (60, 61): ILR (1942) Bom 132 (DB).

(3) Where some of the judgment-debtors are minors, the Court is bound under O. 32, R. 7 to satisfy itself that the compromise is for the benefit of the minors before recording it. AIR 1942 Bom 59 (60): ILR (1942) Bom 132 (DB).

(4) The judgment-debtor will be entitled to show when an application for execution is made that no such payment or adjustment was made or that if it was made it did not operate to extend the period of limitation for execution. AIR 1918 Oudh 460 (462): 21 Oudh Cas 161.

(5) It is open to the decree-holder to withdraw or modify his application for certifying an adjustment before the adjustment is recorded. AIR 1948 Nag 35 (38): ILR (1947) Nag 197 (DB). (AIR 1942 Bom 59, Rel. on; AIR 1931 Rang 332, Dissent.)

(6) Where the payment or adjustment is pleaded by the judgment-debtor under subr. (2), the Court is not bound to record the same as certified without requiring proof of it merely because the decree-holder does not appear to show cause why it should

Order 21, Rule 2 — Note 18 (contd.)
not be recorded as certified. AIR 1928 Rang 185 (186): 6 Rang 218.

(7) If there is a dispute between the parties as to the terms of the adjustment, the Court has power and also is under a duty to enquire and ascertain what those terms were and then record the adjustment on those terms. AIR 1954 Cal 620 (622) (DB).

(8) After a payment or adjustment is recorded, it is not necessary that a fresh or amended decree should be drawn up. AIR 1941 Bom 20 (22) (DB) °° AIR 1925 Nag 49 (49): 20 Nag LR 122.

(9) The rule does not require any particular form of writing in which the payment or adjustment should be recorded. AIR 1941 Bom 20 (22) (DB).

(10) Sub-rule (3) does not require that the payment or adjustment must be both certified and recorded. AIR 1954 Trav-Co 288 (289): ILR (1952) Trav-Co 199 (DB) °° AIR 1915 Cal 744 (745) (DB) °° AIR 1938 All 116 (118).

[But see AIR 1942 Bom 59 (61): ILR (1942) Bom 132 (DB).]

(11) An order recording the adjustment of a decree, brought about by the fraud practised by one party upon another, can be vacated under the inherent powers of the Court. AIR 1963 Mad 261 (263): 76 Mad LW 119 (DB) °° AIR 1915 Mad 281 (282) (DB).

(12) The Court ought not to exercise inherent powers to vacate the order unless it is prejudicial to one of the parties. AIR 1920 Pat 750 (751): 5 Pat L Jour 379 (DB).

(13) Payment made out of the Court certified by decree-holder but not recorded by Court — Certificate cannot be availed of as step-in-aid under Article 182 (5) — Such payment can be availed of for purpose of limitation if it fulfils conditions under Section 20, Limitation Act. AIR 1965 Mad 444 (445): 78 Mad LW 360.

(14) Adjustment brought to notice of Court within time — Court overlooking and not recording — Judgment-debtor can plead it subsequently. AIR 1964 Andh Pra 458 (460): (1964) 2 Andh WR 216 (DB).

(15) Mortgage-decree against agriculturist mortgagor and non-agriculturist puisne mortgagee — Decree scaled down against mortgagor alone — Assignee of puisne mortgagee purchasing property in execution of his decree and paying amount under scaled down decree — Full satisfaction held could not be entered unless difference between two decrees was paid. AIR 1959 Mad 433 (435, 436): (1959) 2 Mad LJ 178 (DB).

19. Notice. — (1) Sub-rule (1) does not contemplate the issue of a notice to the judgment-debtor. AIR 1952 All 715 (716): ILR (1952) 2 All 772 (FB) °° AIR 1919 Pat 136 (137): 4 Pat L Jour 159 (DB).

(2) When the judgment-debtor applies under sub-rule (2), the Court is bound to issue a notice to the decree-holder to show cause why the payment or adjustment should not be recorded as certified. AIR 1923 Nag 20 (20) (DB). °° AIR 1969 Pat 79 (81).

(3) Court has no jurisdiction at all to proceed in matter unless notice is issued in Form I, App. E — Order passed by Court without issuing such notice — Order would be illegal. AIR 1969 Pat 79 (81).

(4) An order allowing a certification on an application by judgment-debtor under sub-rule (2) without notice to the decree-holder is bad in law. AIR 1944 Nag 231 (232) °° AIR 1944 Pat 251 (252) °° AIR 1930 Lah 113 (114).

(5) An application will lie to set aside an ex parte order allowing certification, on application by judgment-debtor, under sub-r. (2) without notice to the decree-holder. AIR 1930 Lah 113 (114).

(6) Copy of application by judgment-debtor served on lawyer purporting to be lawyer on behalf of decree-holder—Is service of notice validly effected (Quaere). AIR 1969 Pat 79 (82).

20. Court to which certification should be made.—See Note 14.

21. Uncertified payment or adjustment. — (1) The prohibition in sub-r. (3) against the recognition of an uncertified payment or adjustment is limited to a "Court executing the decree" and will not extend to a Court, which is not executing the decree, when dealing with such a matter. AIR 1947 Mad 216 (223): ILR (1947) Mad 525 (DB) °° AIR 1958 Madh Pra 333 (337) (DB) °° AIR 1957 All 622 (632, 634): ILR (1957) 2 All 1 (DB).

(2) The object of the prohibition is to compel the judgment-debtor to be careful to apply to the Court to have recorded as certified any payment he may have made on account of the decree, if he desires that it should be recognized by the executing Court as against the decree-holder executing the decree. AIR 1952 Trav-Co 561 (562) (DB) °° (1885) 17 All 42 (45).

(3) The prohibition in sub-rule (3) prevents false claims of payments by the judgment-debtor being presented to the Court executing the decree. But as no such prohibition operates against the decree-holder he can at any time inform the Court of a payment received by him out of Court and thereafter the Court will not compel him to receive the larger amount. AIR 1941 Bom 302 (302): ILR (1941) Bom 596 (FB) °° AIR 1956 Pat 522 (525) (DB).

(4) Where the liability of the judgment-debtor under a decree is only a conditional one, as for instance, where a decree provides that the decree-holder is to execute the decree only in the event of the judgment-debtor failing to comply with a particular condition, it will be open to the latter to prove, where execution is taken out, that the condition has been complied with; sub-rule (3) has no application to such a case AIR 1928 Lah 816 (816) (DB).

Order 21, Rule 2 — Note 21 (contd.)

[See however AIR 1938 Pat 465 (466): 17 Pat 128.]

(5) The prohibition against the recognition of an uncertified payment or adjustment applies just as much to a total discharge as to a partial discharge. AIR 1951 Mad 853 (854).

(6) Uncertified compromise suspending execution temporarily — Executing Court cannot take notice of it. AIR 1960 Assam 24 (25) (DB).

(7) Decree-holder placed in possession of judgment-debtor's properties under private arrangement — In subsequent execution proceedings, judgment-debtor contending that rents and profits of the properties and certain other claims of the judgment-debtor arising out of the same transaction must be taken into account by the executing Court — It was held that it was more just and equitable to dispose of the matter in execution proceedings. AIR 1951 Trav-Co 185 (185) (FB).

(8) The legislature in Marwar in deleting O. 21, R. 2, sub-rule (3) by S. 35 of the Marwar Relief of Indebtedness Act (1941) clearly intended that the judgment-debtor should be permitted to plead uncertified payments and adjustments and resist the execution of the decree in spite of his omission to take appropriate action under sub-rule (2). 1961 Raj LW 307 (310) (DB).

(9) Compromise decree in pre-emption suit — Payment of purchase money to vendees by specified date — Payment to vendees outside Court before specified date, amounts to proper compliance — Failure to get payment certified by Court is immaterial. AIR 1964 Punj 305 (307): 66 Pun LR 261.

(10) Where there is a pre-emption decree directing payment by a fixed date and such payment out of Court is sufficient compliance with the decree then all that is necessary to be seen is whether the payment is made on or before the specified date and the certification does not form an important part of the compliance with the decree. AIR 1963 Punj 133 (136): ILR (1962) 1 Punj 512 (Repeal of sub-rule (3) in Punjab.)

(11) Preliminary decree passed — Subsequent amicable partition of properties of parties — Court can take notice of adjustment although it is not certified and is not obliged to partition them any longer by passing final decree (Obiter). 1968 Pat LJR 322 (324): 1968 BLJR 841 (DB).

(12) Order 21, Rule 2 (3) has been omitted in Punjab, therefore adjustment out of Court, though not certified or recorded as required by sub-rules (1) and (2) could be proved. (1966) 68 Pun LR 420 (428) (DB).

22. Court acting under O. 21, R. 16. — (1) A judgment-debtor, who is debarred under this rule from pleading an adjustment of the decree with the decree-holder for failure to have it recorded, cannot plead the same when opposing an application by the assignee of the decree under O. 21, R. 16. AIR 1943 PC 66 (68): 70 Ind App 50 (AIR 1923 Bom 404: 47 Bom 643, Overruled.) ** AIR 1953 Trav-Co 51 (53) (DB) ** AIR 1941 Bom 302 (302): ILR (1941) Bom 596 (FB). (AIR 1924 Bom 394; AIR 1923 Bom 404: 47 Bom 643, Overruled.) ** AIR 1932 Mad 372 (374): 55 Mad 720 (FB).

23. Court dealing with application under Order 21, Rules 90, 95, 97 and 98. — (1) An application to set aside a sale under O. 21, R. 90 is not a proceeding in execution of a decree, and an adjustment or compromise of the matter in dispute cannot be recorded under the provisions of O. 21, R. 2 by a Court dealing with such an application but must be recorded only under the provisions of O. 23, R. 3. AIR 1929 Lah 886 (887) ** AIR 1929 Pat 400 (400) (DB).

(2) A proceeding under O. 21, Rr. 95, 97 and 98 is not one in execution and the Court dealing with such an application is not an executing Court and is, therefore, not debarred from recognizing an uncertified adjustment of the decree. AIR 1930 Bom 375 (377): 54 Bom 479 (DB) ** AIR 1945 Mad 1 (1, 2, 3): ILR (1945) Mad 348 (DB).

24. Suit by judgment-debtor based upon an uncertified payment or adjustment. — (1) It is only a Court executing the decree that is debarred from recognising an uncertified payment or adjustment. A suit based upon such payment or adjustment is not barred. AIR 1957 All 622 (630):ILR (1957) 2 All 1 (DB) ** AIR 1943 Bom 246 (248): ILR (1943) Bom 382.

(2) A surety for the judgment-debtor can rely upon an uncertified adjustment in a suit by him for declaring that he is discharged from liability by reason of the adjustment of the decree as between the decree-holder and judgment-debtor. AIR 1943 Bom 246 (248): ILR (1943) Bom 382.

(3) Agreement to adjust decree though not certified is a contract and a suit for its specific performance is maintainable. (1935) 157 Ind Cas 26 (28) (DB) (Rang).

25. Suit by decree-holder based on uncertified payment or adjustment.— (1) Where a judgment-debtor executed a bond in favour of the decree-holder in adjustment of the decree against him, it was held that in a suit by the decree-holder upon the bond, the uncertified adjustment can be proved. (1885) 7 All 124 (129, 130) (DB) ** (1901) 25 Bom 252 (262) (DB) ** AIR 1937 Nag 217 (219) (DB).

(2) Where the plaintiff brought a suit under O. 21, R. 63 to establish his right to certain attached property on the allegation that the property attached had been transferred to him in satisfaction of a decree held by him against the judgment-debtor, it was held that it was unnecessary that such transfer should be certified under the provisions of this rule. (1891) 13 All 339 (342).

Order 21, Rule 21 — Note 25 (contd.)

(3) Judgment-debtor executing decree obtained by him against decree-holder — Claim under decree already wiped off by adjustment — No revival of claim of decree-holder under his decree. AIR 1966 All 556 (558): 1966 All LJ 1133.

26. Fraud. — (1) A obtains a decree against B, B satisfies the decree by a payment or adjustment made out of Court; but such payment or adjustment is not certified to the Court in time. A then applies for execution of the decree fraudulently omitting to state in his application the payment or adjustment as required by O. 21, R. 11 (e). B is not entitled to claim an investigation of the question under S. 47. AIR 1925 Bom 309 (309, 310): 49 Bom 548 (FB). (AIR 1916 Bom 217: 40 Bom 333, Overruled.) °° AIR 1938 Oudh 195 (198): 3 Luck 170 (FB) °° AIR 1935 Mad 257 (257) (DB).

27. Effect on limitation. — (1) The executing Court cannot recognise an uncertified payment or adjustment for any purpose whatever. AIR 1943 Pat 7 (9): 21 Pat 481 (DB) °° AIR 1918 Cal 977 (978): 45 Cal 630 (DB).

(2) Where a decree-holder makes an application for execution of his decree more than three years after the date of the decree or after the last starting point of limitation, and mentions in the application a part payment made by the judgment-debtor, it will amount to a sufficient certificate and the payment can, therefore, be recognized by the Court executing the decree provided the payment is as a matter of fact made and provided also that the payment complies with the requirements of S. 20 of the Limitation Act and that the application for execution is within three years of such payment. Madh B LJ 1954 HCR 141 (142) °° AIR 1919 Sind 70 (75): 13 Sind LR 37 (FB) °° AIR 1928 All 629 (631, 632): 51 All 237 (FB).

[But see AIR 1924 Oudh 392 (392).]

(3) It is not open to a judgment-debtor to get over period of limitation prescribed by Article 174 of Limitation Act (1908) by simply omitting to cite O. 21, R. 2 (2) at the head of his application. AIR 1959 Mys 155 (156): 36 Mys LJ 539.

28. Operation as estoppel. — (1) It is not open to the executing Court to enquire into the fact of payment or adjustment of a decree which has not been certified or recorded within the period allowed by law, on the ground that the decree-holder is estopped from denying such payment or adjustment. AIR 1952 Trav-Co 561 (562) (DB) °° (1910) 34 Bom 575 (578). (Per Chandavarkar, J.) °° AIR 1914 Cal 253 (254) (DB).

29. Remedies of judgment-debtor. — (1) Where a judgment-debtor satisfies the decree by a payment or adjustment made out of Court, which is not certified to the Court in time, and the decree-holder applies for execution of the decree in spite of the satisfaction, the judgment-debtor cannot maintain a suit for a declaration that the decree has been satisfied and is consequently incapable of execution. (1894) 21 Cal 437 (445, 449, 460) (FB) °° AIR 1933 Lah 1051 (1052): 15 Lah 75 (DB) (AIR 1925 Lah 54 held to be not good law.) °° (1904) 31 Cal 480 (485) (SB) °° AIR 1922 Lah 428 (431): 3 Lah 319 (FB). (Overruling 1910 Pun Re No. 16 and 21 Ind Cas 557.)

[See also AIR 1955 Bom 64 (67): ILR (1955) Bom 57 (DB).]

(2) If the properties of the judgment-debtor are sold in execution of a decree which has been satisfied by payment or adjustment out of Court, which is not certified to the Court, no separate suit will lie to set aside the sale. (1892) 19 Cal 683 (688, 689): 19 Ind App 166 (PC) °° AIR 1918 Bom 105 (106): 43 Bom 240 (DB) °° AIR 1919 Nag 73 (75): 15 Nag LR 458.

30. Suit for damages. — (1) Where a decree-holder whose decree has been satisfied by payment out of Court fails to certify satisfaction to the Court and executes the decree and realises the money a second time, the judgment-debtor may sue him for the recovery of the money paid out of Court. AIR 1957 All 622 (630): ILR (1957) 2 All 1 (DB) °° AIR 1939 Mad 499 (500) °° (1885) 8 Mad 277 (283) (FB) °° ('82) 5 Mad 397 (400) (FB). (Overruling 3 Mad HCR 188.)

(2) The suit for the recovery of money paid out of Court will not be barred by Sec. 47 for the question in the suit relates not to the execution of a decree, but to a contract which formed no subject of inquiry in the suit and could not form a subject of inquiry in execution of the decree. (1882) 5 Mad 397 (400) (FB).

(3) The cause of action for the suit is failure of consideration or breach of an express or implied promise or of a statutory duty to certify the payment. ILR (1952) 2 Raj 731 (739, 740.)

(4) The cause of action for the suit for the recovery of money paid out of Court arises only when damage is actually sustained, that is, when the money is recovered a second time. AIR 1939 Pat 156 (157) °° AIR 1950 Madh B 15 (16): 1 Madh B LR 419 (DB). (AIR 1933 All 511, Foll.).

[See however ('07) 30 Mad 545 (546) °° ILR (1952) 2 Raj 731 (739). °° AIR 1943 Pesh 13 (15).

(5) Where the decree-holder has not applied for execution at all, nor realised anything over and above the payments alleged to have been made by the judgment-debtor towards the satisfaction of the decree, the judgment-debtor has no cause of action to sue the decree-holder merely because the payment out of Court has not been certified. AIR 1939 All 495 (496) °° AIR 1935 Mad 961 (964). (Note. — This case is reversed on another point in AIR 1938 Mad 493.)

(6) Decree-holder failing to certify payment out of Court — Execution petition

COURTS EXECUTING DECREES

[See Sections 38 to 46.]

R. 3. Lands situate in more than one jurisdiction.—Where immoveable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.

Order 21, Rule 2 — Note 30 (contd.)

not filed — Judgment-debtor cannot sue for recovery of amount of damages. AIR 1961 Mad 283 (285): 74 Mad LW 59.

(7) Where the decree-holder transfers the decree after it is satisfied by an uncertified payment or adjustment and the assignee executes the decree, he is not liable to repay the decretal amount realised in execution of the decree. AIR 1919 Mad 424 (426): 42 Mad 338.

(8) Where an application by the judgment-debtor under sub-rule (2) for recording a payment out of Court is dismissed by the executing Court on a consideration of the merits, the judgment-debtor cannot maintain a suit for recovery of the amount alleged to have been paid twice over. 1912 Pun Re No. 91 °° (1895) 18 Mad 26 (27) (DB) °° (1909) 4 Ind Cas 818 (819) (Upp. Bur.)

31. Restitution of uncertified payment on reversal of decree in appeal. — (1) V obtained a decree against G for Rs. 89 — G appealed against the decree and pending appeal made a payment of Rs. 60 to the decree-holder which was not certified to the Court — The decree was reversed in appeal and G applied for refund of the amount he had paid — It was held that G was entitled to recover on the ground that "the decree having been reversed, the payment, whether certified or not, could only be regarded as made without consideration and entitling the defendant to have it restored." (1887) 11 Bom 724 (726) (DB) •• AIR 1939 Mad 176 (176) (DB).

32. Criminal proceedings. — (1) Sub-rule (3) has no application to a case where a Criminal Court is investigating a charge under Sec. 210 of the Penal Code of fraudulently executing a decree. (1886) 10 Bom 288 (299) (DB) °° ('89) 16 Cal 126 (127) (DB) °° (1886) 9 Mad 101 (101).

(2) The prohibition in sub-rule (3) only means that the Court cannot consider the alleged adjustment in the course of the execution of the decree in question. AIR 1949 Nag 276 (276): ILR (1949) Nag 145 •• (1882) 4 Mad 325 (327) (DB).

(3) Where, on the objection of the judgment-debtor, the Court dismisses an application for execution on the ground that the decree has been satisfied by a payment out of Court, the decree-holder is not guilty of an offence under Sec. 210, Penal Code, because the decree has not been caused to be executed. (1892) 23 Cal 971 (975) (DB).

33. Appeal and revision. — (1) An order on an application by the judgment-debtor under sub-rule (2) recording or refusing to record, as certified, a payment or adjustment made out of Court, is the determination of a question between the parties relating to the satisfaction of the decree within the meaning of Sec. 47 and hence is appealable as a decree. AIR 1954 Bom 273 (277): ILR (1954) Bom 873 (DB) °° AIR 1950 Ajmer 4 (4) °° (1903) 7 Cal WN 172 (174) (DB).

(2) No appeal lies against an order refusing to set aside a dismissal of an application for default. AIR 1931 Lah 505 (505) °° AIR 1920 Cal 914 (916) (DB) °° AIR 1963 Orissa 160: ILR (1963) Cut 321 (DB).

(3) No appeal lies from an order refusing to review an order rejecting an application under this rule. AIR 1927 Lah 809 (810).

(4) Where a decree-holder certifies a payment made out of Court, but the Court in spite of it orders execution to proceed on the ground that the payment is not proved, the Court fails to exercise a jurisdiction vested in it by law, and the order is therefore revisable by the High Court under S. 115 AIR 1931 Rang 332 (333).

[See also AIR 1948 All 443 (444): ILR (1948) All 629 (DB).]

(5) A Judge declining to proceed with an application for execution, on the ground of an uncertified payment or adjustment out of Court, acts with material irregularity and his order is open to revision. AIR 1935 Rang 481 (481).

(6) Application under Order 21, Rule 2 for recording full satisfaction of decree — Dismissal for default — Application for restoration under O. 21, R. 105 (2) — Court imposing terms for restoration after hearing petitioner — Order neither final nor appealable — Order cannot be interfered with in revision under Section 115 since there is no want of jurisdiction or material irregularity in exercise of jurisdiction. (1968) 1 Andh LT 321.

(7) Adjustment of ex parte decree pleaded by defendant — Disposal of execution application as such — Order whether appealable (Quaere). AIR 1969 Pat 79 (81).

Order 21, Rule 3 — Note 1

(1) No Court can execute a decree in which the subject-matter of the suit or of the application for execution is property situate entirely outside the local limits of its jurisdiction. AIR 1947 Mad 347 (349): ILR (1948) Mad 18 (FB) •• AIR 1923 Cal 619 (621) (DB).

R. 4. Transfer to Court of Small Causes.—Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras [a][or Bombay], such Court may send to the Court of Small Causes in Calcutta, Madras [a][or Bombay], as the case may be, the copies and certificates mentioned in Rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

[1882 and 1877, S. 223, para. 5.]

[a] Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Bombay or Rangoon."

HIGH COURT AMENDMENTS

Bombay: Dadra and Nagar Haveli[a]

In Order XXI, for the existing Rule 4 and its marginal note, substitute the following as Rule 4 and marginal note :—

4. Transfer to Court of Small Causes.—(1) Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Small Causes Court and the Court which passed it wishes it to be executed in Calcutta or Madras, such Court may send to the Court of Small Causes in Calcutta or Madras, as the case may be, the copies and certificates mentioned in Rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

(2) A decree in a suit of the nature described in sub-rule (1) but in which the value as set forth in the plaint did not exceed three thousand rupees may be sent for execution to and be executed by the Presidency Court of Small Causes at Bombay in the manner prescribed in sub-rule (1).

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Gujarat

In Rule 4—

(i) delete the words "or Bombay" wherever they occur;

(ii) renumber Rule 1 as sub-rule (1); and

(iii) add as sub-rule (2) the following :

"(2) A decree in a suit of the nature described in sub-rule (1) but in which the value as set forth in the plaint did not exceed rupees three thousand may be sent for execution to and be executed by the Presidency Court of Small Causes at Bombay in the manner prescribed in sub-rule (1)." [17-8-1961].

R. 5. Mode of transfer.—Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such

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Order 21, Rule 4 — Note 1

(1) Where value of suit in which decree which is sought to be executed exceeds Rs. 2.000 it will not be transferred to the Court mentioned in the rule. AIR 1951 All 380 (381) (DB) •• (1966) 2 Mad LJ 5 (6): (1966) 79 Mad LW 269.

(2) The provisions contained in this rule are special provisions relating to the execution of decrees by the Small Cause Courts mentioned therein and such execution can be had only subject to the conditions laid down in this rule. AIR 1943 Mad 271 (272).

(3) The Court of Small Causes in Calcutta, Madras or Bombay, in executing a decree of another Court transferred to it under this rule has the same powers as it possesses in regard to execution of its own decrees. (1907) 34 Cal 823 (827).

Order 21, Rule 5 — Note 1

(1) Where two Courts are in the same district, one Court may transmit a decree for execution to the other Court direct without the intervention of the District Court. AIR 1943 Mad 449 (453): ILR (1943) Mad 804 (DB) •• AIR 1936 Cal 571 (572).

decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

[1882, S. 223, para. 6; 1877, S. 223.]

HIGH COURT AMENDMENTS

Allahabad

For the word "district," where it occurs after the words "same" and "different" read "State" [9-8-1940 and A. L. O., 1950].

Bombay: Dadra and Nagar Haveli[a]

In Order XXI, for the existing Rule 5 and its marginal note, substitute the following as Rule 5 and marginal note :—

5. Mode of transfer.—Where the Court to which a decree is to be sent for execution is situate within the same State as the Court which passed the decree the latter Court shall send the same directly to the former Court. But where the Court to which the decree is to be sent for execution is situate in a different State, the Court which passed it shall send such decree to the District Court of the District in which it is to be executed [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965].

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Gujarat

Same as that of Allahabad [17-8-1961].

Punjab, Haryana and Chandigarh

In the last sentence after the words "the District Court" and before the words "of the district" insert the words "or the Court of any Judge having jurisdiction in the place where the decree is to be executed to whom power to receive plaints has been delegated by the District Judge' [23-3-1938]; Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

Order 21, Rule 5 — Note 1 (contd.)

(2) Where the Court to which the decree is to be sent is situate in a different district, it should be sent to the District Court of the district in which the decree is to be executed, for transmission to the Court by which the decree is to be executed. AIR 1953 Raj 204 (211): ILR (1953) 3 Raj 449 (FB) °° AIR 1940 Mad 214 (214) (DB).

(3) Where the decree is sent direct to the Court subordinate to the District Court in another district, the proceedings in the transferee Court would be null and void for lack of jurisdiction. AIR 1949 Cal 690 (693, 695): ILR (1950) 1 Cal 596 (DB) °° AIR 1950 Assam 163 (164): ILR (1950) 2 Assam 331 (DB) °° AIR 1968 Punj 461 (463): 70 Pun LR 467 (DB) °° AIR 1964 Orissa 88 (91): 30 Cut LT 9.

[But see AIR 1954 Pat 164 (168): 32 Pat 540 (DB) °° AIR 1953 Raj 204 (211): ILR (1953) 3 Raj 449 (FB) °° AIR 1963 Pat 461 (464): ILR 42 Pat 70 (DB).]

(4) If a decree has been transferred direct to a Court subordinate to the District Court, the latter should not dismiss the application but should send the papers back to the Judge who sent them for adopting the correct procedure. AIR 1914 Cal 786 (786) (DB)

(5) Where a decree is sent to a District Court under this rule for transmission to a lower Court in the district, the order of transfer takes effect from the date on which it is passed. AIR 1940 Mad 214 (214) (DB).

(6) The provisions of this rule can be applied only when the transferor and the transferee Courts are in India. AIR 1952 Assam 138 (139) (DB).

(7) On the face of R. 25 of the Rules for the Administration of Justice in Khasi and Jaintia Hills there is no provision for transfer of the decree but the Courts in this area are to be guided by the spirit of the Code of Civil Procedure, although O. 21, R. 5 may not in terms apply to the case. AIR 1957 Assam 153 (155) (DB).

(8) Court of Additional District Judge is as competent as Court of District Judge for purposes of this rule. AIR 1959 Madh Pra 188 (190): (1968) MPLJ 640.

(9) Decree of Presidency Small Cause Court can be transferred directly for execution to another Civil Court. AIR 1962 Pat 272 (273): 1962 BLJR 56.

(10) Transferor Court does not lose seisin till decree is actually transferred. AIR 1961 Madh Pra 158 (161): 1961 Jab LJ 758.

R. 6. Procedure where Court desires that its own decree shall be executed by another Court.—The Court sending a decree for execution shall send—

(a) a copy of the decree;

(b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and

(c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

[1882 and 1877, S. 224; 1859, S. 286.]

HIGH COURT AMENDMENTS

Allahabad

Rule 6 shall be renumbered as 6 (1) and add the following sub-rule (2):

"(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent".

Mysore

For modification of the Rule in relation to Small Causes Court Mysore, see Mysore Small Cause Courts Act, 1964 (Mys. Act 11 of 1964), S. 27.

Orissa

Same as that of Patna.

Order 21, Rule 5 — Note 1 (contd.)

(11) Absence of rules does not affect Court's jurisdiction to execute transferred decree. AIR 1963 Madh Pra 153 (154): 1962 MPLJ 540 (DB).

(12) 'District' in Rule 5 is wide enough to include district in any State in India. AIR 1960 Madh Pra 387 (388) : 1960 MPLJ 1179.

ORDER 21, RULE 6 — SYNOPSIS

1. Scope.
2. Certificate, effect of not sending.
3. Presumption as to compliance with the rule.
4. Notice to judgment-debtor.

1. Scope.— (1) Where a Court, places a wrong construction on the decree and mentions in the certificate that a particular amount is due, the statement is ultra vires. Judgment-debtor need not have it amended. AIR 1925 Pat 807 (809, 810): 4 Pat 440 (DB).

(2) In sending the certificate of non-satisfaction, the Court which passed the decree is not called upon to consider whether the decree is still capable of execution. (1910) 8 Ind Cas 22 (25) (DB) (Cal).

[But see AIR 1950 Mad 608 (609) (DB) °° AIR 1948 Nag 189 (193): ILR (1947) Nag 497.]

(3) When once an order is made sending a decree to another Court for execution, that by itself is sufficient to entitle the decree-holder to apply to the Court to which the decree is sent for execution. AIR 1955 Bom 93 (95): ILR (1954) Bom 1173 (DB) °° AIR 1953 Mad 71 (73).

[See however AIR 1950 Cal 287 (289) (DB).]

[But see AIR 1961 Madh Pra 158 (161): 1961 Jab LJ 758 °° AIR 1928 Mad 496 (497).

(4) The failure of the Court which passes the decree to send it in time to another Court for execution is a mere irregularity. AIR 1945 Cal 141 (142).

(5) The sending of a copy of the decree referred to in Clause (a) is not an essential condition for the transferee Court having jurisdiction to execute the decree. AIR 1954 Mys 1 (2, 3): ILR (1954) Mys 193 (FB). ((1923) 28 Mys CCR 191, Overruled.)

(6) The omission to send a copy of the decree does not prevent the decree-holder from applying for execution to the Court to which the decree is transferred. AIR 1953 SC 65 (67): 1953 SCR 377 °° AIR 1954 Mys 1 (2, 3): ILR (1954) Mys 193 (FB) °° AIR 1933 Mad 627 (627): 56 Mad 692 (DB).

(7) In cases where appeals have been filed from the original decree, the copy to be sent is that of the decree of the ultimate Court of appeal. AIR 1954 Pat 497 (502) (DB).

(8) Reporting in regard to the state of execution of the decree has to be made at both ends both by the transmitting Court and by the Court to which the decree has been transmitted. AIR 1957 All 336 (336, 337).

(9) The Courts in India cannot take any action on an application for execution of a decree passed by the Federal Court of Pakistan unless a non-satisfaction certificate is produced from a Court in Pakistan in which the decree could be legally executed. AIR 1957 Punj 201 (205): ILR (1957) Punj 1097 (DB).

(10) Transferee Court gets jurisdiction to execute decree to the limit of its jurisdiction.

Patna

Insert the following words after the word "decree" in clause (a):

"And a copy of the suit register relating to the suit in which the decree was passed and a memorandum showing the costs allowed to the decree-holder subsequent to the passing of the decree."

HIGH COURT AMENDMENT

Rule 6A

Madras: Pondicherry[a]

"6A. A copy of the judgment bearing the formule executoire, sent by a Court in the Union Territory of Pondicherry, shall be deemed to be a decree and to comply with the requirements of Rule 6:

Provided that notwithstanding anything contained in Rule 2, where any question as to the satisfaction of (or) the discharge, in whole or in part, of such a decree arises, the Court executing the decree shall decide it" [15-3-1967].

[a] See Act 26 of 1968, S. 3 and Sch., Part II [w. e. f. 5-9-1968].

R. 7. Court receiving copies of decree, etc., to file same without proof.—The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

[1882 and 1877, S. 225; 1859, S. 286.]

Order 21, Rule 6 — Note 1 (contd.)

AIR 1964 Orissa 170 (172): (1964) 6 OJD 21.

(11) Order directing preparation of certificate is not final order. Starting point of limitation is date on which certificate to be attached under Order 21, Rule 6 is prepared and signed. AIR 1960 Pat 209 (210): 1959 BLJR 745.

(12) Order 21 does not apply to proceedings under U. P. Encumbered Estates Act (1954). ILR (1966) 2 All 351 (360) (DB).

(13) Filing of certificate of non-satisfaction of foreign decree under Section 44A (1) is not a condition for vesting jurisdiction in the executing Court. Filing of certified copy of the foreign judgment or decree is sufficient. AIR 1967 Mad 45 (53) (FB). (AIR 1964 Mad 221 (DB), **Overruled.**)

2. Certificate, effect of not sending.— (1) The omission to send the certificate as required by Clause (b) of this rule is a mere irregularity and does not affect the jurisdiction of the Court to which the decree is transferred for execution to entertain the application for execution. AIR 1953 SC 65 (67): 1953 SCR 377 °° AIR 1955 Bom 93 (95): ILR (1954) Bom 1173 (DB) °° AIR 1952 Trav-Co 72 (74) (DB).

(2) The omission to send the certificate as required by Clause (b) is not a ground for an application under Order 21, Rule 90 to set aside a sale. AIR 1953 SC 65 (67): 1953 SCR 377 °° AIR 1952 Trav-Co 72 (74) (DB).

(3) A mere mistake in the certificate of non-satisfaction as to the number of the suit or the names of the judgment-debtors will not affect the jurisdiction of the execution Court to proceed with the execution. AIR 1938 Pat 513 (514) (DB).

(4) Transferor Court has jurisdiction to execute decree in respect of property within its jurisdiction even though there is no certificate of non-satisfaction of decree from transferee Court. AIR 1964 Orissa 170 (172): (1964) 6 OJD 21.

3. Presumption as to compliance with the rule.— (1) Where the validity of an attachment effected by the transferee Court is attacked on the ground that no copy of the decree was sent by the Court which passed the decree, it lies upon the judgment-debtor to prove that it was not transmitted. (1872) 17 Suth WR 289 (291) (FB).

(2) Where a decree was passed by a Judge in the capacity of a Small Cause Judge and an application for execution of the decree was filed before the same Judge acting on the Original Side, it was held that even though there was no formal order of transfer, the provisions of this rule were sufficiently complied with. AIR 1927 Cal 782 (783) (DB).

(3) Court passing a decree can handover the execution application to decree-holder with direction to take it to the executing Court. 1960 All LJ 422 (425).

(4) District Court has jurisdiction to execute orders passed by the High Court under Section 45H of the Banking Companies Act and sent to it for execution. (1965) 35 Com Cas 141 (142) (SC).

4. Notice to judgment-debtor.— (1) Where the application for transmission of the decree for execution to another Court is made when the decree is already under execution in the Court which passed it, notice should be given to the judgment-debtor and the transfer should not be ordered unless there is sufficient cause to order simultaneous execution. AIR 1939 Bom 258 (260).

Order 21, Rule 7 — Note 1

(1) The transferee Court has no power under the present Code to question the jurisdiction of the Court which passed the decree under execution. AIR 1954 Hyd 190

R. 8. Execution of decree or order by Court to which it is sent.—Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

[1882 and 1877, S. 226; 1859, S. 287.]

R. 9. Execution by High Court of decree transferred by other Court.—Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

[1882 and 1877, S. 227; See S. 42.]

Order 21, Rule 7 — Note 1 (contd.)

(192): ILR (1954) Hyd 353 (FB) °° AIR 1920 Mad 1019 (1023): 43 Mad 675 (FB) °° AIR 1931 Rang 252 (259): 9 Rang 480 (FB). (Overruling AIR 1930 Rang 337: 8 Rang 544.)

[See however AIR 1943 Bom 404 (405): ILR (1943) Bom 665 °° AIR 1933 Nag 211 (212, 213) (DB).]

(2) The Court can go behind the decree where the decree is null and void and this fact is patent upon the face of the record. AIR 1946 Nag 311 (312, 313): ILR (1946) Nag 583 (DB) °° ILR (1953) Madh B 260 (262, 263) °° AIR 1945 All 177 (182): ILR (1945) All 479 (DB).

(3) Where the decree was passed against a dead person, it is a nullity and objection to the decree on this ground can be taken in the transferee Court. AIR 1935 Lah 439 (439): 17 Lah 32 (DB).

(4) The transferee Court is debarred from taking cognizance of objections as to jurisdiction of which the Court which transferred the decree could take cognizance. AIR 1934 Lah 652 (657) (DB).

(5) A decree passed in a suit brought against the ruling prince without obtaining a certificate required under Section 86, Civil Procedure Code, is a nullity, the validity of which can be questioned by the executing Court. AIR 1958 Bom 30 (32): ILR (1957) Bom 786.

(6) Executability of decree passed without jurisdiction can be challenged in executing Court. (1965) 67 Pun LR 558 (564): ILR (1965) 1 Punj 717 (DB).

Order 21, Rule 8

1. Scope.— (1) The District Court to which a decree is sent for execution under this rule has a right to entrust the execution of the decree to a Court subordinate to it. AIR 1940 Mad 214 (214) (DB) °° (1881) 8 Ind App 165 (171): 8 Cal 28 (PC).

(2) Order of District Court transferring decree for execution, signed by the sheristadar "by order" of District Judge, is a valid endorsement. (1896) 23 Cal 480 (482) (DB) °° (1910) 5 Ind Cas 155 (155) (DB) (Mad).

(3) Under this rule the transfer to the District Court is for execution although such Court is given the power to transfer the decree for execution by another Court. AIR 1940 Mad 214 (214) (DB) °° AIR 1963 Manipur 45 (46).

[But see AIR 1949 Cal 690 (695): ILR (1950) 1 Cal 596 (DB).]

(4) Failure to observe provisions of this rule amounts to a mere irregularity and does not affect the jurisdiction of the Judge to execute the decree. AIR 1954 Pat 164 (168): 62 Pat 540 (DB) °° AIR 1963 Pat 461 (464): ILR 42 Pat 70 (DB).

[But see AIR 1957 Pat 654 (655) (DB) °° AIR 1964 Orissa 88 (91): 30 Cut LT 9.]

(5) Transferee Court allowing without objection, substitution of representatives of deceased judgment-debtor at instance of decree-holder — No prejudice caused — Merits of case not affected. AIR 1965 Pat 52 (53): 1964 BLJR 212 (DB).

(6) Rule 8 is complementary to Rule 5. AIR 1963 Pat 461 (464): ILR 42 Pat 70 (DB).

(7) Absence of rules does not affect Court's jurisdiction to execute transferred decree. AIR 1963 Madh Pra 153 (154): 1962 MPLJ 540 (DB).

2. "Competent jurisdiction."— (1) If the attached property is transferred from the jurisdiction of the transferee Court to some other Court, the sale by the transferee Court after the transfer of the property from its jurisdiction, is not valid even though the Court had jurisdiction over such property at the time of the transfer. AIR 1918 Mad 17 (17) (DB).

[But see AIR 1934 Mad 573 (574, 575) (DB).]

(2) Where a District Court transfers a decree to the Court of Munsif, which is a Court subordinate to the District Court, it is a Court of competent jurisdiction. AIR 1957 Orissa 177 (180): ILR (1957) Cut 287.

(3) Subordinate Court is required to have jurisdiction in execution case though it may not have jurisdiction to entertain suit itself. AIR 1966 Cal 482 (482, 483) (DB).

[See also (1969) Mys LJ 298.]

(4) The jurisdiction of transferee Court to deal with execution application depends on the actual amount under execution and not on valuation of suit or amount of original decree. AIR 1962 All 586 (588): 1962 All LJ 707 (DB).

Order 21, Rule 9 — Note 1

(1) Where a decree is transferred under this rule to the High Court for execution, the High Court cannot make the decree payable in instalments. AIR 1934 Rang 197 (198) (DB).

HIGH COURT AMENDMENT

Kerala: Laccadive, Minicoy and Amindivi Islands

Omit Rule 9 [6-9-1959]; Reg. 8 of 1965 [w. e. f. 1-10-1967].

APPLICATION FOR EXECUTION

R. 10. Application for execution.—Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court, then to such Court or to the proper officer thereof.

[1877, S. 230, Para 1, S. 231; 1859, S. 207.]

HIGH COURT AMENDMENTS

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Punjab, Haryana and Chandigarh

Add the following proviso:

"Provided that if the judgment-debtor has left the jurisdiction of the Court which passed the decree, or of the Court to which the decree has been sent, the holder of the decree may apply to the Court within whose jurisdiction the judgment-debtor is, or to the officer appointed in this behalf, to order immediate execution on the production of the decree and of an affidavit of non-satisfaction by the holder of the decree pending the receipt of an order of transfer under Section 39" [7-4-1932]; Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

ORDER 21, RULE 10 — SYNOPSIS

1. Successive applications for execution.
2. Who may apply for execution.
3. Court to which the decree is sent for execution.
4. Time of presentation of application for execution.
5. Application for execution.
6. Dismissal of application for default.

1. Successive applications for execution.—(1) The Code does not bar a succession of applications for execution. AIR 1926 Cal 1019 (1021): 53 Cal 582 (DB) °° AIR 1915 Mad 811 (812): 38 Mad 199 (DB) °° (1911) 11 Ind Cas 385 (386) (DB) (Cal).

(2) Where an application for execution is withdrawn by the decree-holder without leave to apply again having been granted by the Court, a second application is not barred. (1894) 17 All 106 (111, 112): 22 Ind App 44 (PC). (Overruling 10 All 71.) °° AIR 1956 Hyd 7 (9): ILR (1955) Hyd 797 (FB) °° (1891) 18 Cal 635 (639) (DB) °° (1964) All LJ 1013: ILR (1965) 1 All 269 (DB).

[See however AIR 1948 Pat 113 (114, 116): 26 Pat 601 (FB).]

(3) When a decree gives reliefs of a different character, such as a decree for possession and a decree for costs, there is nothing which prevents separate and successive applications for execution as regards each of them. AIR 1916 Mad 767 (767) (DB) °° (1891) 18 Cal 515 (517) (DB) °° (1897) 19 All 98 (100) (FB) °° AIR 1966 Raj 258 (261): 1966 Raj LW 201.

[But see (1899) 26 Cal 888 (890) (DB) °° (1891) 15 Bom 242 (244) (DB).]

(4) A decree in a suit for money, for principal and interest, is a single money decree and it is not permissible to levy execution thereof piecemeal. AIR 1949 Cal 228 (229): ILR (1949) 2 Cal 489 (DB) °° AIR 1930 Cal 349 (350) (DB) °° AIR 1933 Bom 364 (365, 366): 57 Bom 468 (DB).

[See however AIR 1921 Sind 18 (16): 15 Sind LR 11 (DB).]

(5) Where an application for execution of part of a decree is made and the judgment-debtor fails to raise an objection at once, the piecemeal execution will not be invalid and a subsequent application is not barred. AIR 1932 Nag 89 (90): 28 Nag LR 77.

(6) Money decree — Lesser amount than actually due claimed in execution petition by mistake — Decree-holder cannot be deemed to have waived unclaimed portion — Mistake can be rectified by filing another application for execution. AIR 1951 Trav-Co 75 (77): 1950 Trav-Co LR 624 (DB).

(7) A subsequent application for execution in respect of reliefs different from those claimed in a prior application cannot be said to be one in continuation of the prior application. AIR 1933 Lah 3 (4): 15 Lah 208.

(8) Piecemeal execution not barred. AIR 1966 Raj 258 (260): 1966 Raj LW 201.

2. Who may apply for execution.— (1) It is only the decree-holder whose name is on the record that is entitled to apply for execution of the decree. AIR 1953 Nag 38

Order 21, Rule 10 — Note 2 (contd.)
(39): ILR (1952) Nag 453 (DB) ** AIR 1946 Bom 27 (29): ILR (1946) Bom 234 (DB) ** AIR 1940 Pat 472 (473) (DB).

(2) A defendant in a partition suit in which a decree has been passed is in the position of a decree-holder, and will be entitled to apply for execution. AIR 1923 Bom 23 (23): 46 Bom 937 (DB).

(3) In the case of decrees in representative suits, a person not on the record, but who was represented in the suit by the decree-holder on record, can apply to be brought on the record and to execute the decree. AIR 1923 Mad 472 (473).

(4) In a joint Hindu family a coparcener of a decree-holder cannot apply for the execution of the decree as a decree-holder. AIR 1946 Bom 27 (29): ILR (1946) Bom 234 (DB).

(5) Where a decree grants a relief to a person named in the decree, such person can enforce the decree notwithstanding the fact that he is not party to the suit. AIR 1932 Bom 378 (379) ** AIR 1932 Mad 193 (194) (DB).

[See however AIR 1917 Oudh 182 (184).]

(6) Presentation of execution application by a pleader to whom the authority in the prescribed manner under Rule 4, Order 3, Civil P. C., was not given is only an irregularity which could be cured at a subsequent stage. AIR 1957 Andh Pra 172 (178, 179, 181, 182): ILR (1957) Andh Pra 1 (FB).

(7) Persons entitled to separate amounts under a decree may join in one application. Where, in such a case, one of them subsequently withdraws from the application, it may continue in the name of the other persons. AIR 1952 Trav-Co 575 (576): ILR (1953) Trav-Co 249 (DB) ** AIR 1935 All 402 (403, 404).

(8) Decree in the name of a joint Hindu family firm by its manager — Firm subsequently made a partnership firm with same family members as partners cannot execute the decree. AIR 1969 Guj 55 (58, 59).

(9) An agent authorised by the decree-holder to file the application for execution can sign the same. (1966) 68 Bom LR 868 (870): 1967 Mah LJ 112.

(10) Application of decree-holder or his legal representatives essential to confer jurisdiction on Court — Application by persons claiming to be only children of decree-holder did not give jurisdiction to executing Court. 1961 Ker LT 582 (DB).

(11) Receiver appointed by a Court can apply for execution of decree on behalf of the decree-holder. Receiver may have been appointed by a foreign Court. AIR 1967 Ker 118 (119, 120): 1966 Ker LT 960 (DB).

(12) Heirs of deceased decree-holder can apply for execution of a decree for costs without obtaining a succession certificate. AIR 1968 Pat 128 (129): 1967 BLJR 699 ** AIR 1965 Pat 296 (296).

(13) Execution application — Withdrawal by decree-holder — Permissible at any stage — Judgment-debtor has no say in the matter. 1962 All WR (HC) 18: 1962 All LJ 223 (DB).

(14) In a scheme decree, where defendant, who is also judgment-debtor is given rights he can apply for execution if the decree were otherwise executable. AIR 1960 Cal 718 (721): 1959 Cal LJ 237 (DB).

(15) On transfer of decree by assignment in writing in favour of benamidar of judgment-debtors—Decree-holder or his heir cannot execute decree. AIR 1963 Bom 244 (246): 65 Bom LR 408 (DB).

(16) Suit for damages for taking forcible possession — Transfer of land with claim for damages pending suit — Transferee not substituted — Decree in favour of transferor — Execution by transferee is maintainable. AIR 1969 Orissa 142 (143): 35 Cut LT 86.

3. Court to which the decree is sent for execution.— (1) A transfer made in an irregular manner is not null and void and if the irregularity is not objected to, an application made to the transferee Court is in order. (1887) 1887 Bom PJ 328 (328) Reprint, Page 479 (479) (DB).

[See however AIR 1940 Lah 97 (98).]

(2) The mere fact that the transfer is made on the ground that the judgment-debtor has immovable property within the jurisdiction of the transferee Court does not deprive such Court of the power to entertain an application for the arrest of the judgment-debtor. AIR 1938 Mad 27 (28, 29).

(3) Where an order has been made for transfer, the decree-holder is entitled to apply for execution to the transferee Court even before the receipt of the copy of the decree by that Court. AIR 1946 Mad 169 (169) ** AIR 1933 Mad 627 (627, 628): 56 Mad 692 (DB).

(4) Presentation of execution application to transferee Court before order of transfer — Presentation of application held was valid as application was with transferee Court when order of transfer was passed. AIR 1953 Mad 71 (73) (DB).

(5) The filing of an execution petition in the transferee Court within 12 years of the decree and before the order of transmission which is passed after the expiry of 12 years, would not save the decree-holder from the bar of Section 48, Civil P. C. AIR 1957 Mad 726 (727) (DB).

(6) Transferee Court not having jurisdiction — No steps by decree-holder in transferee Court under O. 21, R. 10 — No occasion for judgment-debtor to raise objection against jurisdiction of transferee Court — No waiver. AIR 1964 Orissa 88 (91): 30 Cut LT 9.

4. Time of presentation of application for execution.— (1) It is in the discretion of the Judge or officer appointed in that behalf to accept an application for execution be-

R. 11. Oral application.—(1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

(2) **Written application.**—Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court

Order 21, Rule 10 — Note 4 (contd.)

yond office hours. AIR 1938 Nag 46 (47): ILR (1938) Nag 451.

5. Application for execution.— (1) If a decree of a lower Court is confirmed on appeal while execution proceedings are pending a fresh application for execution is necessary. AIR 1930 Bom 225 (227) (DB).

(2) Decree-holder whose application for execution has been stayed by the Appellate Court can continue execution proceedings on the same application after the dismissal of the judgment-debtor's appeal. AIR 1946 All 496 (496): ILR (1946) All 475 (DB) °° AIR 1965 Ker 29 (30, 31): 1964 Ker LT 532.

(3) When a decree follows an attachment before judgment, Order 38, Rule 11 does not exempt the plaintiff from making an application as required by this rule. (1910) 34 Mad 25 (28) (DB) °° AIR 1929 Nag 148 (150): 25 Nag LR 94 (DB).

(4) An application under Section 39 for transfer of a decree is not an application for execution, but is only an application to take some step-in-aid of execution. AIR 1948 Nag 189 (192): ILR (1947) Nag 497 °° AIR 1926 All 473 (474) (DB) °° AIR 1932 Pat 309 (311): 11 Pat 785 (DB).

(5) Where a decree is transferred for execution to another Court, it is the application for execution that initiates the proceedings in execution. The receipt of the decree on transfer is a mere ministerial act. AIR 1938 Rang 385 (386): 1938 Rang LR 355 (DB).

[See also (1969) 1 Mys LJ 298.]

(6) Where an application for execution is sent to the Court by post, it is not a proper presentation to the Court. AIR 1951 Punj 371 (374).

(7) The second officer must be held to have proper authority to entertain the execution petition in the absence of the Subdivisional Officer who alone has exclusive jurisdiction to entertain such petitions under the Santhal Paraganas Justice Regulation. AIR 1956 Pat 522 (524) (DB).

(8) Mortgage decree re-opened under Section 36, Bengal Money-lenders Act — New decree passed for certain sum of money — Provision for payment by instalments with default clause — Properties purchased by decree-holder restored to judgment-debtor — Properties to be restored in case of default — Default made — Application for re-restoration — Application is for execution though not couched in proper form. **AIR 1954 SC 409 (411): 1955 SCR 150.**

(9) A decree cannot be executed unless there is an application. **68 Bom LR 868 (870): 1967 Mah LJ 112.**

(10) Execution petition filed within three years of decree is step in aid of execution and saves limitation. AIR 1969 Manipur 1 (2).

(11) Decree passed by Court A — Territorial jurisdiction transferred from Court A to Court B — Both the Courts A and B had jurisdiction to entertain the application for execution. AIR 1969 Guj 141 (145).

6. Dismissal of application for default.— (1) An order dismissing the application, when there is no default on the part of the decree-holder, cannot be upheld, more so when Section 48 of the Code is likely to operate as a bar to making any further application for execution. AIR 1955 Nag 305 (306): ILR (1956) Nag 390 (DB).

(2) A Court has inherent power to dismiss an application for execution when the applicant fails, through his own laches, to put the Court in a position to proceed with the application. (1893) 15 All 84 (95) (FB) °° AIR 1933 Mad 418 (422): 56 Mad 490 (FB) °° AIR 1950 Madh B 59 (59).

(3) Dismissal of an execution application for default does not bar a fresh application for execution. (1893) 15 All 84 (101) (FB) °° (1895) 18 Mad 131 (133).

(4) Where an application for execution is dismissed for default but is later on restored all the proceedings taken under it can be revived. AIR 1948 East Punj 70 (72).

(5) Issue of notice is not a condition precedent to the dismissal of an execution petition for want of prosecution. AIR 1959 Ker 154 (154): 1958 Ker LT 830 (DB).

ORDER 21, RULE 11 — SYNOPSIS

1. Scope.
2. "Decree for payment of money."
3. Immediate execution — Sub-rule (1) — Privilege from arrest.
4. Verification of application.
5. Names of parties.
6. Clause (c).
7. Clanse (d).
8. Clause (e).
9. Clause (f).
10. Clause (g).
11. Clause (h).
12. Clause (i).
13. Clause (j).
14. Certified copy of decree to be filed — Sub-rule (3).

1. Scope.— (1) Sub-rule (2) is not limited to a money-decree but prescribes the form

to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:—

(a) the number of the suit;

(b) the names of the parties;

(c) the date of the decree;

(d) whether any appeal has been preferred from the decree;

(e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;

(f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;

(g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;

(h) the amount of the costs (if any) awarded;

(i) the name of the person against whom execution of the decree is sought; and

(j) the mode in which the assistance of the Court is required, whether—

(i) by the delivery of any property specifically decreed;

(ii) by the attachment and sale, or by the sale, without attachment, of any property;

(iii) by the arrest and detention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise, as the nature of the relief granted may require.

Order 21, Rule 11 — Note 1 (contd.)

for the execution of a decree in all cases, AIR 1947 Bom 430 (432).

(2) Every omission to comply with requirements of sub-rule (2) is not necessarily such a defect as will vitiate the execution proceedings. AIR 1926 Cal 1146 (1147, 1148) (DB) °° AIR 1933 Rang 87 (88, 89) °° AIR 1929 Mad 703 (704): 52 Mad 760 (FB) °° AIR 1965 Raj 155 (158): 1964 Raj LW 59 °° AIR 1959 Raj 107 (109): ILR (1958) 8 Raj 1091.

(3) Informalities of an immaterial character will not vitiate the proceedings. AIR 1941 Rang 316 (319): 1941 Rang LR 774 (DB) °° AIR 1936 Pat 62 (63) (DB) °° AIR 1962 Raj 161 (162): 1961 Raj LW 277.

(4) Court can direct technical and formal defect to be cured by appropriate amendment even after decree has become barred by limitation. AIR 1965 Ker 29 (30, 31): 1964 Ker LT 532. (1949 Ker LT 191, Dissented. from.)

(5) Where the omissions relate to material particulars, the application cannot be considered to be one in accordance with law and cannot save limitation. AIR 1941 Nag 152 (154) °° AIR 1931 All 722 (723) °° AIR 1926 Pat 533 (534) (DB).

(6) Whether an omission is material or not will depend upon the particular facts of each case. AIR 1943 Nag 296 (297): ILR (1943) Nag 584 (DB) °° AIR 1934 Bom 307 (310): 59 Bom 1 (DB) °° AIR 1934 Cal 465 (466) (DB).

(7) An application which complies with the requirements of Order 21, Rules 11 to 13 but not with those of Rule 14 is not one not in accordance with law. AIR 1950 Mad 2 (6): ILR (1950) Mad 39 (DB) °° AIR 1945 Mad 154 (155): ILR (1945) Mad 684 (FB).

[See AIR 1969 Guj 55 (60) °° AIR 1966 Madh Pra 350 (352): 1966 Jab LJ 335.]

(7) The want of a succession certificate will not make the application for execution itself one not in accordance with law. AIR 1953 Mad 855 (856) °° AIR 1935 Nag 1 (2): 31 Nag LR 126.

(8) Where an application for execution is not in proper form or is otherwise defective, the Court should either give the decree-holder an opportunity to amend his application or reject it. AIR 1955 SC 376 (395, 402): 1955-1 SCR 1369.

(9) The Code does not require the filing of sale papers along with the application for execution. AIR 1942 Mad 495 (497).

(10) Application to enforce surety's liability under Section 145 should comply with this rule. AIR 1942 Sind 134 (135): ILR (1942) Kar 79 (DB).

(11) Ground of exemption from the bar of limitation may be urged at the hearing of the application, though not mentioned therein. AIR 1940 Lah 178 (179).

(12) The rule does not require that an encumbrance certificate should be filed along with the execution application in order

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

[1882 and 1877, Ss. 235, 256; 1861, S. 18; 1859, S. 212. See Ss. 88 and 51 and 135 and O. 40, R. 1.]

HIGH COURT AMENDMENTS

Allahabad

(1) For Clause (f) of sub-rule (2), substitute the following:

"(f) The date of the last application, if any," and,

(2) Add the following proviso to sub-rule (2):

"Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application."

(3) Add the following as sub-rule (4):

"Where a decree for money is sought to be executed under sub-rule (2) by the arrest and detention in prison of the judgment-debtor, the application shall also state on which of the grounds mentioned in the proviso to Section 51, detention is claimed" [19-5-1956].

Andhra Pradesh

Same as that of Madras.

Bombay: Dadra and Nagar Haveli[a]

In Order XXI, Rule 11, for the existing Item (ii) mentioned below particular (j) in sub-rule (2), substitute the following as Item (ii):—

"(ii) by the attachment, or by the attachment and sale, or by the sale without attachment of any property" [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965].

Order 21, Rule 11 — Note 1 (contd.)

to make it one in accordance with law. AIR 1954 Mad 74 (76) (DB).

(13) An application for execution by an assignee decree-holder not accompanied by the assignment deed will not be one not in accordance with law. AIR 1952 Mad 90 (90, 91).

(14) This rule does not require that an interlocutory application for continuation of execution proceedings already pending must also be in the form provided by the rule. AIR 1957 All 647 (648) (DB).

(15) Under certain circumstances the cheque application together with the affidavit may well be regarded as an execution petition if it satisfied all the requirements of Rules 11 to 14 of Order 21. AIR 1957 Mad 665 (666, 667).

(16) This rule does not seem to make it a condition precedent for the application for execution to be made that there should be in existence a decree-sheet. AIR 1957 Punj 65 (67, 69): ILR (1957) Punj 365.

(17) If an application is valid and in accordance with law at the time it was made, the same cannot be invalidated by any subsequent act of default by the decree-holder. (1966) 2 Mys LJ 365 (368): (1966) 7 Law Rep 13.

(18) The right to apply under Order 21, Rule 11 for execution of a foreign judgment accrues on and from the date of filing a certified copy under Section 44-A (1) and for this purpose non-filing of a non-satisfaction certificate under Section 44-A (2) is not relevant. AIR 1967 Mad 45 (54): (1966) 2 Mad LJ 346 (FB).

(19) A composite application for execution of a decree for possession with a prayer for a relief by way of mesne profits on the basis of a stay order granted by the High Court on appeal, is maintainable. AIR 1967 SC 761 (762): 1963 Mah LJ 631.

(20) Simultaneous petitions for execution against two different judgment-debtors for amount due under decree is not barred. AIR 1961 Andh Pra 63 (64): (1960) 2 Andh WR 66.

(21) Decree-holder allowed to sue as a pauper — Payment of Court-fee on mesne profits is not a condition precedent before execution can be proceeded with — Case held covered by Order 33, Rule 8. 1968 All LJ 17 (DB).

(22) Application by decree-holder to issue a cheque to withdraw the amount deposited — Non-compliance with sub-rule (1) or (2) of Order 21, Rule 15 — It is not an application for execution. (1968) 2 Andh LT 236 (239): (1969) 1 Andh WR 448.

2. "Decree for payment of money."— (1) A decree need not state the exact amount due. A decree under which the amount due has to be ascertained subsequently may be a decree for the payment of money. AIR 1939 Bom 367 (368) (DB).

3. Immediate execution — Sub-rule (1) — Privilege from arrest.— (1) Although the decree-holder may be conscious that the Court will not make an order for the arrest

Kerala: Laccadive, Minicoy and Amindivi Islands

In Rule 11, in sub-rule (2)—

(i) after clause (f) the following clause shall be inserted, namely :—

"(ff) whether the original decree-holder has transferred any part of his interest in the decree, and if so, the date of the transfer and the name and address of the parties to the transfer".

(ii) for clause (j) the following shall be substituted, namely :—

"(j) the mode in which the assistance of the Court is required whether—

(i) by the delivery of any property, specifically decreed;

(ii) by the attachment and sale, or by the sale without attachment, of any property;

(iii) by the arrest and detention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise, as the nature of the relief granted may require.

In an execution petition praying for relief by way of attachment of a decree of the nature specified in sub-rule (1) of Rule 53 of this order, there shall not be included any other relief mentioned in this clause" (9-6-1959); Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3.

Order 21, Rule 11 — Note 3 (contd.)

of the judgment-debtor and yet applies for such arrest and fails to obtain an order for arrest, his application will be one in accordance with this rule. AIR 1947 Bom 430 (433).

4. Verification of application.— (1) Where there are several applicants it is not necessary that all of them should verify the application even though some of them are not acquainted with the facts of the case. AIR 1924 Pat 23 (25): 2 Pat 809 (DB).

(2) Where an application for execution is verified by a person other than the decree-holder, all that is necessary is that the Court should be satisfied that he is acquainted with the facts of the case. AIR 1924 Cal 811 (811) (DB) °° AIR 1929 Bom 196 (196) (DB) °° AIR 1936 Pat 62 (63) (DB).

[But see (1905) 28 Mad 396 (398) (DB).]

(3) The application itself must be that of the decree-holder or his recognised agent or pleader. AIR 1957 Raj 122 (124): ILR (1957) 7 Raj 185 (DB) °° AIR 1937 Mad 760 (761).

(4) Application signed and verified by person purporting to be mukhtar-i-am of decree-holder — Mukhtarnama not filed — Court not satisfied that he was authorised to sign — Rejection of application is proper. AIR 1936 All 17 (18).

5. Names of parties.— (1) An application for execution will not be defective if it does not specify the addresses of the judgment-debtors. AIR 1941 Nag 152 (154).

(2) Change in name of plaintiff company pending suit — Decree passed on old name can be executed by company in its new name. AIR 1955 All 192 (192) (DB).

6. Clause (c).— (1) The date of the decree is the date on which the judgment was pronounced. (1898) 25 Cal 109 (110, 111) (DB) ° (1909) 3 Ind Cas 391 (392) (DB) (Cal) °° (1897) 1 Cal WN 93 (94) (DB).

(2) If the decree-holder has authorised his agent to file execution application, the agent can sign it. (1966) 68 Bom LR 868: 1967 Mah LJ 112.

(3) An error in the date of the decree or the omission to give it in an application for execution is not a material irregularity and will not affect the validity of the application. (1898) 20 All 478 (480) (DB) °° (1875) 1 All 212 (215) (FB) °° AIR 1931 Sind 160 (160): 25 Sind LR 528 °° AIR 1936 All 17 (18) °° AIR 1961 Bom 145: 62 Bom LR 214 (DB).

(4) It is not necessary for decree-holder to mention the date on which the final mortgage decree or the decree of the High Court was amended specially when his prayer in the execution petition is in accordance with the final decree as amended. AIR 1955 Pat 284 (288) (DB).

(5) Decree-holder applying for execution before date mentioned in decree — Court has discretion to condone such irregularity if no prejudice is caused to opposite side. AIR 1935 Mad 118 (118) (DB).

7. Clause (d).— (1) An omission to mention the particulars required by this clause does not render the application one not "in accordance with law." AIR 1933 Mad 872 (874).

(2) Execution of decree of trial Court — Appeal against decree of trial Court — Decree affirmed or modified — Execution Can still continue subject to the decision of appellate Court. AIR 1960 Raj 249 (250): ILR (1960) 10 Raj 272.

8. Clause (e) — (1) The applicant for execution is bound to mention in the application any payment or adjustment made between the parties after decree. AIR 1921 Pat 135 (136): 6 Pat L Jour 357 (DB) °° AIR 1926 Nag 164 (166).

Madhya Pradesh

Add the following proviso to sub-rule (2):

"Provided that, when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application" [16-9-1960].

Madras and Pondicherry

(1) In sub-rule (2) between clauses (f) and (g), insert the following new clause:

"(ff) whether the original decree-holder has transferred any part of his interest in the decree and, if so the date of the transfer and the name and address of the parties to the transfer" [P. Dis. No. 776 of 1929].

(2) Add the following to sub-rule (2) (j):

"In an execution petition praying for relief by way of attachment of a decree of the nature specified in sub-rule (1) of Rule 53 of this Order, there shall not be included any other relief mentioned in this clause."

(3) Add the following proviso at the end of sub-rule (2):

"Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application (2-9-1936 and 13-10-1936); Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 4-9-1968].

Order 21, Rule 18 — Note 8 (contd.)

(2) The applicant for execution is not bound to state the dates of payments or adjustments. AIR 1941 Nag 152 (154).

(3) Where a portion of the decretal amount has been deposited in Court with notice to the decree-holder, the latter must mention such fact in his application and execute the decree only for the balance. AIR 1933 Pat 89 (89, 90): 11 Pat 796 (DB).

9. Clause (f).— (1) An omission to specify the previous applications and their results is not ipso facto a material defect which will make the application for execution not one in accordance with the law. AIR 1941 Nag 152 (155) °° 1957 Andh LT 584 (586) °° AIR 1926 Cal 1146 (1148) (DB) °° AIR 1928 Mad 440 (442, 444) (DB) °° AIR 1966 Raj 258 (260): 1966 Raj LW 201 °° AIR 1960 Punj 362 (363, 364).

[But see AIR 1922 Sind 29 (30): 15 Sind LR 156 (DB).]

(2) The word "result" in this clause does nor mean completed results and does not imply that no further application for execution can be entertained so long as one is pending and undisposed of. AIR 1955 All 382 (383, 384) (DB) °° AIR 1941 Bom 37 (39). ILR (1941) Bom 89 (DB).

(3) Consent decree — Steps taken against charged properties not specified — Execution held not maintainable. AIR 1969 Bom 84 (88): 70 Bom LR 373.

(4) Decree-holder referring to previous executions dates and thir results — There is compliance with requirements — Objection to such application, it any, should be in specific form. AIR 1964 Orissa 170 (172): (1964) 6 OJD 21.

10. Clause (g).— (1) A Court will be justified in declining to act on an execution petition when the decree-holder does not state the amount due upon the decree. AIR 1921 Nag 90 (91) (DB) °° (1922) 65 Ind Cas 120 (120) (Pat) °° 1890 All WN 93 (93) °° AIR 1964 Pat 214 (225).

(2-3) Under this clause the decree-holder is required to include interest in his application for execution. But interest omitted for the time being can be included subsequently by way of an amendment. AIR 1956 Nag 91 (93): ILR (1956) Nag 330 (DB) °° 1966 Jab LJ 452 (460). (Slight error in calculation.)

(4) Where a decree awards interest and the application for execution specifies the interest from the date of the decree to the date of the application execution may be ordered for future interest also up to the date of sale, even though it is not specifically included in the application. AIR 1932 Cal 555 (557) (DB).

11. Clause (h).— (1) The omission to mention the particulars mentioned in this clause is not a material omission and will not vitiate the application for execution. AIR 1928 Mad 440 (441) (DB) °° AIR 1922 Sind 29 (30): 15 Sind LR 156 (DB).

12. Clause (i).— (1) An application for execution must state the name of the person against whom execution is sought. AIR 1943 Mad 179 (181): ILR (1943) Mad 659 (DB).

(2) Where a judgment-debtor dies pending the execution proceedings the decree-holder can continue the same execution against the heirs by bringing them on record in place of the deceased. AIR 1946 Cal 51 (52, 53): ILR (1945) 2 Cal 637 (DB).

(3) A decree for costs passed against a minor represented by his father as guardian (or next friend) cannot be executed against the father. AIR 1935 All 359 (360) (DB).

(4) The mere fact of a mistake having been made in giving the particulars re-

Mysore

In Rule 11 sub-rule (2) (i) insert the following as clause (ff) after clause (f) and before clause (g) :—

"(ff) Whether the decree-holder has transferred any part of his interest in the decree and, if so, the date of the transfer and the names and addresses of the parties to the transfer;"

(ii) At the end of clause (j) of sub-rule (2) of Rule 11 add the following:—

"In an execution petition praying for relief by way of attachment of a decree of the nature specified in sub-rule (1) of Rule 53 of this Order, there shall not be included any other relief mentioned in this clause" [30-3-1967].

Orissa

Same as (1) and (2) of Patna.

Patna

(1) Add the following as sub-rule (1A):

"(1A) Where an order has been made under Section 39 for the transfer of a decree for the payment of money for execution to a Court, within the local limits of the jurisdiction of which the judgment-debtor resides, such Court may, on the production by the decree-holder of a certified copy of the decree and an affidavit of non-satisfaction, forthwith order immediate execution of the decree by the arrest of the judgment-debtor".

(2) Substitute the words and figures "sub-rules (1) and (1A)" for the word and figure "sub-rule (1)" in sub-rule (2).

(3) Delete clauses (b), (c), (d), (f) and (h) of sub-rule (2) of Rule 11 [5-4-1961].

Order 21, Rule 11 — Note 12 (contd.)

quired by this clause cannot have the effect of rendering the application a nullity. AIR 1957 Pat 299 (302): 35 Pat 907 (DB).

13. Clause (j).— (1) An execution application which does not specify the manner in which the assistance of the Court is required is not an application in accordance with law. AIR 1953 All 74 (75) (DB) °° AIR 1929 Nag 148 (150): 25 Nag LR 94 (DB) °° AIR 1932 Lah 534 (534): 14 Lah 6 (DB) °°1961 Raj LW 115.

[But see 1883 Pun Re No. 23 p. 72 (75) (DB).]

(2) An application asking for a relief which the Court cannot grant is not one in accordance with law. AIR 1943 Bom 353 (358): 45 Bom LR 707 (716) (DB) °° AIR 1941 Mad 30 (31) °° AIR 1918 Bom 236 (240): 42 Bom 420 (DB).

[But see (1905) 26 Bom 283 (287) (DB).]

(3) Where in the column intended for the entry of the mode in which the assistance of the Court is required the entry consists merely of a prayer that a certificate of non-satisfaction of the decree should be sent to another Court, it is not an application for execution. AIR 1948 Nag 189 (192): ILR (1947) Nag 497 °° AIR 1947 Pat 388 (391): 25 Pat 790 (DB).

(4) Application for attachment of property lying outside jurisdiction of Court — No prayer for transfer of decree — This amounts to irregularity. AIR 1946 Nag 365 (367): ILR (1946) Nag 563 (DB).

(5) No objection at any stage, taken that application did not specify mode of execution — Decree-holder later on filing another tabular statement specifying mode of execution — Judgment-debtor cannot contend that application was not maintainable. AIR 1955 SC 376 (395): 1955-1 SCR 1369.

(6) The modes of execution mentioned are not exhaustive. (1913) 18 Ind Cas 691 (695) (DB) (Mad) °° AIR 1920 Lah 117 (118) (DB).

(7) Where the decree-holder prays for a particular mode of execution, he cannot ask the Court to give a different mode of execution upon that application. 1899 Pun Re No. 21, p. 121 (DB) °° (1911) 9 Ind Cas 241 (241) (Oudh).

[But see (1906) 33 Cal 306 (308) (DB).]

(8) The issue of a notice under Order 21, Rule 22 may itself be a mode in which the assistance of the Court is sought. AIR 1943 Bom 238 (239).

[But see AIR 1947 Bom 430 (432).]

(9) Case falling under Order 30, Rule 9 — Nature of relief need not be stated. AIR 1950 Bom 184 (187) (FB).

(10) Where the property sought to be attached is inalienable under the law the Court has no power to attach it. AIR 1941 Nag 152 (155) °° AIR 1935 Nag 133 (135): 31 Nag LR 239.

(11) The clause says nothing about the specification of the property which may be desired to be attached. But if attachment is asked the decree-holder has to state the property which is to be attached. AIR 1949 Cal 457 (459): ILR (1950) 2 Cal 171 °° AIR 1947 Bom 430 (432) °° AIR 1944 Pat 214 (216): 23 Pat 103 (DB).

R. 12. Application for attachment of moveable property not in judgment-debtor's possession.—Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

[1882 and 1877, S. 236; 1859, S. 214. See Ss. 2 (13) and 60].

Order 21, Rule 11 — Note 13 (contd.)

[See however AIR 1969 Guj 55 (61).]

(12) Application for execution of money decree seeking assistance of Court by rateable distribution is one of the modes covered by sub-cl. (v) of sub-rule 2 (j). AIR 1969 Guj 200 (202): 10 Guj LR 148. (AIR 1929 Nag 148, Dissented. from.)

(13) Claimant for rateable distributions must have applied for execution to court by which assets are held, before receipt of assets — Application for transfer of decree to Court holding assets is not one for execution. AIR 1965 Mad 511 (512): (1965) 2 Mad LJ 17.

(14) The execution petitioner must satisfy both in form and substance the requirements of Rule 11. AIR 1957 Andh Pra 1017 (1017, 1018) °° AIR 1961 Madh Pra 145 (146, 147): 1961 MPLJ 256 (FB) °° AIR 1962 Raj 161 (163, 164): 1961 Raj LW 277 (DB) °° AIR 1959 Cal 566 (566, 567): 63 Cal WN 983 (DB). (AIR 1929 Nag 148, Dissented from.)

(15) Where a decree-holder applies for payment of amount which is in Court deposit, it means by implication that he requests the Courts to take all necessary steps to enable payment of that amount, that is to say, to attach that amount and pay it to him. AIR 1957 Mad 665 (666).

(16) Execution application with prayer for attachment of amount payable to judgment-debtor — Amount already attached by another decree-holder and received in Court — Mode in which assistance of Court was required sufficient — No specific application for rateable distribution was necessary. AIR 1968 Raj 3 (4): 1968 Raj LW 111.

(17) Application for attachment of money in hands of Receiver — Application is in accord with Rule 11 (2) (j) (ii) — Merely because relief cannot be granted by executing Court as no permission was obtained from Court which appointed Receiver, application cannot be considered as inconsistent with R. 11. AIR 1968 Andh-Pra 113 (115, 116): (1968) 1 Andh LT 89.

(18) A composite application for execution of a decree for possession, with a prayer for relief by way of mesne profits on the basis of a stay order granted by the High Court in appeal, is maintainable. AIR 1967 SC 761 (762): 1968 Mah LJ 631.

(19) Unless a decree is on the basis of hypothecation or charge the property sought to be proceeded against in execution has to be attached, otherwise attachment is not necessary and a decree-holder can ask directly for sale of the property hypothecated or charged. AIR 1961 All 436 (437): 1962 All WR (HC) 94.

(20) Decree-holder not only failing to mention mode of execution but also stating that no notice need be issued for the time being — Application not in accordance with law. AIR 1959 Raj 107 (109): ILR (1958) 8 Raj 1091.

(21) Properties to be attached must have been in possession of judgment-debtor on the date of execution petition itself. AIR 1964 Orissa 182 (184): ILR (1963) Cut 927 (DB). (Application for adding compensation money held, would be a fresh execution petition and barred under Sec. 48 having been filed more than 12 years from the date of decree.)

14. Certified copy of decree to be filed—Sub-rule (3). — (1) It is not imperative that an application for execution should, in all cases, be accompanied by a copy of the decree. AIR 1954 Pat 92 (93) (DB) °° AIR 1930 Cal 804 (805, 806): 57 Cal 996 (DB) °° (1910) 5 Ind Cas 660 (662) (DB) (Cal) °° (1966) 2 Mys LJ 25 (29): (1966) 6 Law Rep 809 °° AIR 1960 Madh Pra 41 (42): 1959 MPLJ 559.

(2) The Court can order the execution to proceed without a copy of the decree being filed. (1910) 5 Ind Cas 660 (662) (DB) (Cal).

[See also AIR 1963 Cal 104 (107, 109, 110) (DB).]

Order 21, Rule 12 — Note 1

(1) This rule applies to moveables in the possession of third parties. When a third party has some moveables belonging to himself and others belonging to the judgment-debtor, an inventory is obviously necessary before an attachment can be made. AIR 1930 Bom 65 (66) (DB) ** (1893) 15 All 84 (86) (FB) ** (1911) 9 Ind Cas 729 (729) (DB) (Mad).

(2) Where a decree is passed under Section 52 of the Code against the legal representatives of a deceased debtor and the moveable property attached is in their possession, the rule has no application. AIR 1927 Bom 52 (52): 50 Bom 730 (DB).

(3) Where a decree is sought to be executed against the legal representative under Section 50, no inventory is necessary. AIR 1953 All 461 (463) (DB). (AIR 1952 All 618, Reversed.) ** AIR 1930 Bom 65 (65, 66) (DB).

(4) No inventory is necessary where the property sought to be attached is in the possession of the judgment-debtor himself. AIR 1941 Nag 152 (155) ** (1956) 22 Cut L

R. 18. Application for attachment of immoveable property to contain certain particulars.—Where an application is made for the attachment of any immoveable property belonging to a judgment-debtor, it shall contain at the foot—

(a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and

(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

[1882, S. 237; 1877, Ss. 237, 238; 1859, S. 213.]

R. 14. Power to require certified extract from Collector's register in certain cases.—Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors.

[1882, S. 238; 1877, Ss. 237, 238; 1859, S. 213.]

Order 21, Rule 12 — Note 1 (contd.)

Tim 215 (217) ** AIR 1938 Cal 235 (235) (DB).

(5) Where the application is for sale of property already under attachment, an inventory of the property is not necessary. AIR 1940 Bom 250 (251).

(6) There is no obligation on the judgment-debtor to post the decree-holder with all details of his properties. **AIR 1951 SC 16 (20): 1950 SCR 852.**

(7) Execution petition would be in accordance with law if it complies with provisions of Order 21, Rules 11 to 14, even when a condition precedent prescribed by the decree is not performed. AIR 1966 Madh Pra 350 (352): 1966 Jab LJ 335.

(8) Jugment-debtor himself being in possession of moveables — Description not necessary — Inventory, however, necessary if they are with the agent of the Judgment-debtor. AIR 1969 Guj 55 (60).

(9) No list of moveable property in possession of judgment-debtor is necessary under Order 21, Rule 12. Position of legal representative is same. AIR 1960 Madh Pra 187 (188): 1960 MPLJ 174.

Order 21, Rule 13 — Note 1

(1) The rule applies only to execution of money decrees, and not to decrees made upon a charge or a mortgage. AIR 1955 Trav-Co 109 (109) ** AIR 1943 Cal 131 (132) (DB).

(2) Where the property is already under attachment and the application is for sale, the rule does not apply. AIR 1940 Bom 250 (251).

(3) The object of requiring the boundaries and numbers to be specified is to easily identify the property. AIR 1943 Pat 127 (130): 21 Pat 838 (DB) ** AIR 1914 Oudh 280 (281): 17 Oudh Cas 256 (DB).

(4) Clause (b) imposes a duty on the decree-holder to specify the judgment-debtor's share or interest, to the best of his belief. AIR 1953 Pat 58 (59): 31 Pat 722 (DB) ** AIR 1931 Nag 116 (117): 27 Nag LR 318.

(5) The provisions of this rule are mandatory. AIR 1950 Mad 2 (6): ILR (1950) Mad 39 (DB) ** **AIR 1943 PC 98 (101).**

(6) An application not containing the particulars required by this rule is not an application in accordance with law. AIR 1944 Pat 214 (216): 23 Pat 103 (DB) ** AIR 1931 Bom 128 (128) ** (1893) 15 All 84 (86) (FB).

(7) Execution petition will be in accordance with law if it complies with provisions of Order 21, Rules 11 to 14 even if a condition precedent prescribed by the decree is not performed. AIR 1966 Madh Pra 350 (352): 1966 Jab LJ 335.

(8) The formal defects in the application, though detected after 12 years, can be removed by application under Order 21, Rule 17 at the discretion of the Court. AIR 1959 Assam 25 (27, 28): ILR (1958) 10 Assam 14 (DB). (AIR 1945 Mad 241, Foll.)

Order 21, Rule 14 — Note 1

(1) This rule leaves it to the option of the Court to require the applicant to produce a certified extract. AIR 1950 Mad 2 (6): ILR (1950) Mad 39 (DB) ** **AIR 1943 PC 98 (101): 71 Ind App 83.**

(2) Where an application for sale is made in pursuance of a mortgage decree, a preliminary attachment of the mortgaged properties is not necessary, and therefore this rule does not apply to such a case. AIR 1946 Bom 105 (106): ILR (1945) Bom 1068 ** AIR 1937 Oudh 233 (234): 13 Luck 162 (DB).

(3) An application for execution cannot be held to be not one in accordance with

HIGH COURT AMENDMENT

Kerala: Laccadive, Minicoy and Amindivi Islands

(i) In Rule 14, for the marginal note the following shall be substituted :—

"Power to require certified extracts from the Registers of Revenue Accounts".

(ii) for the words "in the office of the Collector" in the rule, the words "in the Revenue Accounts" shall be substituted [9-6-1959]; Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3.

R. 15. Application for execution by joint decree-holder.—(1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

[1882, S. 231; 1877, Ss. 230, 231; 1859, S. 207.]

Order 21, Rule 14 — Note 1 (contd.)
law merely because of the failure of the decree-holder to comply with an order of the Court under this rule. AIR 1950 Mad 2 (6): ILR (1950) Mad 39 (DB) ** AIR 1945 Mad 154 (155): ILR (1945) Mad 684 (FB) ** AIR 1943 PC 98 (100, 101): 70 Ind App 83.

(4) Rules 11 to 14 do not require that an encumbrance certificate should be filed along with the execution application in order to make it one in accordance with law. AIR 1954 Mad 74 (76) ** AIR 1966 Madh Pra 350 (352): 1966 Jab LJ 335.

ORDER 21, RULE 15 — SYNOPSIS

1. Scope.
2. "Where a decree has been passed jointly."
3. "Any one or more of such persons may . . . . . apply for the execution of the whole decree."
4. Application by one of several decree-holders for execution in respect of his share of the decree.
5. Payment by judgment-debtor out of Court to one of several decree-holders.
6. Defective application under the rule, if can be amended.
7. Appeal.

1. Scope.— (1) Where a decree is passed jointly in favour of several persons, one of the decree-holders alone cannot apply for execution of his share only of the decree, leaving the other decree-holders to take out execution for their shares. 1950 Ker L Tim 642 (643) (DB) ** AIR 1919 Pat 286 (287, 288): 4 Pat L Jour 575 (DB) ** AIR 1926 Oudh 605 (605): 2 Luck 259 (DB).

(2) This rule is based on the principle that the judgment-debtor should not be harassed by a number of applications for execution. AIR 1955 Raj 197 (199): ILR (1955) 5 Raj 857 (DB).

(3) In order to prevent the interest of the other decree-holders from being jeopardised the Court is given power to make such order as is necessary to safeguard such interests. AIR 1945 Bom 380 (381): ILR (1945) Bom 463 (DB) ** AIR 1940 Sind 230 (232): ILR (1940) Kar 461 (DB) ** (1905) 1 Nag LR 24 (30) ** AIR 1918 Cal 153 (154) (DB).

(4) This rule does not prohibit a judgment-debtor from paying off the share of one of the decree-holders where they are shown or proved to have separate interests. AIR 1954 All 739 (741).

[But see AIR 1953 Bom 137 (139): ILR (1953) Bom 356 (DB).]

(5) A case falling within the scope of Order 21, R. 15 must be outside the purview of Section 66 of Civil P. C. AIR 1960 Pat 56 (57): 1959 BLJR 688.

(6) Provisions of Order 21, Rule 15, do not apply where, by terms of the joint decree, execution has been made dependent on all decree-holders joining in the application. 1967 MPLJ 740: 1968 Jab LJ 272 (DB).

(7) Adjustment of joint decree by one of several decree-holders (executors) — Adjustment binding on other executors. (1966) 2 Andh WR 276 (278).

(8) Order 21, Rule 15 contemplates execution by joint decree-holders against persons liable under the decree — Execution of a decree for joint possession by one of the joint decree-holders against the other is an impossible notion. AIR 1960 Cal 718 (721) (DB): 1959 Cal LJ 237.

2. "Where a decree has been passed jointly."— (1) A decree specifying shares of several decree-holders is not a joint decree, even though the amount is made payable as an entire sum. AIR 1953 Bom 137 (139): ILR (1953) Bom 356 (DB) ** (1892) 2 Mad L Jour 14 (15).

Order 21, Rule 15 — Note 2 (contd.)

[But see AIR 1932 Pat 261 (265): 11 Pat 445 (DB) ** AIR 1969 Pat 162 (165) ** AIR 1928 Sind 37 (38) (DB).]

(2) Where a suit is filed in the name of a firm, the decree passed in the suit in favour of the firm must be held to be a decree passed jointly in favour of all the partners. AIR 1932 Lah 596 (597): 13 Lah 546 (DB) ** AIR 1934 Mad 330 (331): 57 Mad 696 (DB).

(3) This rule applies only where a decree has been passed jointly in favour of more persons than one. AIR 1934 Pat 627 (628) (DB) ** 1967 MPLJ 740: 1968 Jab LJ 272 (DB).

[See however AIR 1929 Pat 232 (232, 233) (DB) ** ('31) AIR 1931 Lah 5 (6).]

(4) Where a portion of a decree is transferred to another either by assignment in writing or by operation of law, the transferee is in the position of a joint decree-holder and the Court has got the inherent power to grant him relief in execution by applying general principles of law analogous to this rule. AIR 1954 Bom 273 (274): ILR (1954) Bom 873 (DB) ** AIR 1945 Bom 380 (381, 382): ILR (1945) Bom 463 (DB) ** AIR 1921 Mad 599 (601, 605): 44 Mad 919 (FB).

(5) Where a decree has been passed awarding separate amounts to several persons, they can all make a single application for execution. AIR 1952 Trav-Co 575 (576): ILR (1953) Trav-Co 249 (DB) ** AIR 1935 All 402 (403).

(6) Composite decree under which several plaintiffs acquiring right in respect of different subject-matters — But in respect of certain amount one of plaintiff's only entitled to receive payment — That plaintiff only held was entitled to execute the decree in regard to that sum. AIR 1950 FC 8 (12): 1949 FCR 501.

(7) If a decree-holder dies leaving a number of heirs they will evidently become joint decree-holders. AIR 1956 All 575 (576).

(8) Joint decree in favour of several decree-holders — Death of one of joint decree-holders — Substitution of heirs of deceased decree-holder — Succession certificate not necessary. AIR 1967 Assam 27 (28): ILR (1966) 18 Assam 482.

(9) Decree passed jointly — Application for substitution of heirs of one of deceased decree-holders and for proceeding with execution — Procedure followed is correct and no exception can be taken to it. AIR 1967 Assam 27 (28): ILR (1966) 18 Assam 482.

(10) Decree for joint possession — Execution by one of joint decree-holders against another cannot proceed. AIR 1965 Punj 166 (168): 67 Pun LR 60. (Order 21, Rule 15, No. 2) quoted with approval.)

(11) Apportionment of subject-matter of decree — Decree is still joint — Individual decree-holder cannot execute in respect of shares allotted to others. AIR 1960 Madh Pra 66 (67, 68): 1960 MPLJ 278.

(12) Decree in favour of numbers of persons — No dispute as regards respective shares — Shares apparent on face of decree — Decree not joint decree — One of the decree-holders can take and execution in respect of his share. (1959) 25 Cut LT 303.

(13) Decree containing directions to plaintiffs to pay to each of nine defendants the costs incurred by him is not a joint decree. 1967 MPLJ 740: 1968 Jab LJ 272 (DB).

3. "Any one or more of such persons may . . . . . apply for the execution of the whole decree."— (1) This rule permits one or more of several joint decree-holders to apply for execution of the whole decree. AIR 1955 Raj 197 (199): ILR (1955) 5 Raj 857 (DB) ** AIR 1942 Bom 29 (31): ILR (1942) Bom 1 ** AIR 1941 Oudh 474 (475): 17 Luck 78 ** AIR 1964 All 548 (552): 1963 All LJ 969 (DB).

(2) The rule does not confer an unconditional right on one of the decree-holders to execute the decree. The matter is within the discretion of the Court. AIR 1955 Raj 197 (199): ILR (1955) 5 Raj 857 (DB) ** AIR 1954 All 739 (741) ** (1880) 7 Cal L Rep 537 (538) (DB).

(3) In a case where some of the decree-holders have already been paid off, the Court in its discretion will refuse to allow the remaining decree-holders to execute the whole decree. AIR 1954 All 739 (741).

[But see AIR 1953 Bom 137 (140): ILR (1953) Bom 356 (DB).]

(4) The Court may allow other decree-holders to intervene in a pending execution, if it is not being properly conducted. AIR 1921 Mad 599 (601): 44 Mad 919 (FB).

(5) It is the discretion of the Court whether or not notice should be given to the other decree-holders or to the judgment-debtor before making an order for execution under this rule. (1906) 33 Cal 306 (310) (DB) ** AIR 1933 Lah 655 (656): 14 Lah 212 ** AIR 1926 Cal 811 (812) (DB) ** AIR 1964 Orissa 83 (85).

(6) Where one decree-holder applies for execution and the others do not object it is not for the judgment-debtor to say that sufficient steps have not been taken to safeguard the interests of the other decree-holders. AIR 1941 Pat 499 (501) ** AIR 1931 Lah 600 (601) (DB) ** AIR 1926 Mad 1198 (1199) ** (1965) 2 Mys LJ 103 (DB).

(7) When one of several joint decree-holders executes a decree, he executes the decree prima facie for the benefit off all. AIR 1928 Mad 800 (801) (DB) ** AIR 1935 Lah 484 (486): 17 Lah 115 (DB) ** AIR 1960 Mys 249 (250): 38 Mys LJ 347.

(8) Where one decree-holder executes a joint decree and realises the amount due under it, the realization is made on be-

Order 21, Rule 15 — Note 3 (contd.)

half of, and for the benefit of, all the joint decree-holders and they are entitled to recover their respective shares from him by a separate suit. AIR 1942 Pat 230 (232, 233): 20 Pat 855 (DB) ** AIR 1915 PC 81 (82): 37 All 545: 42 Ind App 177.

(9) The absence of a statement that the entire decree is being executed for the benefit of all the decree-holders from the execution petition does not render the application for execution not in accordance with law. AIR 1957 Andh Pra 403 (405) ** AIR 1953 Orissa 13 (15): ILR (1952) Cut 522 (DB) ** AIR 1951 Pat 645 (646, 647): 30 Pat 357 (DB) ** (1965) 2 Mys LJ 103 (DB) ** AIR 1964 Orissa 83 (85).

[But see AIR 1958 Pat 228 (229, 230) ** AIR 1919 Pat 286 (287, 288): 4 Pat L Jour 575 (DB) ** AIR 1938 Pat 457 (460): 17 Pat 223 (DB).]

(10) Omission in execution application to state names of all persons interested in decree — Defect does not vitiate execution proceedings. AIR 1957 Andh Pra 403 (405) ** AIR 1943 Nag 296 (297): ILR (1943) Nag 584 (DB) ** AIR 1926 Cal 811 (812) (DB).

(11) The decree-holder applying for execution under this rule represents the interest of all the decree-holders. Hence if it becomes necessary at any stage to file an appeal against the order of the executing Court, it is sufficient if the appellant impleads him only as respondent. AIR 1955 Raj 197 (199): ILR (1955) 5 Raj 857 (DB). (ILR (1954) 4 Raj 244, Reversed.)

(12) Whenever decree-holders' rights have vested by succession in more than one heir, they or any one of them can apply to execute the decree under Order 26, R. 16 read with Order 21, Rule 15. 1966 Jab LJ 452 (459).

(13) Decree for possession specifying shares of all the three decree-holders — Decree is not joint — Transfer of interest of shares by two decree-holders to judgment-debtors — Decree is executable to the extent of the share of the third decree-holder by delivery of symbolic possession. AIR 1965 J and K 2 (5, 6): 1964 Kash LJ 238.

(14) Execution of joint decree by surviving decree-holder alone without joining heirs and legal representatives of deceased decree-holder is valid. AIR 1964 All 548 (552): 1963 All LJ 969 (DB).

(15) Mortgage decree declaring entire amount due — Amounts payable to each set of decree-holders specified — Direction for sale of entire mortgaged property on failure to redeem — Decree is joint — Either set of decree-holders can apply for execution of whole decree for benefit of others. 1962 MPLJ 57 (60): (1961) Jab LJ 323.

(16) Evidence is permissible to substantiate case whether execution is for the benefit of all the decree-holders. AIR 1964 Orissa 83 (85, 86).

(17) Joint decree in favour of two sisters — One sister transferring her interest in favour of the other by a partition deed — The other sister (decree-holder) could alone apply for execution of the decree. (1965) 2 Mys LJ 103 (DB).

4. Application by one of several decree-holders for execution in respect of his share of the decree.— (1) Where some of the joint decree-holders apply for execution with regard to a certain portion only of the decree giving up the rest and the other decree-holders, being made parties, do not object to such a giving up by the applicants, the execution asked for may be allowed and the other decree-holders cannot subsequently apply for execution of the balance of the decree. AIR 1928 Cal 559 (560): 56 Cal 12 (DB) ** AIR 1934 Cal 465 (467) (DB).

(2) Where A and B jointly obtain a decree for money or for possession of immovable property against C, and C as judgment-debtor either purchases A's share in the decree or inherits such share from A, the result would be the extinguishment of the decree pro tanto and B can, therefore, execute the decree in respect of his share. (1888) 10 All 570 (574) ** (1883) 9 Cal 482 (494): 10 Ind App 4 (PC).

(3) Execution application by one of several decree-holders — Application in respect of his share of the decree — Such an application lies in respect of his share only in the property. AIR 1964 Pat 363 (367): ILR 44 Pat 651. (10 IA 4 (PC), ILR 10 All 570 and ILR 25 Mad 431 (FB), Foll.)

(4) Joint decree for khas possession — Adjustment by some of the decree-holders only (is not valid in law — The remaining decree-holders are entitled to execute the whole decree.) (1959) 63 Cal WN 570.

5. Payment by judgment-debtor out of Court to one of several decree-holders.— (1) A payment to one of several decree-holders out of Court is valid only to the extent of the share of that decree-holder. AIR 1953 Hyd 53 (54): ILR (1952) Hyd 1007 ** AIR 1945 Nag 95 (97): ILR (1945) Nag 242 (DB) ** AIR 1941 Oudh 336 (336) ** (1905) 1 Nag LR 24 (30).

(2) If it can be proved that the decree-holder who granted the discharge was an agent of the other decree-holders, or otherwise had legal authority to bind them by his acts the discharge will bind all the decree-holders. AIR 1941 Oudh 336 (336) ** AIR 1929 Lah 462 (463) ** AIR 1915 Lah 155 (155).

(3) One of two or more joint decree-holders is not competent, without being authorized by the other or others, to certify a payment made to him under O. 21, Rule 2 so as to operate as a satisfaction of the entire decree, and the others are not debarred from executing the decree as to their shares. AIR 1954 All 739

R. 16. Application for execution by transferee of decree.—Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder :

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the trans-

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Order 21, Rule 15 — Note 5 (contd.)

(741) ** AIR 1953 Bhopal 15 (17) ** AIR 1953 Hyd 53 (54): ILR (1952) Hyd 1007.

(4) A payment to one of the several joint decree-holders out of Court does not amount to a pro tanto satisfaction even in respect of his shares in the decree and the remaining decree-holders can execute the whole decree. AIR 1953 Bom 137 (140): ILR (1953) Bom 356 (DB).

(5) Where the joint decree-holders are partners or members of a Hindu coparcenary, a payment to one of them or a certificate by him under Order 21, R. 2 cannot be treated as satisfaction of the decree even in part. AIR 1943 Pat 10 (12): 21 Pat 322 (DB).

(6) The fact that the decree-holder receiving payment is a partner or is the managing member of the joint family is not enough to clothe him with authority to act as the agent of the other decree-holders in receiving such payment. AIR 1945 Nag 95 (97): ILR (1945) Nag 242 (DB).

(7) A karta of a joint Hindu family has legal authority to act on behalf of the family and a payment to, or a certificate by, him will bind the other decree-holders. AIR 1958 Raj 311 (316): ILR (1958) 8 Raj 666 ** (1913) 35 All 380 (384) (DB) ** AIR 1927 Pat 329 (330) (DB) ** AIR 1954 Madh B 140 (142): ILR (1954) Madh B 398.

(8) One partner is the agent of the others and where a decree is obtained in the name of a firm, one of the partners can receive the entire money due under the decree and certify the payment. AIR 1927 Lah 385 (387) ** AIR 1926 Sind 167 (169).

(9) Where a decree is passed in favour of a firm, a payment made to one partner decree-holder binds the other partners decree-holders in the absence of proof of special circumstances by the latter as to why such payment should not bind them. AIR 1949 Mad 790 (797): ILR (1950) Mad 285 (FB). (AIR 1917 Mad 988 and AIR 1934 Mad 330: 57 Mad 696, **Overruled.**) ** Madh BLJ 1954 HCR 666 (669) (DB).

[But see AIR 1942 Pesh 58 (59).]

(10) If, after the decree the status of the family is broken, then payment made to any one will bind his share only and to that extent it would be competent for him to give a discharge, enter satisfaction or to certify. AIR 1954 Madh B 140 (142): ILR (1954) Madh B 398.

(11) Although a payment to one of two joint decree-holders of the whole decree amount does not, even when certified, absolve the judgment-debtor from liability to the other decree-holder, such decree-holder is not bound to proceed against the judgment-debtor in execution, but may sue to recover his share from the other decree-holder. (1906) 29 Mad 183 (183) (DB) ** AIR 1928 Mad 800 (803) (DB).

(12) When some of the decree-holders holding separate shares in the house property subject to lease have adjusted their claims with the judgment-debtor, one of the remainjng decree-holders is not entitled to execute the whole decree nor does the decree become entirely inexecutable. AIR 1964 Pat 363 (365, 366): ILR 44 Pat 651.

6. Defective application under the rule, if can be amended.— (1) Where an application for execution by one of the several joint decree-holders is found to be defective in some particulars the Court can order amendment of the application so as to bring it in conformity with the provisions of this rule. AIR 1930 All 188 (191) (DB) ** AIR 1939 Mad 278 (280): ILR (1939) Mad 338 (DB).

[But see AIR 1919 Pat 286 (288): 4 Pat L Jour 575 (DB) ** AIR 1945 Pat 459 (459): 24 Pat 485 (DB).]

(2) Defect can be made good by other decree-holders coming into execution case and giving their assent to the proceeding. AIR 1949 Orissa 73 (77): ILR (1949) 1 Cut 269 (DB).

7. Appeal.— (1) An order allowing or refusing execution in favour of one of the decree-holders when an objection is raised by the judgment-debtor is one falling under Section 47 and, therefore, appealable as a decree. (1894) 17 Mad 394 (394) (DB).

[But see AIR 1958 Pat 228 (229, 230).]

(2) No appeal will lie against an order refusing to allow execution in favour of one joint decree-holder on the objection of another joint decree-holder. (1899) 23 Bom 623 (625) (DB) ** AIR 1924 Mad 518 (519).

ORDER 21, RULE 16 — SYNOPSIS

1. WHERE A DECREE HAS BEEN TRANSFERRED.
2. Transfer by assignment in writing.
3. Transfer by operation of law.
4. Benamidar.

feror and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution :

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

[1882 and 1877, S. 232; 1859, S. 208. See S. 49.]

HIGH COURT AMENDMENTS

Assam and Nagaland

Same as that of Calcutta — See Act 27 of 1962, Ss. 13 and 15 [w. e. f. 1-12-1963].

Bombay: Dadra and Nagar Haveli

For Rule 16 substitute the following :—

16. Application for execution by transferee of decree.—Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree, is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it, or to the Court to which it has been sent for execution, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder :

Order 21, Rule 16 — Synopsis (contd.)

5. Part transfer of a decree.
6. TRANSFER, WHEN TAKES EFFECT.
7. RIGHTS OF THE TRANSFEREE.
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13. APPLICATION FOR SUBSTITUTION BY TRANSFEREE.
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16. LIMITATION.

1. Where a decree has been transferred.— (1) A decree obtained in the name of the karta of a joint Hindu family cannot be executed by any other member in the absence of an assignment in writing or devolution. (1954) ILR (1954) Mad 1247 (1259) (DB).

(2) Decree obtained for and on behalf of joint family allotted in writing to one of its members, as asset of family, by final decree in partition suit empowering him to realise fruits of decree — **Held,** there was not only an assignment in writing but also a transfer of interest of decree-holder by operation of law and hence allottee would be entitled to execute that decree — It cannot also be said that the decree has merged in partition decree. AIR 1966 Mys 115 (117, 118): (1965) 3 Law Rep 202.

(3) The rule is intended primarily for those cases where the applicant for execution does not appear as decree-holder in the decree and he applies for execution on the basis of a transfer of the decree. AIR 1938 Pat 462 (464): 17 Pat 206 (DB) ** AIR 1968 Andh Pra 94 (97): (1967) 1 Andh WR 171 (DB).

(4) The transferee of the decree gets all the rights of the decree-holder to execute the decree. ILR (1963) 2 Ker 80 (82).

(5) The rule does not apply to a case where the application for execution is made jointly by both the transferor and transferee. AIR 1945 Cal 387 (394): ILR (1946) 1 Cal 45 (DB).

(6) A transfer in writing of a property which is the subject-matter of a suit without in terms transferring the decree passed or to be passed in the suit in relation to that property does not entitle the transferee to apply for execution of the decree as transferee of the decree by assignment in writing under this rule. AIR 1955 SC 376 (383): 1955 SCR 1369 ** AIR 1960 J and K 65 (66) (DB).

[See AIR 1969 Mad 271 (272, 273): (1968) 2 Mad LJ 610. (Legatee of deceased decree-holder taking out execution — Genuineness of will can be determined in execution proceedings itself — Section 146 applied and not Order 21, R. 16. ILR (1964) 2 Mad 383, **Dissented from.**)]

(7) Transferee of subject-matter of decree can continue execution petition filed by transferor decree-holder — Or he can file fresh petition on ground that he is a transferee under Section 146. AIR 1967 Punj 268 (270).

(8) Person claiming benefit of decree by assignment of property after decree is passed can avail himself of provisions of Section 146. AIR 1968 Mad 190 (193): (1967) 2 Mad LJ 281.

Provided that, where the decree or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution :

Provided further that where the transferee Court holds the assignment proved, it shall forthwith communicate its decision in that behalf to the Court which passed the decree, and the latter Court shall make an entry in the Register of Suits indicating that the assignment has been held to be proved :

Provided also that, where the decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

Explanation.—In an application under this rule, any payment of money made under a decree, or any adjustment in whole or in part of the decree arrived at to the satisfaction of the decree-holder, which payment or adjustment has not been certified or recorded by the Court under Rule 2 of this Order, shall not be recognised by the Court entertaining the application. [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965].

Calcutta : Andaman and Nicobar Islands

In the first proviso cancel the words "and the decree shall not be executed until the Court has heard their objections (if any) to its execution" and substitute therefor the following words :

> "and until the Court has heard their objections (if any) the decree shall not be executed provided that if, with the application for execution, an affidavit by the transferor admitting the transfer or an instrument of transfer duly registered be filed, the Court may proceed with the execution of the decree pending the hearing of such objections".

Order 21, Rule 16 — Note 1 (contd.)

(9) Decree for redemption — Transferee of equity of redemption pending suit can apply for execution under Section 146. AIR 1959 Ker 180 (182): 1958 Ker LT 787 (DB).

(10) A person who obtains a transfer pending suit, of the property forming the subject-matter of the suit is not entitled to execute the decree subsequently passed unless his name has been substituted in place of his vendor under Order 22, R. 10. But in such a case, the transferee can apply under Section 146. **AIR 1955 SC 376 (395): 1955 SCR 1369** ** AIR 1924 Cal 661 (665): 51 Cal 703 (DB) ** AIR 1965 Andh Pra 81 (82, 83): (1964) 2 Andh WR 81 ** AIR 1964 Pat 311 (314).

(11) The provisions of this rule on a strict construction thereof contemplate the actual transfer of the decree by an assignment in writing executed after the decree is passed. **AIR 1955 SC 376 (389, 403): 1955 SCR 1369.**

(12) Transfer of subject-matter of decree after the decree came into existence — Transferee can execute the decree. AIR 1968 Cal 242 (243, 244) (DB).

(13) Name of decree-holder company changed but identity not changed — No transfer of interest of decree-holder was involved. AIR 1966 Cal 585 (586, 587) (DB).

(14) An assignment of the decree of the trial Court carries with it the right to execute the decree passed in appeal. AIR 1940 Pat 270 (271) ** AIR 1918 Mad 279 (280) (DB).

(15) Power of attorney in favour of Bank to execute decree and credit amount to decree-holder who was indebted to Bank — **Held** Bank was equitable assignee and could execute decree in view of Section 146. **AIR 1969 SC 73 (76, 77): (1968) 2 SCJ 851.**

(16) Rule does not govern recognition of assignment of preliminary decrees. AIR 1961 Andh Pra 322 (323): (1961) 1 Andh WR 254 (DB).

(17) The word "decree-holder" in O. 21, Rule 16 means the actual decree-holder on the date of the assignment, and not a person, who may, after the so-called assignment get a decree in his favour. (1964) 2 Mad LJ 563 (565): 77 Mad LW 249 (DB).

(18) Award by Court on reference — Award is decree and is executable — Decree assigned to third person — Application by latter to Court for payment of decretal amount — Application not strictly governed by Order 21, Rule 16. AIR 1963 Pat 30 (34): 1962 BLJR 813 (DB).

2. Transfer by assignment in writing. — (1) An assignee of a decree under an oral transfer has no locus standi to apply for execution under this rule. AIR 1952 Madh B 9 (11) ** AIR 1924 Cal 661 (662): 51 Cal 703 ** 1960 Ker LT 1077: 1960 Ker LJ 1372 (1373).

(2) In order to enable a transferee to apply, the transfer must be effected by an instrument in writing. **AIR 1916 PC 147 (147): 43 Cal 990: 43 Ind App 108** ** AIR 1953 Cal 666 (667) (DB).

(3) A mere contract for sale of a decree without an assignment in writing in favour

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 20 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Madhya Pradesh

After the words, "which passed it" insert the words "or to any Court to which it has been sent for execution" [16-9-1960].

Orissa

Same as that of Patna.

Patna

(a) Add the words "or to the Court to which the decree has been sent for execution, as the case may be" after the words "to the Court which passed it;'

(b) Delete the words "and the judgment-debtor" from the first proviso and in the said proviso after the word "transferor", insert the words "unless an affidavit of the transferor admitting the transfer is filed with the application," and substitute the word "his" for the word "their" and the word "objection" for the word "objections".

Punjab, Haryana and Chandigarh

In the first proviso the words "and the judgment-debtor" which were deleted are reinstated and the word "their" is substituted for the word "his". Thus the first Proviso as now stands is the same as that in the Central Code [24-1-1940]; Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

Order 21, Rule 16 — Note 2 (contd.)

of the purchaser is not enough. AIR 1916 PC 147 (148): 43 Cal 990: 43 Ind App 108 ** AIR 1925 Bom 472 (472) (DB).

(4) A release of his rights by a decree-holder in favour of another does not operate as an assignment. AIR 1927 Pat 170 (171) (DB).

[But see AIR 1933 All 188 (189) (DB).]

(5) An assignment of a decree for sale of immovable property does not require to be registered. (1913) 35 All 524 (526) (DB) ** (1896) 23 Cal 450 (453, 454) (DB) ** AIR 1928 Lah 70 (71).

[But see (1954) ILR (1954) Madh B 149 (152, 153) ** AIR 1940 Mad 610 (611).]

(6) The rule does not require any particular form of writing. AIR 1947 Pat 233 (234) ** AIR 1936 Mad 543 (545) (DB) ** AIR 1939 Bom 221 (225): ILR (1939) Bom 271 (DB) ** AIR 1960 Pat 179 (180): 1959 BLJR 653 (DB) ** 1959 Ker LT 1231 (1231, 1232): 1959 Ker LJ 1463. (Only notice to the parties concerned necessary.)

(7) A decree declaring that a certain person is entitled to the money due under another decree does not make such person an assignee of the decree. **AIR 1955 SC 376 (393): 1955 SCR 1359** ** AIR 1944 Sind 230 (232): ILR (1944) Kar 231.

3. Transfer by operation of law.— (1) Ordinarily transferees by operation of law would include the following persons. In the case of a deceased decree-holder, his legal representatives; in the case of an insolvent debtor, the Official Assignee or Official Receiver; the purchaser of a decree at a court-sale. AIR 1944 Mad 363 (364) ** (1912) 13 Ind Cas 324 (326) (DB) ** AIR 1959 Mys 41 (42, 43): 36 Mys LJ 411 (DB).

(2) The expression 'by operation of law' in Order 21, Rule 16 covers devolution of the decree by inheritance and the provisions of this rule apply to application by legal representatives. AIR 1959 Madh Pra 403 (404): 1959 MPLJ 733. (Overruled on another point in AIR 1963 Madh Pra 176.)

(3) Receiver appointed by foreign Court — Reciprocal arrangement for execution of decrees passed in each of the area in the other — Receiver can apply for execution of decree. AIR 1967 Ker 118 (120). 1966 Ker LT 960.

(4) Transfers 'by operation of law' are not intended by it to be confined to the three cases of death, devolution or succession. **AIR 1955 SC 376 (391, 392, 393): 1955 SCR 1369.** (AIR 1930 Rang 308, Not approved.)

[See AIR 1959 Mad 209 (212): (1958) 2 Mad LJ 429. (Creditor appointed receiver to realise debtor's debts — Death of receiver — Rights cannot be exercised by his legal representative without any order by Court.)]

(5) The words 'operation of law' cannot apply to a case where a person has become the owner of a decree by some transaction inter vivos. AIR 1952 Madh B 9 (11) ** AIR 1936 Mad 543 (544) (DB). (The view taken in this case that auction sale in partnership action is 'inter vivos' has not been approved by the Supreme Court in **AIR 1955 SC 376: 1955 SCR 1369.**)

(6) If a decree obtained by a member of a joint Hindu family is allotted to another member at a family partition, the latter is not a transferee by operation of law and, therefore, must get an assignment in writing from the decree-holder to enable him to apply under this rule. AIR 1952 Madh B 9 (11) ** (1912) 16 Ind Cas 807 (807) (DB) (Mad).

(7) A person does not become a transferee by operation of law from a decree-holder by merely obtaining another decree against him. AIR 1926 Pat 320

Order 21, Rule 16 — Note 3 (contd.)

(320): 5 Pat 511 (DB) ** AIR 1934 Mad 471 (472).

(8) A person in whose favour a decree has been passed declaring his title to a certain decree previously passed is not a transferee of the decree by operation of law. **AIR 1955 SC 376 (393): 1955 SCR 1369** ** AIR 1939 Bom 221 (225): ILR (1939) Bom 271 (DB).

[See however AIR 1948 Pat 323 (326): 26 Pat 408 (DB).]

(9) Where after an Indian Court has passed a decree for sale on foot of a mortgage of immovable property the decree-holder is declared an insolvent by a foreign Court, a receiver of the insolvent's estate appointed by the foreign Court cannot, in the absence of an assignment by the decree-holder, apply for the execution of the decree. AIR 1941 Bom 381 (381, 382): ILR (1941) Bom 635 (DB).

(10) When an application is made by a transferee by assignment or by operation of law, the rule as such does not require that there should be a prayer for recognition of the transfer. AIR 1957 Andh Pra 66 (68, 69) (FB).

(11) Substitution of legal representatives of deceased decree-holder in pending execution case — Order 21, Rule 16, applies. AIR 1965 Pat 85 (86) (DB) ** ILR (1960) 10 Raj 1472.

(12) Application for continuing pending application for execution of decree presented by deceased decree-holder — Production of succession certificate necessary. AIR 1968 Raj 273 (275): 1968 Raj LW 519 (DB).

(13) Under Section 44-A (6) of the Banking Companies Act (1949), once the Reserve Bank sanctions a scheme of amalgamation, the transfer takes place by operation of law within Order 21, Rule 16, Civil P. C. and no vesting order is required to be made by Reserve Bank. AIR 1969 Bom 84 (87): (1968) 70 Bom LR 373.

4. Benamidar. — (1) The "transferee" referred to in this rule is the transferee named as such in the transfer. The real owner is not entitled to apply, and the benamidar is entitled to apply. AIR 1925 Mad 701 (702): 48 Mad 553 (DB) ** AIR 1935 Mad 140 (141) (DB) ** AIR 1944 Pat 307 (307): 23 Pat 410 (DB).

[But see AIR 1939 Mad 210 (214): ILR (1939) Mad 1004 (DB) ** (1889) 16 Cal 355 (363) (DB). (Note. — This case is overruled on a different point in 24 Cal 62 (FB).) ** (1883) 9 Cal 633 (634) (DB)** (1879) 5 Cal L Rep 253 (256) (DB).]

(2) Where the transferee of a decree dies and thereupon his heirs and a person alleging that the transferee was only a benamidar for him apply separately to execute the decree, the Court has got power under Section 47, sub-section (3) to enquire who is the representative of the deceased and the question of benami can be gone into in execution proceedings. AIR 1942 Mad 688 (690): ILR (1943) Mad 164 (FB) ** AIR 1927 Mad 903 (905, 907): 51 Mad 219 (DB).

(3) Where the decree itself is obtained by a benamidar, the benamidar has the right to execute the decree. AIR 1931 Oudh 69 (69) (DB).

[But see (1914) 25 Ind Cas 555 (556) (DB) (Cal).]

(4) Transfer whether benami for defendant has to be decided by Court — On facts held that order of remand passed by High Court did not operate as res judicata in subsequent proceedings. AIR 1965 Andh Pra 339 (341) (DB).

(5) Hindu son taking assignment of decree against father — Assignment taken to safeguard his own interest — Son is not benamidar. AIR 1960 Ker 108 (110): 1959 Ker LT 1120 (DB).

5. Part transfer of a decree. — (1) There is nothing in this rule or elsewhere which prohibits the transferee of a portion of the decree from applying under this rule. (1890) 17 Cal 341 (343) (DB) ** AIR 1926 All 346 (348): 48 All 432 (DB) ** AIR 1928 Lah 70 (71) ** AIR 1921 Mad 599 (601): 44 Mad 919 (FB).

[But see AIR 1920 Lah 324 (325) (DB) ** AIR 1922 All 101 (102).]

(2) The transferee of a portion of a decree is in the position of a joint decree-holder and can execute the decree only subject to general provisions of law analogous to Rule 15. AIR 1921 Mad 599 (601): 44 Mad 919 (FB) ** AIR 1957 Trav-Co 147 (149, 150): ILR (1956) Trav-Co 1266 (DB) ** AIR 1954 Bom 273 (274, 276): ILR (1954) Bom 873 (DB).

(3) A transferee of a part of a decree is not entitled to execute his part of the decree, nor even the whole decree, since he cannot be regarded as a joint decree-holder. AIR 1934 Bom 59 (62): 58 Bom 226 ** AIR 1951 Punj 324 (327): ILR (1950) Punj 170 (DB).

6. Transfer, when takes effect. — (1) The transfer of a decree made by an instrument in writing takes effect from the date of such instrument, irrespective of its recognition by the Court on an application made to it under this rule. (1894) 16 All 483 (492) (DB) ** (1899) 26 Cal 250 (253) (DB) ** (1909) 33 Mad 62 (64) (DB).

[But see (1880) 5 Cal 869 (870, 871).]

7. Right of the transferee. — (1) Where a transfer is recognized by the Court on an application under this rule, the transferee is entitled to execute the decree as if the application were made by the original decree-holder. AIR 1955 Bom 77 (78): ILR (1954) Bom 1004 (DB) ** AIR 1934 All 209 (211): 56 All 694 (DB).

(2) The completion of a transfer of decree does not depend upon any recognition of the Court. However, the assignment itself cannot invest the assignee with a right to proceed to impugn the attachment of the said decree by another decree-

Order 21, Rule 16 — Note 7 (contd.)

holder. The first essential requisite for the assignee to proceed with execution is to put in a petition under Order 21, Rule 16, since the permission to execute the decree will be given only after disposing of the objections of the transferor contemplated by that rule. AIR 1964 Andh Pra 1 (3): (1963) 2 Andh WR 205 (FB). (ILR 33 Mad 62; ILR 20 Mad 157, Overruled.) ** AIR 1969 Bom 84 (87): 70 Bom LR 373. (Formal order or at least recognition by Court that applicant is transferee of decree is necessary.)

(3) Transferee's name does not appear in decree — Original decree-holder entitled to execute the decree — Executing Court cannot go behind decree. AIR 1968 Andh Pra 94 (96, 97): (1967) 1 Andh WR 171 (DB) ** AIR 1960 Andh Pra 305 (309).

(4) The absence of consideration for the assignment of a decree is immaterial and will not deprive the assignee of his rights to execute the decree, provided the assignment is not a sham transaction. AIR 1954 Nag 234 (235): ILR (1954) Nag 447 (DB) ** AIR 1928 Mad 458 (459) (DB).

(5) Where the transferee of a decree does not apply under this rule for execution, the executing Court is bound to allow execution at the instance of the transferor, even after the date of the transfer, till the transfer is recognized by the Court. AIR 1945 Oudh 225 (227): 20 Luck 414 (DB) ** AIR 1935 Nag 230 (233, 234): 31 Nag LR (Supp) 111 (DB).

(6) Rule 16 is for the benefit of transferee — Judgment-debtor cannot object to the execution of decree by original decree-holder. AIR 1968 Andh Pra 94 (96, 97): (1967) 1 Andh WR 171 (DB).

(7) Assignee of decree not applying for recognition of assignment — He cannot question subsequent attachment and sale of decree by another person in execution of his decree against original decree-holder. AIR 1962 Andh Pra 497 (499): (1962) 2 Andh WR 65 (DB). (ILR 33 Mad 62; AIR 1928 Rang 25; AIR 1928 Sind 71 and AIR 1941 Mad 795, **Dissented from.**)

(8) Where a decree has been assigned to two or more persons jointly, any one of them may apply for execution under this rule read with Order 21, Rule 15. AIR 1946 Bom 27 (30): ILR (1946) Bom 234 (DB).

(9) Transferee of ex parte decree for mesne profits — Application by J. D. for setting aside ex parte decree allowed without impleading transferee decree-holder — Would not preclude transferee decree holder to maintain application for determination of mesne profits. AIR 1964 Andh Pra 28 (31): (1963) 2 Andh WR 179.

(10) Assignment of decree — Subsequent attachment under Order 21, Rule 53 (1) (b) of decree assigned — Remedy open to assignee is one under Order 21, Rule 16 and not one under Order 21, Rule 58. AIR 1964 Andh Pra 1 (3, 4, 5, 6): (1963) 2 Andh WR 205 (FB).

(11) Assignment of decree after starting of execution proceedings — Assignee need not make a fresh application. (1963) 2 Mys LJ 400.

(12) The assignee of the attached decree only obtains the right, title and interest of the assignor subject to such limitations and restrictions as the assignor himself was subject to by reason of the attachment of the decree in his favour. AIR 1964 Madh Pra 221 (223, 224): 1963 Jab LJ 710.

8. Application for execution must be made to the Court which passed the decree. — (1) An application by the transferee of a decree under this rule can be entertained only by the Court which passed the decree, and not to the Court to which the decree has been transferred. (1949) ILR (1949) 2 Cal 424 (427) (DB) ** AIR 1946 Bom 27 (30): ILR (1946) Bom 234 (DB) ** AIR 1944 Mad 363 (364).

[See (1965) 1 Ker LR 369 (375).]

(2) Where an application under this rule is made to the transferee Court and it recognises the transfer, it is only an irregularity which may be waived by acquiescence. AIR 1946 Bom 27 (30): ILR (1946) Bom 234 (DB) ** AIR 1934 Lah 648 (651): 16 Lah 63 (DB).

[But see AIR 1940 Bom 5 (8).]

(3) Award under Section 51 of Madras Co-operative Societies Act by Dy. Registrar — Transmission to civil Court for execution — Civil Court has jurisdiction to recognise assignment. 1960 Ker LT 918.

(4) Formal order or at least recognition by Court that applicant under this rule is transferee of decree is necessary in either kind of transfer contemplated by rule. AIR 1969 Bom 84 (87): 70 Bom LR 373.

9. Notice to transferor and judgment-debtor. — (1) The provisions of this rule as to notice are imperative. AIR 1949 Bom 63 (63): ILR (1948) Bom 625 (FB) ** AIR 1952 Madh B 9 (11) ** AIR 1946 Bom 27 (30): ILR (1946) Bom 234 (DB).

[See AIR 1960 Pat 339 (340): 1960 BLJR 352. (The execution case however should not be dismissed without giving an opportunity to decree-holder for giving notice to transferor.)]

[See however ('87) 9 All 46 (49) (DB).]

(2) The notice that is to be given under this rule is of the application for execution and not of the assignment. (1954) 1954 Ker L Tim 434 (435, 436) ** AIR 1924 Pat 576 (578, 580): 3 Pat 596 (DB).

(3) If the judgment-debtor is present in Court at the time the order on the application is made and has thus notice of the application the fact that no written notice was given will not vitiate the proceedings. AIR 1924 Pat 576 (580): 3 Pat 596 (DB).

[See also AIR 1949 Bom 63 (64): ILR (1948) Bom 625 (FB) ** AIR 1944 Cal 328 (330) (DB).]

(4) A combined notice under this rule and Rule 22 will be sufficient. AIR 1942

Order 21, Rule 16 — Note 9 (contd.)
Bom 134 (135): ILR (1942) Bom 190 ** AIR 1933 Pat 658 (662): 13 Pat 86 (DB).

(5) It is not necessary that notice must be issued on every subsequent application by the transferee under this rule. (1954) 1954 Ker L Tim 434 (435, 436) ** AIR 1927 Cal 694 (696) (DB).

(6) When there is no order under O. 21, Rule 16 the objection before the transferee Court that the decree cannot be exccuted because of non-compliance with the provisions of Order 21, Rule 16 can be entertained by transferee Court. (1958) 1958 MPC 145 (146, 147).

(7) Though notice must be given to the assignor and to the judgment-debtor, if one of them cannot be served because he does not exist, the other does not forfeit his right to the notice. AIR 1948 Cal 131 (133): ILR (1948) 1 Cal 472 (DB).

(8) There is no necessity for the issue of notices on those judgment-debtors against whom the decree is not going to be executed. AIR 1945 Mad 243 (244): ILR (1945) Mad 882 (DB).

(9) In the case of a transfer by operation of law, it is not necessary that the notice referred to in the first proviso to this rule should be given. AIR 1934 Pat 627 (628) (DB) ** AIR 1938 All 256 (257): ILR (1938) All 425 (DB).

(10) Where the right, title and interest of the decree-holder auction-purchaser are acquired by his creditor the application by the creditor to exercise all the rights the auction purchaser has in the execution case cannot be regarded as an application for execution at all and therefore, no notice is necessary. (1947) ILR (1947) 1 Cal 22 (27, 28, 30) (DB).

10. Objections to be heard. — (1) After the service of the notice mentioned in the first proviso to this rule, the Court is bound to hear the objections, if any, of the transferor and of the judgment-debtor. AIR 1946 Bom 27 (30): ILR (1946) Bom 234 (DB) ** AIR 1931 Lah 545 (546).

(2) Any plea that the judgment-debtor can validly put forward as to why the decree should not be or could not be executed against him must be heard and decided by the Court when an application for leave is made under this rule. AIR 1956 Bom 526 (527) (DB).

(3) It is not a valid objection that the assignment is not supported by consideration. AIR 1932 Mad 327 (327, 328) ** AIR 1915 Mad 1138 (1140) (DB).

(4) The judgment-debtor can show that the assignee was benamidar for him or that the assignment was made in fraud of him. AIR 1943 PC 66 (68): 70 Ind App 50: ILR (1943) Kar (PC) 77: ILR (1944) Mad 1 ** (1953) 6 Sau LR 357 (359).

(5) Where a notice under Order 21, Rule 22 is necessary, objections to the executability of the decree as distinct from objections to the right of the applicant to execute it cannot be heard at the time of hearing the application under this rule but can be taken only at the time when the matter is heard after the notice under Order 21, Rule 22. AIR 1941 Bom 190 (191).

(6) The failure of the judgment-debtor to object to the validity of the assignment when an application under this rule is made will preclude him, under general principles of res judicata, from raising such objection at a subsequent stage of the proceedings. AIR 1942 Bom 134 (135, 136): ILR (1942) Bom 190 ** AIR 1937 Cal 4 (6) (DB).

11. Transfer of decree for payment of money against two or more persons to one of them. — (1) When one of the persons jointly liable under a decree unites in himself the two opposite characters of creditors and joint debtor in respect of the whole decretal debt, the effect is to extinguish the liability of all the co-judgment-debtors under the decree. (1883) 5 All 27 (33) (DB) ** AIR 1956 Trav-Co 171 (172): ILR (1956) Trav-Co 129 (FB).

[See also 1966 Ker LT 874 (877): 1966 Ker LR 506 (DB). (Assignment of decree to a son of one of two defendants — Pending execution defendant (father of assignee) died — Merger of decree only to the share of the assignee.)]

(2) The total ban to execution under this proviso has no application to the vesting of a share of the rights of the sole decree-holder or of one or more of the decree-holders under the decree, in one or more of the judgment-debtors which would extinguish it only in part leaving the rest alive. AIR 1956 Trav-Co 171 (173, 174): ILR (1956) Trav-Co 129 (FB).

(3) When the alleged transferee of a decree for money is found to be the benamidar to one of the judgment-debtors, the Court is bound, under the second proviso to this rule, to refuse to allow the assignee to execute the decree against the other judgment-debtors. AIR 1956 Trav-Co 171 (173, 174): ILR (1956) Trav-Co 129 (FB) ** AIR 1942 Mad 28 (28): ILR (1942) Mad 225 (DB).

(4) Where the judgment-debtor did not raise the objection when notice was issued to him under the first proviso to this rule, he cannot subsequently raise the objection. AIR 1937 Oudh 111 (112): 12 Luck 755 (DB).

[See however AIR 1938 Oudh 106 (106) (DB) ** AIR 1939 Rang 245 (247): 1939 Rang LR 152.]

(5) The second proviso to this rule does not apply to the case of the decree-holder acquiring a share in the estate of one of the judgment-debtors, though the decree-holder is bound to give credit for a proportionate amount of the decree. AIR 1956 Trav-Co 171 (173, 174): ILR (1956) Trav-Co 129 (FB) ** AIR 1938 Mad 814 (815): ILR (1939) Mad 73 (DB).

Order 21, Rule 16 — Note 11 (contd.)

(6) The proviso applies whether the transfer of the decree is by act of parties or by operation of law. AIR 1956 Trav-Co 171 (173, 174): ILR (1956) Trav-Co 129 (FB) ** AIR 1938 Mad 814 (814): ILR (1939) Mad 73 (DB).

(7) The second proviso applies to simple money decree — But if decree also creates charge on hypotheca it can be executed. AIR 1964 Ker 101 (102): 1963 Ker LT 112.

(8) Assignment of decree to son — Principle underlying Proviso 2 does not apply. AIR 1960 Ker 108 (109): 1959 Ker LT 1120 (DB).

12. "Decree for the payment of money". — (1) The second proviso to this rule does not apply to decrees other than money decrees. AIR 1954 Nag 234 (235): ILR (1954) Nag 447 (DB) ** AIR 1957 Ker 6 (6).

(2) In other decrees the decretal amount that can be recovered from the other judgment-debtors will be reduced proportionately. AIR 1956 Trav-Co 171 (172): ILR (1956) Trav-Co 129 (FB) ** AIR 1920 All 129 (131): 42 All 544 (DB).

[See however (1953) 6 Sau LR 357 (362).]

(3) The proviso is confined to cases of personal decrees. AIR 1932 All 704 (707): 54 All 448 (DB) ** AIR 1956 Trav-Co 171 (173, 174): ILR (1956) Trav-Co 129 (FB).

[But see AIR 1924 Nag 41 (41): 19 Nag LR 151.]

(4) Transfer of money decree by assignment in writing in favour of benamidar of judgment-debtors — Decree-holder or his heirs cannot execute decree. AIR 1963 Bom 244 (246): 65 Bom LR 408.

13. Application for substitution by transferee.— (1) An application merely for recognising the transferee from a decree-holder as transferee is legally incompetent. **AIR 1955 SC 376 (402): 1955 SCR 1369 **** AIR 1947 Bom 157 (159): ILR (1946) Bom 1048 (DB) ** AIR 1959 Madh Pra 403 (404): 1959 MPLJ (Notes) 71: ILR (1959) Madh Pra 89: 1959 MPC 380: 1959 MPLJ 733: 1959 Jab LJ 609. **(Overruled** on another point in AIR 1963 Madh Pra 176 (FB).)

(2) It is not necessary for the validity of the proceedings that the substitution of the name of the transferee is actually made. AIR 1942 All 150 (151): ILR (1942) All 144 ** AIR 1946 Bom 27 (30): ILR (1946) Bom 234 (DB) ** (1954) 1954 Ker L Tim 434 (435, 436).

[See however AIR 1937 Bom 365 (368): ILR (1937) Bom 691.]

(3) Where a partnership firm obtains a decree under its name under Order 30, Rule 2 and on its dissolution assigns it to one of the partners the partner can either execute the decree as a partner in the firm or bring himself on the record under this rule, where he adopts the first course, it is not obligatory on him to first apply under this rule. AIR 1952 Assam 86 (88): ILR (1952) 4 Assam 193 (DB).

14. Appeal.— (1) An order allowing or dismissing an application by a transferee from a decree-holder made under this rule is appealable as a decree. (1903) 25 All 443 (445) (DB) ** (1894) 16 All 483 (492) (DB) ** AIR 1917 Mad 605 (605, 606) (DB) ** (1958) 60 Pun LR 686 (688).

15. Suit by assignee for refund of price. — (1) Where a transfer of a decree is not recognized by the executing Court, the transferee is entitled to sue the assignor for refund of the money received by him for the assignment. (1893) 16 Mad 325 (326) (DB) ** (1897) 20 Mad 157 (158) (DB).

(2) The assignee is not entitled to treat the assignment in his favour as ineffectual and to maintain a suit, unless he has taken steps to have his transfer recognised. (1909) 33 Mad 62 (64, 65) (DB).

16. Limitation.— (1) Assignment of decree — Petition by assignee under O. 21, Rule 16, for recognition and for issue of notice — Mode of execution not indicated — Though defective as execution petition, it amounts to step in aid within Limitation Act, (1908), Article 182 (5). AIR 1963 Andh Pra 241 (242): (1962) 1 Andh WR 27 (DB).

(2) Transfer of decree pending execution not brought on record — Dismissal of execution — Transferee filing fresh execution — He can rely on pending execution by decree-holder for purpose of execution. AIR 1964 All 337 (338): 1963 All LJ 685.

(3) Objection as to genuineness of transfer — Application dismissed as not maintainable for want of proof of transfer — Application though not proving factum of transfer is still 'in accordance with law' within Article 182 (5), Limitation Act. AIR 1964 Orissa 107 (110): 30 Cut LT 262.

(4) Belated application by legal representative for continuation of execution proceedings — Application held to be under Order 21, Rule 16 and not Section 146 and hence Article 181 of Limitation Act (1908) would apply. (Limitation Act (1963), Article 137). 1967 MPLJ 231 (235): 1967 Jab LJ 96 (DB).

(5) Application for execution made by transferee of decree — Notice to transferor as required by Order 21, Rule 16, C. P. Code, not issued — Application is recording to law and a step in aid of execution. AIR 1962 Madh Pra 379 (379, 380): 1962 MPLJ 495.

R. 17. Procedure on receiving application for execution of decree.—(1) On receiving an application for the execution of a decree as provided by Rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of Rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

[1882, S. 245.]

ORDER 21, RULE 17 — SYNOPSIS

1. Procedure on receiving an application for execution.
2. Amendment.
3. Non-compliance with the order of amendment within the time fixed.
4. Procedure on admission of application.
5. Execution of maintenance decree.
6. Value of property attached.
7. Appeal.

1. Procedure on receiving an application for execution.— (1) If such of the requirements of Rules 11 to 14 as are applicable are complied with then the application for execution must be admitted and registered — If they are not complied with, the Court can either reject the application at once or allow the defect to be remedied then and there or within a time fixed — If it does neither, it cannot, after the period of limitation for execution has expired, reject the application without giving the decree-holder an opportunity to amend the application. AIR 1950 All 580 (583): ILR (1951) 2 All 375 (FB) ** AIR 1955 SC 376 (395, 402): 1955 SCR 1369 ** AIR 1957 Orissa 5 (7) (DB) ** AIR 1961 Madh Pra 145 (147): 1961 MPLJ 256 (FB).

(2) Under this rule the executing Court has got a discretion to allow the necessary amendments. AIR 1948 Nag 272 (274): ILR (1948) Nag 230 ** AIR 1947 Pat 129 (130) (DB) ** AIR 1933 PC 68 (70): 60 Cal 662: 60 Ind App 83.

(3) The Court can allow only formal defects to be amended under this rule. AIR 1950 Mys 64 (69): ILR (1951) Mys 30 (FB) ** AIR 1943 Pat 127 (129): 21 Pat 838 (DB) ** AIR 1960 Madh Pra 41 (42, 43): 1959 MPLJ 559. (Substitution of appellate decree for original decree.)

(4) An execution petition filed against a deceased judgment-debtor is not a nullity and the defect can be amended under this rule by substituting the name of his legal representatives. AIR 1956 All 494 (495) (DB) ** AIR 1957 Andh Pra 221 (221) (DB).

(5) The judgment-debtors can point out the defect in the application if the Court has failed to notice it. (1956) 1956 Raj LW 486 (487).

(6) Question whether application is fresh application — It is to be decided from the form and contents of application and position of earlier execution proceedings. AIR 1965 Assam 96 (98, 99): ILR (1964) 16 Assam 410 (DB).

(7) Certificate of debt — Execution of — Pending execution name of company changed pursuant to provisions of Sections 21 to 23 of Companies Act, 1956 — Identity of Company not changed — No transfer of interest of decree-holder — Executing Court had power to amend the petition by substitution of name of the decree-holder. AIR 1966 Cal 585 (586, 587) (DB).

(8) Execution of decree stayed pending appeal — Dismissal of appeal — Decree-holder applying to executing Court to proceed with stayed petition — Execution petition does not cease to be pending after passing of appellate decree, though petition becomes factually defective after appellate decree — Executing Court can proceed with execution after allowing amendment of execution petition. AIR 1965 Ker 29 (30, 31): 1964 Ker LT 532.

(9) Under Order 21, except at the stage of Rule 17 at no subsequent stage barring Rules 58 to 63 — Property attached can be removed from such attachment except on satisfaction of the decree or it is reversed or set aside. AIR 1969 AP 184 (187).

HIGH COURT AMENDMENTS

Allahabad

Between the words "been complied with" and "the Court may", insert the words "and if the decree-holder fails to remedy the defect within a time to be fixed by the Court".

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta: Assam H. C. Order 1948, Cl. 6 and see Act 27 of 1962, Ss. 13; 15 [w. e. f. 1-12-1963].

Bombay: Dadra and Nagar Haveli

In Order XXI, Rule 17, for the existing sub-rule (1), substitute the following:

(1) Procedure on receiving application for execution of decree.—On receiving an application for execution of a decree as provided by Rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of Rules 11 to 14 as may be applicable to the case have been complied with; and if they have not been complied with, the Court may allow the defect to be remedied then and there, or may fix a time within which it should be remedied and in case the decree-holder fails to remedy the defect within such time, the Court may reject the application [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965].

Order 21, Rule 17 (contd.)

2. Amendment.— (1) The rule does not apply where the defect in the execution application is one which has no reference to Rules 11 to 14. The Court can, however, amend such defects under its general powers. AIR 1957 Orissa 5 (7) (DB) ** AIR 1943 Pat 127 (129): 21 Pat 838 (DB) ** AIR 1955 Orissa 94 (96): ILR (1955) Cut 156 (DB) ** (1955) Madh BLJ 1955 HCR 476 (479).

(2) The amendment dates back to the original date of the application. AIR 1950 All 580 (583): ILR (1951) 2 All 375 (FB) ** AIR 1956 Cal 132 (133, 134) (DB) ** AIR 1960 Mys 277 (277, 278): 38 Mys LJ 794 ** 1966 Jab LJ 452 (456, 457) ** AIR 1968 Andh Pra 113 (115, 116): (1968) 1 Andh LT 89.

(3) Execution petition — Amendment by deleting property originally mentioned therein as it did not belong to judgment-debtor and substituting another property — Judgment-debtor not objecting to execution in spite of notice under Order 21, Rule 22 is entitled to object subsequently after amendment. AIR 1968 Pat 458 (460, 461, 462) ** AIR 1964 Pat 480 (481, 482): 1964 BLJR 480 (DB). (Execution proceedings stayed and ultimately dismissed — Subsequent application substituting another property will be treated as fresh application — Bar of limitation applies.) ** AIR 1959 Pat 199 (200): 1958 BLJR 706 (DB).

(4) If the Court without giving an opportunity to amend rejects the application, the rejected application cannot be considered to be in accordance with law. AIR 1956 All 494 (495) (DB) ** AIR 1918 Cal 245 (246) (DB).

(5) Where the subsequent application is not one for amendment of the original application but is really an independent application for execution asking for a relief not included in the original application, sub-rule (2) cannot apply. AIR 1950 Mys 64 (69, 70): ILR (1951) Mys 30 (FB) ** AIR 1955 Punj 247 (249): ILR (1955) Punj 1317 (DB).

(6) Where by mistake the name of a dead judgment-debtor is given in the execution application the name can be corrected by impleading his legal representatives under Order 21, Rule 17. AIR 1957 Andh Pra 221 (221) (DB).

(7) The discretion of the Court for leave to amend under Order 21, Rule 17 (1) is not fettered and the time for such amendment may exceed the limit of 12 years from the date of the decree. AIR 1959 Assam 25 (27, 28): ILR (1958) 10 Assam 14 (DB).

(8) No amendment of execution application to add more property to be sold or attached can be permitted — But such amendment application, if filed within the prescribed period of limitation for a new application for execution, can be treated as an independent application and decree-holder directed to pay extra court-fees. AIR 1964 Guj 277 (278).

(9) The decree-holder cannot be allowed, after the expiry of the date of limitation, to execute the decree against a property which was not specified in the application for execution as originally presented. 1963 BLJR 845 (847, 848).

3. Non-compliance with the order of amendment within the time fixed.— (1) If the party fails to amend within the time fixed or such further time as the Court may extend, the proper course is to reject the application. (1890) 17 Cal 631 (635) (FB) ** (1896) 23 Cal 217 (224) (DB).

Calcutta: Andaman and Nicobar Islands

In sub-rule (1), cancel the words "the Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it" and substitute therefor the following:

"the Court shall allow the defect to be remedied then and there or within a time to be fixed by it. If the defect is not remedied within the time fixed, the Court may reject the application."

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Kerala: Laccadive, Minicoy and Amindivi Islands

In sub-rule (1) for the words "or may allow the defect to be remedied then and there or" substitute the words "if the defect is not remedied" [9-6-1959]; see Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3.

Madhya Pradesh

In sub-rule (1) for the words "the Court may reject....within a time to be fixed by it," substitute the words "the Court may allow the defect to be remedied then and there, or may fix a time within which it should be remedied and, in case the decree-

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Order 21, Rule 17 — Note 3 (contd.)

(2) When a Court rejects an application under this rule, no application is deemed to have been filed. AIR 1940 Mad 615 (616) (DB).

(3) Decree-holder himself guilty of serious negligence — No notice issued to judgment-debtor on his request — **Held,** that failure of the Court to reject the application in such circumstances cannot have the effect of making the application in accordance with law so as to prejudice the rights of the judgment-debtor for no fault of his. AIR 1959 Raj 107 (111): ILR (1958) 8 Raj 1091.

4. Procedure on admission of application. — (1) If the application is not in any way defective the Court is bound to order execution according to the nature of the application. AIR 1926 Lah 110 (110): 5 Lah 548 (DB) ** (1896) 18 All 482 (486) (FB).

(2) No enquiry as to whether the property sought to be proceeded against belongs to the judgment-debtor is contemplated under the rule before execution can be ordered. (1869) 12 Suth WR 329 (330) (DB) ** AIR 1935 Lah 114 (114).

(3) If an order to execute is passed in an execution petition the Court is deemed to have decided that the petitioner has a right to execute, that the judgment-debtor is liable to satisfy the decree, that the decree is executable, and that it is not barred by limitation. AIR 1954 Mad 1070 (1073) (DB).

(4) When an application for execution made against a sole deceased judgment-debtor is registered under Order 21, Rule 17 (4) and the Court orders execution of the decree thereon and issues notice under Order 21, Rule 22 the application must be held to be in accordance with law. AIR 1957 Pat 299 (302): 35 Pat 907 (DB).

5. Execution of maintenance decree. — (1) A decree declaring a person's right to maintenance at a certain rate and also directing the payment of such maintenance by future instalments can be executed as each instalment falls due. AIR 1955 Pat 472 (472) (DB) ** AIR 1951 Pat 459 (460) (DB).

[See however (1894) 16 All 179 (181) (DB).]

(2) A decree granting maintenance at a certain rate and creating a charge on the property of the judgment-debtor for future maintenance can be enforced in execution. AIR 1950 All 210 (212) ** AIR 1958 Pat 2 (3) (DB) ** AIR 1957 Trav-Co 90 (90): ILR (1956) Trav-Co 321 (DB).

[See ILR (1964) Andh Pra 227 (DB). (By proceeding against income of property, maintenance holder is proceeding against charged property, itself.)]

6. Value of property attached. — (1) Under the proviso to the rule the Court should call upon the decree-holder to specify the approximate value of the property to be attached, to see that the value of the property to be attached corresponded as nearly as may be with the amount due under the decree. AIR 1929 Nag 305 (306, 308) ** (1898) 20 All 412 (418): 25 Ind App 146 (PC).

(2) If more property than is necessary is attached and sold and a purchaser buys the same without notice of the fact that the amount realized by sale of the other plots was more than sufficient to satisfy the decree, the sale in his favour cannot be set aside. AIR 1919 Cal 1095 (1096) (DB).

7. Appeal. — (1) An appeal lies against an order returning an execution application on the ground that the decree-holder is not entitled to calculate the amount due to him on the basis adopted in the petition, and directing him to amend the same. AIR 1914 Mad 532 (533): 37 Mad 314 (DB).

(2) An order allowing the decree-holder to withdraw the execution proceedings is not appealable. (1913) 19 Ind Cas 904 (905) (DB) (Cal).

holder fails to remedy the defect within such time, the Court may reject the application" [16-9-1960].

Madras and Pondicherry

(1) For the words "or may allow....fixed by it" in sub-rule (1) substitute the words "if the defect is not remedied within a time to be fixed by it."

(2) Add the following proviso at the end of the rule:

"Provided that where an execution application is returned on account of inaccuracy in the particulars required under Rule 11 (2) (g), the endorsement of return shall state what in the opinion of the returning officer is the correct amount" [13-10-1936]; see Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-1968].

Mysore

In Rule 17 delete sub-rule (1) and substitute the following :—

(1) On receiving an application for the execution of a decree as provided by sub-rule (2) of Rule 11 of this Order, the Court shall ascertain whether such of the requirements of Rules 11 to 14 as may be applicable to the case have been complied with; and if they have not been complied with, the Court may reject the application, if the defect is not remedied within a time to be fixed by the Court.

At the end of Rule 17 add the following :—

Provided that where an execution application is returned on account of inaccuracy in the particulars required by Rule 11 (2) (g), the endorsement of return shall state what in the opinion of the returning officer is the correct amount. [30-3-1967].

Orissa

Same as that of Patna.

Patna

In sub-rule (1) substitute the following for the words "the Court may reject the application, etc.," to the end of the sub-rule:

"the Court shall allow the defect to be remedied then and there or within a time to be fixed by it, and, if the decree-holder fails to remedy the defect within such time, the Court may reject the application".

Punjab, Haryana and Chandigarh

For the words "the Court may reject....to be fixed by it" in sub-rule (1) substitute the following words:

"the Court shall fix a time within which the defect shall be remedied, and if it is not remedied within such time, may reject the application" [7-4-1932]; see Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

HIGH COURT AMENDMENTS

Rule 17A

Andhra Pradesh

Same as that of Madras.

Kerala: Laccadive, Minicoy and Amindivi Islands

After Rule 17, Rule 17A is inserted; Rule 17A same as that of Madras [9-6-1959]; Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3.

Madras and Pondicherry

Add the following after Rule 17 (4):

"17A. Where an application is made to a Court for the execution of a decree or order passed against a defendant in respect of whom service of summons has been dispensed with under Rule 31 of Order V, the Court shall ordinarily direct stay of the execution of the decree or order against such defendant till the expiry of a period of one year after cessation of hostilities with the State in whose territory such defendant was resident:

Provided that the Court may, if it considers that the interests of justice so require, order execution on such terms as to security, or, otherwise as it thinks fit" [R. O. C., No. 2108 of 1944 B. I., 29-3-1945]; Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-1968].

Mysore

After Rule 17 and before Rule 18 insert the following as Rule 17A :—

17A. Where an application is made to a Court for the execution of a decree passed against a defendant in respect of whom service of summons has been dispensed with under Rule 31 of Order V of this Code, the Court shall ordinarily direct stay of execution of the decree against such defendant till the expiry of a period of one year after cessation of hostilities with the State in whose territory such defendant was resident :

Provided that the Court may, if it considers that the interests of justice so require, order execution on such terms as to security or otherwise as it thinks fit. [30-3-1967].

R. 18. Execution in case of cross-decrees.—(1) Where applications are made to a Court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then—

(a) if the two sums are equal, satisfaction shall be entered upon both decrees; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction of the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

ORDER 21, RULE 18 — SYNOPSIS

1. Scope and applicability.
2. Cross-decrees for the payment of two sums of money.
3. Cross-decrees in separate suits.
4. "Between the same parties".
5. Same character in both suits necessary.
6. Decrees must be capable of execution at the same time.
7. Decrees must be in the same Court for execution.
8. Execution can be had only of the decree for the larger sum.
9. Assignment of the decree.
10. Sub-rule (4).

1. Scope and applicability. — (1) Until the Court passes necessary orders on two applications for execution of cross-decrees, there is no adjustment of the two decrees. AIR 1944 Mad 255 (256).

(2) A right to set off under this rule cannot be defeated by an assignment of either decree or by its attachment by the other decree-holder. AIR 1929 All 502 (502) (DB).

(3) A right of set-off cannot be defeated by a stranger. AIR 1940 PC 173 (175): 67 Ind App 350 ** AIR 1938 All 130 (131) ** AIR 1937 All 422 (422) (DB).

[See however AIR 1935 Mad 587 (588) (DB).]

(4) Under Rules 18 to 20, the set-off of decrees is not a discretionary matter depending upon equitable considerations. Circuity of proceedings can be and should be avoided: this is the principle of the rules. AIR 1937 PC 39 (41): 16 Pat 127: 64 Ind App 67.

(5) Apart from the provisions of this rule and Rule 19, the Court has inherent power to allow a set-off in execution proceedings. AIR 1957 Andh Pra 403 (404) ** AIR 1938 Sind 31 (32): 32 Sind LR 162 (DB) ** AIR 1939 Lah 85 (86) ** AIR 1925 Cal 102 (104) (DB).

[But see AIR 1937 Pesh 83 (84).]

(6) When a case cannot be brought within either Order 21, Rule 18 or O. 21, Rule 19 of the Civil P. C., or within any permissible extension of the same on equitable grounds, that is under the Court's inherent powers under the Code, a claim for set-off cannot be allowed. AIR 1962 Cal 272 (275): ILR (1962) 2 Cal 254.

(7) It is equitable to extend the principle on which Rules 18 and 19 of Order 21 are based though the Rules themselves cannot strictly speaking, be applied to cases in which money has to be deposited for payment to a mortgagee, in suits for

(3) This rule shall not be deemed to apply unless—

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

(b) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

Illustrations

(a) A holds a decree against B for Rs. 1000. B holds a decree against A for the payment of Rs. 1,000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this rule.

(b) A and B, co-plaintiffs, obtain a decree for Rs. 1000 against C, and C obtains a decree for Rs. 1,000 against B. C cannot treat his decree as a cross-decree under this rule.

(c) A obtains a decree against B for Rs. 1,000. C, who is a trustee for B, obtains a decree on behalf of B against A for Rs. 1,000. B cannot treat C's decree as a cross-decree under this rule.

(d) A, B, C, D and E are jointly and severally liable for Rs. 1,000 under a decree obtained by F. A obtains a decree for Rs. 100 against F singly and applies for execution to the Court in which the joint decree is being executed. F may treat his joint-decree as a cross-decree under this rule.

[1882, S. 246; 1877, Ss. 233, 243, 246; 1859, S. 209. See S. 49 and O. 21, Rr. 19, 20 and 29.]

Order 21, Rule 18 — Note 1 (contd.)

redemption when he is liable under the decree for costs and mesne profits. AIR 1951 Mys 20 (22).

2. Cross-decrees for the payment of two sums of money. — (1) A decree directing recovery of money by sale of immovable property is a decree for the payment of money under this rule, even though it may be in enforcement of a charge. (1906) 29 Mad 318 (319) (DB) ** AIR 1933 Mad 63 (64): 56 Mad 339 (DB) ** (1910) 33 All 240 (242) (DB).

[See however AIR 1936 All 639 (641): 58 All 907 (DB).]

(2) A mortgage decree is a decree for the payment of money and the fact that there is no personal remedy under the mortgage decree is immaterial. AIR 1944 Mad 149 (150).

(3) Money decree against legal representative limited to assets of deceased judgment-debtor in his hands — Sum actually due is not definite — If judgment-debtor is prepared to pay entire decretal amount decree may be described as definite. AIR 1957 Andh Pra 520 (522, 523): ILR (1956) Andhra 144 (DB).

3. Cross decrees in separate suits. — (1) An adjudication under Section 144 of the Code is a decree to which this rule will apply. AIR 1925 Cal 102 (103, 104) (DB).

(2) Cross-claims in the same suit do not fall within this rule but come under R. 19. (1883) 5 All 272 (273) (DB).

(3) Costs in Letters Patent appeal and under decree in same suit — Neither R. 18 nor Section 151 applies. AIR 1932 Lah 537 (537).

4. "Between the same parties". — (1) In order that this rule may apply, the parties should be the same in both suits. AIR 1950 Trav-Co 28 (29) (DB) ** (1887) 9 All 64 (67) (DB).

(2) A foreman of chitty fund — B subscriber, transferring his rights in paid-up subscriptions to C who in turn assigning same to P — P filing suit on same and obtaining decree against A — Decree allowing P to realise unrealised amount, if any, from C — A having decree against B and charge on amount due from A to P — A seeking to set-off his decree amount against P's decree — Set-off held could not be allowed. AIR 1950 Trav-Co 28 (29) (DB).

5. Same character in both suits necessary. — (1) A holding decree against B personally — B filing suit on mortgage executed by C — A impleaded as purchaser of portion of equity of redemption — Suit decreed — Two decrees cannot be set-off. AIR 1916 All 290 (293): 38 Mad 669 (DB).

(2) A decree against a widow in respect of a debt contracted by her deceased husband can be set off against a decree obtained by the widow on a debt due to herself. AIR 1914 Mad 2 (3) (DB).

(3) A decree obtained against the assets in the hands of the heir of a deceased person and a decree obtained by such heir against the holder of the former decree personally cannot be set off against each other. AIR 1939 All 25 (27).

HIGH COURT AMENDMENT

Madhya Pradesh

Substitute the following for the existing Rule 18 :—

"18. (1) Where decree-holders apply to a Court for execution of cross-decrees in separate suits between the same parties for the payment of two sums of money passed and capable of execution at the same time by such Court, then

(a) if the two sums are equal, satisfaction shall be entered upon both decrees;

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum :

Provided that—

(i) each party fills the same character in both suits, and

(ii) the sums due under the decrees are definite.

(2) This rule shall be deemed to apply where either applicant is an assignee of one of the decrees as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself :

Provided that—

(i) where the decrees were passed between the same parties, each party fills the same character in each suit; and

(ii) where the decrees were not passed between the same parties the decree-holder in one of the suits is the judgment-debtor in the other suit and fills the same character in both suits; and

(iii) the sums due under the decrees are definite.

(3) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons" [16-9-1960].

Order 21, Rule 18 — Note 5 (contd.)

(4) A obtaining decree for maintenance against appellants — A dying leaving behind three daughters — Appellants depositing amount of A's decree and attaching it in execution of decree for costs which they had obtained against A — Court held could allow set off in such case under its inherent power. AIR 1957 Andh Pra 403 (404).

(5) A person against whom a decree is passed in his character as a legal representative can at his option have the whole decree treated as a decree personally against him irrespective of any assets in his hands. AIR 1957 Andh Pra 520 (523): ILR (1956) Andhra 144 (DB).

(6) A decree against a firm can be set off against a decree obtained by one of the partners against the holder of the former decree. AIR 1927 Bom 255 (256).

6. Decrees must be capable of execution at the same time. — (1) There can be no set off if one of the decrees is only a preliminary decree. AIR 1931 Cal 23 (24): 57 Cal 855.

(2) There can be no set off if execution of one of the decrees is time-barred. AIR 1950 Trav-Co 36 (37) (DB) ** AIR 1933 Lah 372 (373) ** AIR 1918 Cal 631 (632) (DB).

(3) There can be no set off if execution of one of the decrees is expressly postponed till the happening of a certain contingency and the contingency has not happened. (1867) 7 Suth WR 535 (536) (DB).

(4) Execution of decree stayed — There can be no set off. AIR 1942 Pat 197 (198) (DB).

(5) Decree already satisfied — There can be no set off. AIR 1935 Lah 914 (915).

(6) The Court has inherent power to allow a set off in execution proceedings even if the claim to set off is time-barred. AIR 1939 Lah 85 (86).

7. Decrees must be in the same Court for execution. — (1) It is essential that applications should have been made for execution of both decrees. AIR 1940 PC 173 (174): 67 Ind App 350 ** (1902) 24 All 481 (482, 485) (DB).

(2) Application for execution should be pending in one and the same Court either as the Court which passed the decrees or as the Court to which the decree or decrees have been transferred for execution. AIR 1940 Mad 534 (536) ** (1866) 6 Suth WR Misc 72 (73) (FB) ** AIR 1933 Mad 215 (216).

(3) Even without filing any execution petitions, the claims under cross-decrees

R. 19. Execution in case of cross-claims under same decree.—Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,

(a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and

(b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree.

[1882 and 1877, S. 247.]

Order 21, Rule 18 — Note 7 (contd.)

can be set off and adjusted by agreement of parties or under orders of Court. AIR 1951 Trav-Co 78 (78) (DB).

(4) Execution of one decree sought — No application for execution of other decree — Execution of former decree may be stayed to enable application for execution of latter decree being filed and set off worked out. AIR 1914 Mad 2 (3) (DB).

(5) Holder of decree for larger sum applying for execution of his decree and praying that cross-decree for smaller sum should be attached and executed — Applications must be held to have been made for execution of both decrees. AIR 1940 PC 173 (174, 175): ILR (1940) Kar (PC) 312: 67 Ind App 350: ILR (1941) Mad 1.

(6) If one of the decrees expressly stipulates that execution shall not issue till the amount under the other decree is ascertained, a set-off can be ordered even though no application for execution of the latter decree may have been filed. AIR 1919 Pat 312 (312) (DB).

8. Execution can be had only of the decree for the larger sum.— (1) If the amounts due under two cross-decrees are not equal, execution of the decree for the smaller sum becomes incapable of being issued. AIR 1942 Mad 399 (400) ** AIR 1918 Cal 133 (134) (DB).

(2) Execution can only issue under the decree for the larger amount and only in respect of the balance due after the set-off. AIR 1934 Cal 140 (142) (DB).

(3) If execution of the decree for the smaller sum does take place and properties are sold in auction the sale is not invalid. (1887) 14 Cal 18 (25): 13 Ind App 106 (PC).

9. Assignment of the decree.— (1) A right to set off can be enforced against assignee of a decree. AIR 1933 Mad 215 (216, 217).

(2) The assignee of a decree is entitled to set off such decree against a decree which the judgment-debtor has obtained against such assignee. AIR 1938 All 130 (131).

(3) A holds a decree against B for Rs. 5,000. B holds a decree against A for Rs. 6,000. A assigns his decree to C. B can claim a set off and C will not be entitled to execute his decree for any amount. (1903) 26 Mad 428 (429) (DB) ** AIR 1934 Cal 820 (820, 821) (DB).

(4) The assignee of a decree is not entitled to a set-off under this rule, unless the decree was assigned to him before applications were made for the execution of the two decrees sought to be set off against each other. (1937) 20 Nag L Jour 70 (72).

(5) An attaching decree-holder is an "assignee" within the meaning of this rule. AIR 1925 Cal 102 (103) (DB).

[But see AIR 1935 Mad 587 (588) (DB).]

(6) Order 21, Rule 18 (2) has to be read along with Section 49 of the Code. Sub-rule (2) of Order 21, Rule 18 must be applied in respect of judgment debt due by the original assignor only if such judgment-debt was in existence at the time of the assignment. AIR 1962 Raj 223 (223, 224): 1962 Raj LW 542 (DB).

10. Sub-rule (4).— (1) Where a person holds a decree against several persons jointly and severally and is singly liable under another decree in favour of one or more of such persons, he can claim a set off between the two decrees. (1892) 14 All 339 (340, 341) ** (1883) 9 Cal 479 (480, 481) (DB) ** AIR 1937 PC 39 (41): 16 Pat 127: 64 Ind App 67.

(2) A mortgage decree can never be termed a "joint" and "several" decree within Order 21, Rule 18 (4) and, therefore, there cannot be a set off of two mortgage decrees not between the same parties. AIR 1917 All 308 (308, 309) (DB).

(3) Where X obtains a decree against A, and A and B obtain a decree against X, X cannot insist on a set-off. AIR 1937 PC 39 (41): 16 Pat 127: 64 Ind App 67.

(4) Where X's decree against A is based on a debt incurred by A on behalf of himself and B, and both A and B claim to set off their joint decree against X's decree (against A), the set off must be allowed. AIR 1937 PC 39 (41): 16 Pat 127: 64 Ind App 67.

ORDER 21, RULE 19 — SYNOPSIS

1. Scope and object.
2. "Two parties".
3. Two sums unequal — Procedure.
4. Set-off of costs.

Order 21, Rule 19 (contd.)

1. Scope and object.— (1) The object of the provision is to prevent each side taking out execution in respect of sums due under the same decree. AIR 1954 Kutch 55 (56) ** AIR 1948 Bom 399 (400): ILR (1946) Bom 891 ** AIR 1917 Mad 226 (227) (DB).

(2) A set-off under this rule will be ordered even though the remedy of each party against the other is not precisely of the same nature. (1894) 16 All 395 (396) (DB) ** AIR 1938 Mad 638 (639, 640) (DB).

(3) Costs awarded can be set off against money directed to be realised by sale of hypothecated property. (1894) 16 All 395 (397) (DB).

(4) Costs can be set off against redemption amount awarded by decree. (1893) 17 Bom 32 (34) (DB) ** (1900) 23 Mad 121 (123) (DB).

(5) Costs can be set off against mesne profits decreed. AIR 1915 Bom 226 (226, 227): 40 Bom 60 (DB).

(6) Costs can be set off against pre-emption amount to be deposited under decree. AIR 1922 Lah 142 (143): 2 Lah 294 (DB) ** AIR 1939 All 228 (229): ILR (1939) All 261 (DB).

(7) In pre-emption suits under Sections 14 and 15 of the Oudh Laws Act the purchase money must be deposited. In such suits costs cannot be set off against the pre-emption amount. AIR 1924 Oudh 104 (105): 26 Oudh Cas 345.

(8) Costs can be set off against amount decreed as rent and directed to be realised by sale of property. AIR 1938 Mad 638 (639, 640) (DB).

(9) Where A, a mortgagee, sues B, the mortgagor and C, subsequent mortgagee, and a decree is passed in favour of A but awarding costs to C, A cannot set off the costs against his decree inasmuch as A could not have recovered any amount from C. AIR 1934 All 8 (9, 10).

(10) The principle of the rule will not apply when the party entitled to recover is not personally liable to pay under that decree. AIR 1954 Kutch 55 (56).

(11) Set-off under this rule and Rule 18 is not a discretionary matter depending on equitable considerations. **AIR 1937 PC 39 (41): 16 Pat 127: 64 Ind App 67.**

(12) On general principles and in exercise of its inherent power, an executing Court can entertain and give effect to a claim of set off even in cases which do not come strictly within the provisions of this rule. AIR 1954 Bom 335 (337): ILR (1954) Bom 678 ** AIR 1951 Mys 20 (22) ** 1950 Trav-Co LR 275 (276) (DB).

(13) Even under general principles, a sum due to several persons cannot be set off against a sum due by one of them alone. AIR 1942 Oudh 177 (178).

(14) An order against a garnishee in proceedings under Order 21, Rules 131 to 139 of the Allahabad High Court directing him to pay a certain sum to the decree-holder forms part of the original decree and hence the garnishee is entitled to set off against such sum the amount awarded to him as costs by the original decree. AIR 1934 All 1056 (1057).

(15) This rule cannot apply where one of the parties is not entitled to take out execution. AIR 1948 Bom 399 (400): ILR (1946) Bom 891.

(16) A decree against one's properties is a decree against oneself for purposes of Order 21, Rule 19. Therefore, the mutual claims under the decree are really "cross claims under the same decree" and come exactly within the purview of Rule 19. 1961 Ker LT 875 (875): (1961) 2 Ker LR 478. (AIR 1938 Mad 638, Rel. on.)

(17) Where one of the shares of a property created a mortgage in favour of a third party over his share during the pendency of a suit for partition and the suit is finally decreed and the property is purchased in a sale under the Partition Act by the other sharer, the purchaser has to deposit the value of the share purchased by him into Court and the mortgagee will be entitled to a prior charge over the said amount. The purchaser cannot seek to set-off his decree for costs against the other sharer against the value of the share purchased by him to the detriment of the mortgagee. AIR 1959 Mad 225 (226): (1959) 1 Mad LJ 178.

2. "Two parties".— (1) The expression "two parties" means the two parties or sets of parties who are parties not only to the suit in which the decree was passed but also to the application referred to in the opening sentence of the rule. AIR 1942 Oudh 177 (178) ** AIR 1917 Mad 226 (227) (DB).

(2) The expression "two parties" includes the legal representatives of a party but not two different legal representatives of the same party. AIR 1941 Sind 49 (49, 50): ILR (1941) Kar 129 (DB) ** AIR 1923 Mad 638 (639, 640) (DB).

3. Two sums unequal — Procedure.— (1) The rule does not debar the party liable to pay the larger sum from paying such sum and then seeking execution for the smaller sum due to him. AIR 1942 Oudh 177 (178).

(2) Execution under the claim for the larger amount should be allowed only to the extent of the difference. AIR 1954 Bom 335 (337): ILR (1954) Bom 678 ** AIR 1920 Cal 438 (439) (DB) ** AIR 1923 Lah 151 (153) (DB).

(3) The Court should first ascertain the amounts due, enter satisfaction in respect of the claim for the smaller amount and enforce execution for the balance of the amount due under the larger claim. AIR 1954 Kutch 55 (55) ** AIR 1918 Cal 153 (154) (DB).

(4) Since the two claims form a single indivisible decree, and only enforceable for

R. 20. Cross-decrees and cross-claims in mortgage suits.—The provisions contained in Rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge.

R. 21. Simultaneous execution.—The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor.

[1882, S. 230, para. 2; 1877, Ss. 230, 231. See S. 51 and O. 21, R. 30.]

Order 21, Rule 19 — Note 3 (contd.)

the difference, the fact that one of the claims is barred by limitation does not alter the position. AIR 1941 Mad 662 (663) (DB) ** AIR 1915 Bom 226 (226): 40 Bom 60 (DB).

(5) If in executing the decree for the larger claim, no deduction is made for the amount due under the smaller claim, and the claim is executed in full, the Court may order refund of the excess under Section 151. AIR 1920 Cal 438 (439) (DB).

(6) Decree for costs awarded by trial Court set aside on appeal by High Court — Appeal to Privy Council dismissed with costs — In execution of decree for costs in Privy Council judgment-debtor is entitled to set off costs in trial Court realised by decree-holder. AIR 1935 Cal 225 (226): 62 Cal 298 (DB).

(7) Decree for pre-emption — Plaintiff awarded costs — Smaller sum awarded to defendant as costs — Plaintiff not directed to deposit costs of defendant in Court — Deposit of pre-emption money after depositing costs awarded to him but without giving credit for defendant's costs is not bad — Clause (b) of Rule 19 does not apply to such case. AIR 1939 All 228 (229): ILR (1939) All 261 (DB). (AIR 1937 All 756, **Reversed.**)

4. Set-off of costs.— (1) Costs awarded to one party in a suit may be set-off against costs awarded to the other party in the suit. (1906) 28 All 676 (677) (DB).

(2) Costs awarded to one party may be set off against other sums awarded to the other party. AIR 1954 Bom 335 (337): ILR (1954) Bom 678 ** (1911) 10 Ind Cas 454 (455) (DB) (All).

[See however (1887) 9 All 64 (67, 68) (DB).]

(3) Costs awarded on interlocutory matters in the same suit between the same parties and against each other, will be deemed to be incorporated in, and to form part of, the final decree in the suit and will, therefore, be set off against each other. AIR 1917 Pat 259 (260) (DB).

(4) Where in a suit for specific performance of a contract for sale of immovable property plaintiff was given a decree with costs, it was held that the plaintiff could not deduct the amount of costs from the amount which he had to deposit in Court as the sale price because the amount of costs was in the nature of a set-off to be worked out in execution. AIR 1946 Nag 29 (30): ILR (1945) Nag 924.

[See AIR 1969 Andh Pra 146 (147, 148): (1969) 1 Andh WR 252. (Decree-holder filing execution petition for execution of sale deed — Claim for set off of the amount payable by him under decree against costs awarded to him — Costs awarded are more than the amount payable by him — Section 28 of Specific Relief Act cannot be invoked by judgment debtor — Rule 19 (b) of Order 21, C. P. Code, applies to such cases.)]

(5) A defendant can set off the amount of costs due to him under the decree for rent against the rents that accrue due after the date of the Holdings (Stay of Execution Proceedings) Act VIII of 1950 came into force and deposit the balance for the purpose of earning the concession under that Act. 1958 Ker L Tim 586 (588) (DB).

Order 21, Rule 20 — Note 1

(1) This rule makes the provisions of Rules 18 and 19 applicable to cases where the decrees are, or one of the decrees is, a mortgage-decree. AIR 1933 Pat 210 (214) (DB) ** AIR 1933 Mad 63 (64): 56 Mad 339 (DB) ** AIR 1937 PC 39 (40): 16 Pat 127: 64 Ind App 67.

[But see AIR 1936 All 639 (641): 58 All 907 (DB).]

(2) For allowing set off, it is not necessary that the mortgage decree should be actually one for the payment of money personally by the judgment-debtor; it is enough if the personal remedy is legally available. AIR 1933 Pat 210 (216, 217) (DB) ** AIR 1945 Cal 1 (5, 6) (DB) ** AIR 1944 Mad 149 (150) ** AIR 1937 PC 39 (41): 16 Pat 127: 64 Ind App 67.

[But see AIR 1930 Rang 68 (70, 71): 7 Rang 505 (DB).]

(3) The right to set off is not lost by merely asking the Court to notify the incumbrance of the decree under Order 21, Rule 66 of the Court. AIR 1933 Pat 210 (218) (DB).

Order 21, Rule 21

1. Simultaneous execution.— (1) The power to order execution against the person and property simultaneously is within the discretion of the Court. AIR 1952 Pat 213 (216): 31 Pat 56 (FB) ** AIR 1957 Mad 777 (779) ** AIR 1953 Cal 717 (718).

(2) This rule is general in its terms and is not restricted to the decrees for the payment of money like R. 30. AIR 1955 All 382 (384) (DB).

(3) The refusal of simultaneous execution should be an exception rather than

R. 22. Notice to show cause against execution in certain cases.—(1) Where an application for execution is made—

(a) more than one year after the date of the decree, or

(b) against the legal representative of a party to the decree, [a][or where an application is made for execution of a decree filed under the provisions of Section 44A],

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

[1882, S. 248; 1877, S. 248; 1859, S. 216. See Ss. 48 and 50.]

[a] Inserted by the Code of Civil Procedure (Amendment) Act, VIII of 1937, S. 3.

Order 21, Rule 21 — Note 1 (contd.)

the rule. AIR 1926 Lah 110 (111): 6 Lah 548 (DB) ** AIR 1934 Nag 140 (141, 142).

(4) If the judgment-debtor is evading payment, his arrest can be ordered even though his properties might have been attached under the same decree. (1883) 7 Bom 301 (302) (DB) ** AIR 1933 Lah 307 (308).

(5) If there is no fraud or mala fides on the part of the judgment-debtor, simaltaneous execution may be refused. 1899 Pun Re No. 21, p. 121 (123) (DB).

(6) This rule does not empower the Court to pin the decree-holder down to any particular mode of execution. AIR 1929 Lah 86 (87) ** (1887) 9 All 484 (485) ** AIR 1939 Pat 380 (381): 18 Pat 366 (DB).

(7) The rule does not prevent the decree being executed simultaneously in several districts. (1882) 8 Cal 687 (689, 690) (DB).

(8) A decree-holder is entitled to proceed simaltaneously against the different properties. AIR 1957 Orissa 274 (275): ILR (1957) Cut 446.

2. Appeal.— (1) An order refusing simultaneous execution under this rule amounts to a decree and is appealable as such. (1883) 7 Bom 301 (302) (DB).

ORDER 21, RULE 22 — SYNOPSIS

1. Scope and object.
2. Legal representative.
3. "Shall issue notice".
4. Proof of notice.
5. Effect of omission to give notice.
6. Notice to wrong person.
7. Irregular service of notice.
8. Objection as to notice, when may be taken.
9. More than one notice, if contemplated by the rule.
10. Remedy when property has been sold without notice under this rule.
11. Date of the decree.
12. Notice when not necessary.
13. Court executing the decree.
14. Sub-rule (2).
15. Appeal.
16. Costs.
17. Application of res judicata.
18. Limitation.

1. Scope and object.— (1) The object of the notice is to furnish an opportunity to the person concerned to urge any objection he may have to the maintainability of the execution application to prevent his being taken by suprise and to enable him to satisfy the decree before execution is issued against him. (1897) 21 Bom 424 (432) (FB) ** AIR 1957 Pat 433 (434) (DB) ** (1909) 36 Cal 543 (552) (DB) ** 1964 BLJR 617 (619).

(2) The rule is imperative and notice shall be issued in the circumstances mentioned therein. 1943-1 Mad L Jour 149 (150) ** AIR 1935 Lah 962 (962) ** AIR 1921 Nag 126 (126, 127) ** **AIR 1914 PC 129 (131): 42 Cal 72: 41 Ind App 251** ** AIR 1969 Pat 228 (232) (DB) ** AIR 1965 Guj 69 (70): (1963) 4 Guj LR 1017.

(3) The rule applies also to cases where execution had been previously taken

HIGH COURT AMENDMENTS

Allahabad

(1) Omit Cl. (a) of sub-rule (1) and from the Proviso to sub-rule (1) delete the words beginning from "in consequence of more than one year" to "made on any previous application for execution, or".

(2) Omit the letter and the brackets "(b)". (1-6-1957.)

(3) To sub-rule (2) of this rule shall be added the following proviso:

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission."

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta: see Act 27 of 1962, Ss. 13 and 15 [w.e.f. 1-12-1963].

Bombay: Dadra and Nagar Haveli

In Order XXI, for the existing Rule 22 and its marginal note, substitute the following as Rule 22 and marginal note :—

22. Notice to show cause against execution in certain cases.—(1) Where an application for execution is made—

(a) more than two years after the date of the decree, or

(b) against the legal representative of a party to that decree, or where an application is made for execution of a decree filed under the provisions of Section 44A,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

Order 21, Rule 22 — Note 1 (contd.)

against the judgment-debtor himself, and, on his death, the execution is sought to be taken out against the legal representatives. AIR 1947 Pat 454 (457): 26 Pat 340 (FB) ** AIR 1945 Pat 1 (17): 23 Pat 528 (FB) ** AIR 1936 Mad 205 (211, 212): 59 Mad 461 (FB) ** AIR 1969 Bom 84 (90): 70 Bom LR 373.

[But see AIR 1952 Cal 58 (60): ILR (1953) 1 Cal 1 (DB).]

(4) A notice under this rule may be issued by the Court executing a transferred decree, while a notice under Order 21, Rule 16 should be given only by the Court which passed the decree. AIR 1925 Oudh 448 (450): 28 Oudh Cas 330 (DB).

(5) Notice under Order 21, Rule 16 — Fact of assignment and assignee's right to execute not disputed — Various other objections raised — Objections cannot be entertained at that stage if notice under Rule 22 is necessary. AIR 1941 Bom 190 (191).

(6) The issue of a notice under this rule to the guardian of a minor judgment-debtor raises no presumption that he has been appointed guardian by implication by the Court. AIR 1925 Cal 23 (25) (DB).

[But see (1907) 5 Cal L Jour 434 (438) (DB).]

(7) The rule does not apply to summary proceedings like those contained in Section 111 of the Madras Estates Land Act. AIR 1929 Mad 517 (519).

(8) The issue of a notice under this rule is not a mode of enforcing the decree. AIR 1947 Bom 430 (434).

(9) This rule does not contravene Article 14 of the Constitution. AIR 1957 Andh Pra 136 (142) (DB).

(10) (Patna amendment) — The amendment made in 1947 cannot, be held to be ultra vires and unconstitutional. AIR 1959 Pat 89 (97): ILR 36 Pat 1027.

(11) A vested right cannot be taken away by a procedural amendment and the invalidity of the sale cannot be affected by any subsequent amendment made to O. 21, Rule 22. (1965) 31 Cut LT 632 (637): ILR (1964) Cut 829 (DB).

(12) Where show cause notice was not legally necessary but was issued, attachment in pursuance of order passed before expiry of notice, was held valid. AIR 1963 Manipur 45 (46).

(13) (Orissa) — Amendment not retrospective to cover transactions closed before amendment. ILR (1964) Cut 829: 31 Cut LT 632 (DB).

(14) Decree ordered to be executed by attachment and sale of deceased judgment-debtor's property — No objection by widow to saleability in spite of notice to her under Order 21, Rule 22 — Her subsequent application for release of property

Provided that no such notice shall be necessary ni consequence of more than two years having elapsed between the date of the decree and the application for execution, if the application is made within two years from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3) Notwithstanding anything contained in sub-rules (1) and (2) above, no order for the execution of a decree shall be invalid merely by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Calcutta

Add the following sub-rule (3):

"(3) Omission to issue a notice in a case where notice is required under sub-rule (1), or to record reasons in a case where notice is dispensed with under sub-rule (2), shall not affect the jurisdiction of the Court in executing the decree".

Delhi and Himachal Pradesh

Same as that of Punjab, see Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Gujarat

Words "two years" shall be substituted for 'one year' wherever they occur [17-8-1961].

Order 21, Rule 22 — Note 1 (contd.)

under Section 47 is barred though property is her own. AIR 1969 Pat 251 (253) (DB).

(15) Application for execution — Service of notice under Order 21, Rule 22 is imperative. Desirability of dispensing with a notice under Order 21, Rule 22 may be considered in a fit case only at the time when application for execution is filed. AIR 1969 Pat 228 (232) (DB).

2. Legal representative. — (1) On the adjudication of a person as an insolvent, the Official Receiver cannot be said to be his 'legal representative'. AIR 1943 Pat 297 (298): 22 Pat 256 (DB) ** AIR 1936 Mad 205 (207): 59 Mad 461 (FB).

(2) Under the amendment of the rule by the Madras High Court notice is required to be given to the Official Receiver where the judgment-debtor has been declared an insolvent. AIR 1943 Mad 260 (261) ** AIR 1941 Mad 606 (607) (DB).

[See however AIR 1949 Mad 886 (891): ILR (1949) Mad 904 (DB).]

(3) Execution of decree against heirs and legal representatives of deceased partner of firm — No express prayer for leave in tabular statement — Summons was, however, issued in usual form — **Held,** though no express prayer was made, leave could be granted on determination of summons. (1966) 70 Cal WN 131.

(4) When judgment-debtor dies, notice of execution must be issued to the legal representative. AIR 1969 Bom 84 (90): 70 Bom LR 373.

3. "Shall issue notice". — (1) The provisions of this rule are mandatory. AIR 1917 Cal 728 (731): 44 Cal 954 (DB).

(2) The issue of the notice is a condition precedent to the validity of the execution proceedings. (1893) 21 Cal 19 (22, 23) (DB) ** (1881) 3 All 424 (426) (DB) ** AIR 1914 PC 129 (131): 41 Ind App 251.

(3) The Court must issue the notice whether the decree-holder has asked for it or not. (1909) 2 Ind Cas 941 (942) (DB) (Cal) ** AIR 1917 Cal 728 (731): 44 Cal 954 (DB).

(4) The failure to issue notice will render the proceedings null and void. Madh BLJ 1954 HCR 142 (143) ** AIR 1951 Mys 118 (119): ILR (1952) Mys 24 (DB) ** AIR 1924 Mad 431 (436): 47 Mad 288 (FB).

(5) Notice given to persons who sufficiently represented the interested minors for whom guardians were not appointed is sufficient compliance with this rule. AIR 1921 Cal 476 (478) (DB) ** AIR 1957 Pat 433 (434) (DB).

(6) Where the Court executing the decree is also the Court which passed the decree, there is nothing in this rule to prohibit the issue of a combined notice under this rule and Rule 16. AIR 1942 Bom 134 (135): ILR (1942) Bom 190 ** AIR 1933 Pat 658 (663): 13 Pat 86 (DB).

(7) A minor who attained majority pending execution proceedings is not entitled on that ground, to a fresh notice under this rule. AIR 1950 Mad 314 (316): ILR (1950) Mad 779 (DB).

Kerala : Laccadive, Minicoy and Amindivi Islands

Same as that of Madras (9-6-1959); see Act 37 of 1960, S. 60 and Reg. 8 of 1965, Section 3.

Madhya Pradesh

To sub-rule (2), add the following proviso :

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission" [16-9-1960].

Madras and Pondicherry

(1) In sub-rule (1) the words "two years" shall be substituted for the words "one year" wherever they occur.

(2) In sub-rule (1) after Clause (b), insert the following :

"or (c) where the party to the decree has been declared insolvent, against the Assignee or Receiver in insolvency".

(3) Between sub-rules (1) and (2), insert the following :

"(1a) Where from the particulars mentioned in the application in compliance with Rule 11 (2) (ff), supra, or otherwise the Court has information that the orginal decree-holder has transferred any part of his interest in the decree, the Court shall issue notice of the application to all parties to such transfer, other than the petitioner, where he is a party to the transfer."

(4) Add the following proviso to sub-rule (2) :

"Provided that no order for execution of a decree shall be invalid owing to the omission of the Court to record its reasons unless the judgment-debtor has

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Order 21, Rule 22 — Note 3 (contd.)

(8) A notice under this rule should be to specifically show cause why the decree should not be executed. AIR 1932 Pat 199 (201, 203): 11 Pat 241 (DB).

(9) Where there are two or more judgment-debtors with joint liability, the notice under this rule must be given to all of them. Notice to one of them will not bind the others. (1947) 51 Cal WN 560 (562).

(10) Where one of the judgment-debtors with joint liability dies, a notice to his legal representatives under this rule is necessary before the decree can be executed against them. AIR 1945 Bom 409 (412) (DB).

[See also AIR 1962 All 125 (126, 127). (To widow of deceased judgment-debtors.) ** AIR 1961 Ker 172 (173, 174): 1960 Ker LT 1032 (DB).]

(11) Prayer for leave under Section 50 and Order 21, Rule 22 (b) for execution of decree against legal representatives of deceased partners — They are entitled to notice under Order 21, Rules 50 (2) and 22 (1) (a) (b) — At hearing Court did not make any order as regards legal representative — Appellate Court could decide and grant necessary relief. (1966) 70 Cal WN 131 (DB).

4. Proof of notice.— (1) The onus of proving want of notice will be on the party setting it up. (1902) 29 Cal 580 (582) (DB) ** AIR 1962 Andh Pra 156 (157): 1961 Andh LT 136.

(2) An entry on the order sheet to the effect that notice has been served will be prima facie evidence of the service of notice. AIR 1948 Cal 165 (167): ILR (1948) 1 Cal 331 (DB) ** AIR 1959 Pat 89 (99, 100): ILR 36 Pat 1025 (DB).

(3) Mere entries in suit register showing that the notices were issued cannot by themselves prove that notices were served. AIR 1950 Cal 513 (514) (DB).

(4) Property sold for grossly inadequate price and purchased by decree-holders who were the only bidders — Court should require best evidence of service of notice. AIR 1947 Pat 139 (140) (DB).

5. Effect of omission to give notice.— (1) Death of judgment-debtor — Execution against his estate — Notice under this rule served on certain person as legal representative — Objection that he was not legal representative not accepted — Properties of judgment-debtor sold in execution — Later on person to whom notice was sent found to be not proper legal representative — Case held was one of material irregularity in the exercise of jurisdiction and, therefore, the sale was not void. (1901) 25 Bom 337 (348): 27 Ind App 216 (PC).

(2) In cases of a total omission to issue a notice under the rule the sale is absolutely void and not merely voidable. AIR 1914 PC 129 (132): 41 Ind App 251 ** AIR 1924 Mad 431 (436): 47 Mad 288 (FB) ** AIR 1945 Pat 1 (17): 23 Pat 528 (FB) ** (1965) 31 Cut LT 632 (635): ILR (1964) Cut 829 (DB) ** AIR 1964 Ker 158 (161): 1964 (1) Cri LJ 668: 1964 Ker LJ 97 (DB).

[But see AIR 1957 Trav-Co 153 (155) (DB).]

sustained substantial injury as the result of such omission" [2-9-1936 and 13-10-1936]; Act 26 of 1968, S. 3 and Sch., Pt. II (w.e.f. 5-9-1968).

Mysore

Delete Rule 22 and substitute the following :—

22. (1) Where an application for execution is made—

(a) more than two years after the date of the decree, or

(b) against the legal representative of a party to the decree, or

(c) where the party to the decree has been declared insolvent, against the Assignee or Receiver in Insolvency, or

(d) for the execution of a decree filed under the provisions of Section 44A of this Code,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than two years having elapsed between the date of the decree and the application for execution if the application is made within two years from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Where from the particulars mentioned in the application in compliance with Rule 11 (2) (ff) of this Order or otherwise the Court has information that the decree-holder has transferred any part of his interest in the decree, the Court shall, issue notice of the application to all parties to such transfer, other than the petitioner, where he is a party to the transfer.

(3) Nothing in the foregoing sub-rules shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice hereby prescribed,

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Order 21, Rule 22 — Note 5 (contd.)

(3) Even if the judgment-debtor died after property had been attached and ordered to be sold, the absence of notice to the legal representative would render the sale void. AIR 1936 Mad 205 (214, 219): 59 Mad 461 (FB). (AIR 1924 Mad 130: 47 Mad 63, **Overruled.**)

(4) Omission to issue notice — Sale is void — It is immaterial whether property sold is immovable or movable — Nor is it material that purchaser was stranger. (1894) 21 Cal 19 (22) (DB).

(5) The failure to bring the legal representative of the judgment-debtor on the record does not necessarily make the proceedings in execution a nullity. AIR 1938 Nag 308 (308).

[But see (1965) 31 Cut LT 632: ILR (1964) Cut 829 (DB).]

(6) If, though no notice is served, he appears and contests the application, the object of the rule is achieved and the proceedings are valid. AIR 1956 Trav-Co 147 (153): ILR (1955) Trav-Co 823 (FB) ** AIR 1957 Pat 431 (433) (DB) ** AIR 1956 Raj 1 (4): ILR (1956) 6 Raj 23 (DB) ** AIR 1959 Pat 89 (95): ILR 36 Pat 1027 (DB).

[See however AIR 1940 Pat 142 (144): 18 Pat 761 (DB).]

(7) Person concerned served with notice under Rule 66 and thus aware of application pending against him — Proceedings are valid even if no notice under this rule is issued. AIR 1951 Mys 118 (119): ILR (1952) Mys 24 (DB) ** AIR 1959 Raj 47 (50): 1959 Raj LW 682.

(8) The omission to issue notice under this rule does not render the sale in execution of a mortgage decree void. AIR 1957 Bom 170 (173): ILR (1957) Bom 623 (DB) ** AIR 1918 Oudh 379 (388) (DB).

(9) Though notice under this rule is not necessary where the judgment-debtor has been fighting out the execution tooth and nail in cases which have nothing to do with revivor, that principle cannot be applied in a case of revivor where there is a specific procedure which must be undergone if there is to be revivor and notice is essential. AIR 1956 Raj 1 (5): ILR (1956) 6 Raj 23 (DB).

(10) In a jurisdiction in which the proviso to sub-rule (2) of Rule 22 (Nagpur High Court amendment) is in force, an omission to issue a notice under the rule does not render the sale even voidable unless the irregularity has resulted in a substantial injury to the legal representative. AIR 1957 Bom 170 (175): ILR (1957) Bom 623 (DB)

(11) Sub-rule (3) added by Patna High Court is retrospective. AIR 1953 Orissa 296 (298): ILR (1953) Cut 446 (DB). (AIR

if for reasons to be recorded in writing the Court considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice:

Provided that no order for the execution of a decree shall be invalid owing to the omission of the Court to issue a notice as required by sub-rule (1) or to record its reasons where notice is dispensed with under sub-rule (3), unless the judgment-debtor has sustained substantial injury as a result of such omission [30-3-1967].

Orissa

Same as that of Patna.

Patna

(a) For sub-rule (1) substitute the following:

"Where an application for execution is made in writing under Rule 11 (2), the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him."

(b) In Rule 22 add the following as sub-rule (3):—

"(3) Proceedings held in execution of a decree shall not be invalid solely by reason of any omission to issue or failure to serve a notice under sub-rule (1) or to record reasons where such notice is dispensed with under sub-rule (2) unless the judgment-debtor has sustained injury thereby" [9-5-1947].

Punjab, Haryana and Chandigarh

(1) The words "two years" shall be substituted for the words "one year" wherever they occur.

Order 21, Rule 22 — Note 5 (contd.)

1951 Pat 333, Foll.) ** AIR 1951 Pat 333 (338) (DB).

[See however AIR 1954 Pat 429 (431) (DB).]

(12) In view of amended sub-rule (1) of Order 21, Rule 22 (Patna High Court amendment), as it stood after the 1st April, 1936, the issue of notice under Order 21, Rule 22 is not a matter of jurisdiction. AIR 1957 Pat 431 (433) (DB) ** AIR 1957 Pat 433 (435) (DB) ** AIR 1961 Cal 336 (340): 65 Cal WN 171 (FB). (Calcutta High Court Amendment.) ** AIR 1961 Pat 508 (510) (DB) ** AIR 1961 Pat 480 (482) (DB). (Sale in execution, in absence of notice, is not nullity.) ** AIR 1959 Pat 89 (96): ILR 36 Pat 1027 (DB).

[But see AIR 1959 Pat 89 (100): ILR 36 Pat 1027 (DB).]

(13) On the analogy of Order 21, R. 22 (as amended), where notice was not served on the judgment-debtor, under Section 158-B of Bihar Tenancy Act (1885), omission to give notice was held to be an irregularity not vitiating sale. AIR 1965 Pat 482 (485): 1965 BLJR 320 (DB).

(14) The notice under Order 21, Rule 22 as it stood before the amendment of 1947 did go to the root of jurisdiction and the non-issue of the same had the effect of making the execution proceedings void. But it was void not in the sense of complete nullity but only in the sense that it was not valid and operative against the judgment-debtor. AIR 1959 Pat 89 (97): ILR 36 Pat 1027.

(15) Notice under O. 21, R. 37 issued — Omission to issue notice under O. 21, R. 22 not fatal unless judgment-debtor shows that prejudice has been caused to him by omission to give notice. AIR 1964 Ker 158 (161): 1964 (1) Cri LJ 668: 1964 Ker LJ 97 (DB).

(16) Execution petition filed within two years of decree — Notice under Order 21, Rule 22 not required — Notice under Order 21, Rule 66 not served — Execution sale held a nullity. AIR 1964 Mad 424 (426): (1964) 2 Mad LJ 229.

6. Notice to wrong person. — (1) Notice to wrong person — Sale is only voidable — Proper legal representatives are equally bound by execution proceedings though not parties to the same. AIR 1952 Orissa 312 (317) (DB) ** AIR 1950 Mad 801 (806) (DB) ** AIR 1938 Pat 372 (374) (DB).

(2) Where, both the decree-holder and the Court being not aware of the true age of the judgment-debtor, a notice is issued to a major judgment-debtor as if he were a minor, the issue of such notice only amounts to an irregularity. AIR 1939 Mad 5 (6) (DB).

(3) If the decree-holder was aware of the proper legal representatives and deliberately gets notice served on a wrong person and there is no adjudication by the Court as to who is the legal representative, the sale will be void. AIR 1940 Pat 62 (64) ** AIR 1921 Bom 385 (387): 45 Bom 1186 (DB).

7. Irregular service of notice. — (1) The notice issued under this rule must be in accordance with law and must satisfy the requirements laid down in sub-rule (1). AIR 1916 Cal 511 (512, 513) (DB).

(2) Sufficient time must be allowed to the person concerned to enable him to come and oppose the application. AIR 1928 Mad 1052 (1054) (DB).

(3) The notice must be signed by the Judge or other officer. (1885) 7 All 506 (508, 509) (PC) ** ('86) 8 All 293 (294).

(2) Add the following at the end of the rule :

"Failure to record such reasons shall be considered an irregularity not amounting to a defect in jurisdiction" [7-4-1932]; Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

HIGH COURT AMENDMENTS

Rule 22A

Orissa

Same as that of Patna.

Patna

After Rule 22 add the following new rule :—

"22A. Where any property is sold in execution of a decree, the sale shall not be set aside by reason only of the death of the judgment-debtor between the date of issue of the sale proclamation and date of sale notwithstanding the failure to substitute his legal representative in his place but in case of such failure the Court may set aside the sale if satisfied that the legal representative of the judgment-debtor has been prejudiced thereby" [9-5-1947].

Order 21, Rule 22 — Note 7 (contd.)

(4) An irregularity in the service of notice will not make the subsequent proceedings void. AIR 1947 Pat 454 (459): 26 Pat 340 (FB). (AIR 1941 Pat 481, **Overruled.)** ** AIR 1957 Trav-Co 153 (155) (DB).

(5) The irregularity may also furnish a ground for avoiding a sale under Rule 90. AIR 1930 Pat 153 (154).

(6) It is for the Court to determine whether there has been sufficient service and it is not every departure from the prescribed mode of service that will invalidate the service. AIR 1936 Pat 593 (594) (DB) ** AIR 1965 Raj 79 (80): 1964 Raj LW 446 ** AIR 1959 Pat 89 (99): ILR 36 Pat 1027 (DB).

(7) For service of notice under Order 21, Rule 22 non-compliance with Order 5, Rule 17 amounts to material irregularity. AIR 1966 Orissa 166 (168): 32 Cut LT 646.

8. Objection as to notice, when may be taken.— (1) An objection that no notice was issued is entertainable at any time, even in appeal. (1911) 9 Ind Cas 584 (585) (DB) (Cal) ** AIR 1938 Pat 162 (164) (DB).

(2) An objection cannot be allowed to be taken in appeal if it is likely to take the other side by surprise. AIR 1920 Pat 735 (738): 4 Pat L Jour 645 (DB).

(3) Execution petition — Amendment by deleting property originally mentioned therein as it did not belong to judgment-debtor and substituting another property — Judgment-debtor not objecting to execution in spite of notice under Order 21, Rule 22 is entitled to object subsequently after amendment. AIR 1968 Pat 458 (462).

(4) Principle of cases under this rule that judgment-debtor appearing in proceedings cannot later object that the proceedings are bad for want of notice, applies to recovery proceedings against defaulters of income-tax. AIR 1969 Mad 143 (144): 71 ITR 26 (DB).

9. More than one notice, if contemplated by the rule.— (1) The provisions of the rule as to notice apply to every subsequent application also. AIR 1925 Pat 474 (476) (FB).

[See however AIR 1929 Mad 275 (279, 280) (DB).]

(2) A fresh notice is contemplated as necessary even in subsequent applications except in so far as the proviso renders that course unnecessary. AIR 1925 Pat 474 (476): 5 Pat 1 (FB). (**Overruling** AIR 1924 Pat 111: 2 Pat 916.)

(3) The expression "last order against party" is not restricted to an order subsisting against the party but also includes an order which has been vacated. AIR 1930 Pat 536 (538): 9 Pat 499 (DB).

(4) An order directing the execution proceedings to be struck off for the default of the decree-holder does not furnish a fresh starting point. AIR 1938 Pat 162 (164) (DB).

(5) Where the proceedings are but a continuation of a prior execution case, no notice of such proceedings is necessary. AIR 1949 Pat 401 (403): 27 Pat 43 (DB) ** AIR 1931 Bom 425 (427, 428) (DB) ** AIR 1920 Mad 1034 (1035): 43 Mad 57 (DB).

(6) If a notice under this rule has already been properly issued at the time of making the application, a fresh notice, after the amendment, is not necessary. AIR 1949 Pat 401 (403): 27 Pat 43 (DB) ** AIR 1947 Bom 430 (433, 434).

(7) Decree radically amended without notice to affected party — Amendment invalid — Application for execution made more than two years from original decree — Notice under Order 21, Rule 22 is essential. AIR 1962 Andh Pra 134 (135, 136).

10. Remedy when property has been sold without notice under this rule.— (1) When a sale is held without a notice under this rule, the party aggrieved will be entitled

Order 21, Rule 22 — Note 10 (contd.)
to have the sale declared void and to claim damages. This he may do by means of an application under Section 47. (1908) 32 Bom 572 (574) (DB) ** (1911) 9 Ind Cas 584 (585) (DB) (Cal).

11. Date of the decree. — (1) If the decree of the first Court is affirmed or modified in appeal, the date of the decree is the date of the appellate decree. If the appeal is dismissed for default, the date of the decree is that of the decree appealed against. AIR 1917 Cal 728 (730): 44 Cal 954 (DB).

(2) Where a decree is amended the terminus a quo is the date of the amended decree and not the original decree. AIR 1940 Pat 5 (6) (DB).

(3) Where a decree provides for the payment of money in instalments, the period of one year should be computed from the date of the decree and not from the date of default in payment of the instalment. AIR 1921 Lah 384 (385).

12. Notice, when not necessary. — (1) In cases falling under Clause (a) of sub-rule (1), no notice need be issued to a judgment-debtor who has no interest in the property against which execution is sought. AIR 1926 Cal 86 (86, 87) (DB).

(2) In cases falling under Clause (b) of sub-rule (1), notice to an adult legal representative capable of representing the estate is sufficient. AIR 1954 Trav-Co 26 (27) ** AIR 1929 Mad 275 (282) (DB).

(3) No notice is essential where the legal representative is already a party on the record though in another capacity. AIR 1925 Cal 1227 (1228) (DB) ** (1904) 14 Mad L Jour 342 (343) (DB).

(4) In view of Section 158-B (2) of the Bihar Tenancy Act (8 of 1885) which is a mandatory provision as to notice, corresponding to this rule, notice under this rule has been held not necessary in execution proceedings under the Bihar Tenancy Act. AIR 1947 Pat 33 (34): 25 Pat 267 (DB).

(5) Application for transmission of decree to another Court for execution — No notice of such application to judgment-debtor is necessary. 1956 Andh LT 997 (998).

(6) Attachment before judgment — Subsequent sale of attached property — Decree-holder bringing property to sale in execution of his decree not bound to give notice to alienee under Order 21, R. 22. AIR 1957 Andhra Pra 38 (40).

13. Court executing the decree. — (1) Where the decree is transferred for execution, the transferee Court can and in fact is the only Court competent to issue the notice. (1908) 12 Cal WN 897 (899) ** AIR 1918 Mad 580 (584, 585): 40 Mad 1069 (FB) ** AIR 1925 Oudh 448 (450): 28 Oudh Cas 330 (DB).

(2) An application to execute against the legal representatives has to be made to the Court which passed the decree, but notice under the rule has to be issued by the transferee Court. (1905) 28 Mad 466 (469) (FB).

14. Sub-rule (2). — (1) The mandatory character of the rule is not in any way abrogated by sub-rule (2). AIR 1928 Cal 60 (62): 55 Cal 96 (DB) ** AIR 1924 Mad 431 (436): 47 Mad 288 (FB) ** AIR 1936 Mad 205 (207): 59 Mad 461 (FB).

(2) The sub-rule gives a discretion to the Court to dispense with the notice under certain circumstances. AIR 1933 Cal 560 (561) (DB) ** AIR 1935 Cal 125 (126) (DB).

(3) If notice is dispensed with, the reasons should be recorded. AIR 1918 Mad 645 (647).

(4) The omission to record reasons for dispensing with notice will be a mere irregularity and the proceedings will not be totally invalid merely by reason of the omission. AIR 1924 Mad 431 (436): 47 Mad 288 (FB) ** AIR 1956 Trav-Co 147 (154): ILR (1955) Trav-Co 823 (FB).

[But see AIR 1935 Rang 42 (43) (DB) ** AIR 1954 Nag 78 (81): ILR (1953) Nag 657.]

15. Appeal. — (1) An order on a question of notice under the rule will come under Section 47 and is therefore, appealable as a decree. AIR 1926 Pat 397 (397) (DB) ** AIR 1926 Cal 539 (539, 540) (DB).

(2) An order of arrest without notice is not a final order and is not appealable. AIR 1929 Mad 718 (720).

(3) The High Court will interfere in its revisional jurisdiction in extreme cases. AIR 1929 Rang 161 (162): 7 Rang 110.

(4) An order allowing or refusing an application to set aside a sale for want of a notice under the rule comes under Section 47 and is, therefore, appealable. (1912) 40 Cal 45 (49) (DB) ** AIR 1924 Mad 431 (432): 47 Mad 288 (FB) ** AIR 1921 Pat 145 (149): 6 Pat L Jour 319 (DB).

16. Costs. — (1) Under the ordinary practice a notice under this rule is made absolute without costs being awarded. AIR 1947 Bom 430 (434).

17. Application of res judicata. — (1) Objections which might and ought to have been taken but were not taken on service of notice under Order 21, Rule 22 cannot be subsequently raised. AIR 1969 Pat 21 (23): 1968 BLJR 602 (DB) ** AIR 1966 Raj 44 (45): 1965 Raj LW 381.

(2) Objections about non-saleability of property should be raised before order on notice under Rule 22 is passed — Subsequent objection held barred by principle of constructive res judicata. AIR 1969 Pat 21 (23): 1968 BLJR 602 (DB).

18. Limitation. — (1) Allegations of absence of notices under Order 21, Rules 22 and 66 — Judgment-debtor coming to know sale only within a week of applica-

R. 23. Procedure after issue of notice.—(1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

[1882 and 1877, S. 249; 1859, S. 247. See Ss. 38, 47, 51 and Rr. 24 and 57 below.]

Order 21, Rule 22 — Note 18 (contd.)

tion — Section 18 of Limitation Act (1908) applies. AIR 1964 Ker 88 (90).

(2) Notice did not state that question of limitation was to be decided — Judgment-debtor did not appear — Court ordering arrest of J. D. — He could raise question of Limitation in subsequent execution proceedings. AIR 1954 Mad 1 (3, 4, 5): (1953) 2 Mad LJ 225. (**Overruled** on another point in AIR 1960 Mad 343.)

(3) Assignment of decree — Petition by assignee under Order 21, Rule 16, for recognition and for issue of notice — Mode of execution not indicated — Though defective as execution petition, it amounts to step-in-aid as it was accepted by the Court. AIR 1963 Andh Pra 241 (242): (1962) 1 Andh WR 27 (DB).

(4) Notice to J. D. on question of limitation followed by notice under Rule 22 — Plea of limitation could properly be taken by J. D. after receipt of notice under Rule 22 and considered by Court under Rule 23. 1963 Ker LT 388 (390).

(5) Finding of Court of appeal that notice under Order 21, Rule 22 concise statement and sale proclamation was duly served on judgment-debtors was held sufficient to enable the High Court to hold that the judgment-debtor had knowledge of the proceedings — Benefit of Section 18 of Limitation Act not available. ILR (1960) 1 Cal 643.

(6) Application for execution made by mistake against judgment-debtor who is dead be regarded as step in aid of execution. AIR 1964 Ker 90 (92): 1963 Ker LT 466 (DB).

ORDER 21, RULE 23 — SYNOPSIS

1. Scope.
2. Objections.
3. Appeal.

1. Scope.— (1) If the person to whom notice is issued under Rule 22 does not appear and show cause against execution, the Court is bound to order execution. Thereupon such person will be concluded and bound by the order and cannot go behind it. AIR 1951 Assam 75 (77): ILR (1950) 2 Assam 215 (DB) ** AIR 1950 Hyd 15 (17): ILR (1951) Hyd 84 (DB) ** AIR 1942 Cal 369 (369) (DB) ** AIR 1969 Pat 251 (252, 253) (DB) ** AIR 1965 Raj 155 (158): 1964 Raj LW 59 ** AIR 1960 Raj 280 (282): 1960 Raj LW 149 (DB).

(2) If the execution application is subsequently dismissed under Rule 57 of the this Order, the dismissal has been held to have the effect of vacating the previous order for execution. AIR 1916 Mad 886 (886).

(3) If, on the day fixed, neither party appears, the application can be dismissed. (1895) 20 Bom 541 (542) (DB).

[But see AIR 1965 Guj 69 (70): (1963) 4 Guj LR 1017.]

(4) Issue of warrant for arrest of judgment-debtor is a process for execution of the decree. AIR 1962 Ker 258 (259): 1962 (2) Cri LJ 372: 1962 Ker LT 169 (DB).

(5) Suit against undischarged insolvent without leave of Insolvency Court — Ex parte decree not a nullity — Execution of decree held good. AIR 1967 Andh Pra 188 (189): (1966) 1 An WR 281.

(6) Order of the executing Court under Rule 23 (1) operates as a constructive res judicata against the judgment-debtors. AIR 1965 Raj 155 (158): ILR (1964) 14 Raj 431 ** 1964 BLJR 617 (619) ** AIR 1963 Guj 1 (5): (1962) 3 Guj LR 1032.

(7) Any contention against execution of decree is barred by res judicata — Contention which ought to have been raised but not raised is also barred by constructive res judicata. AIR 1963 Guj 1 (2): (1962) 3 Guj LR 1032.

2. Objections.— (1) If the person to whom the notice is issued appears and offers objections the Court is equally bound to consider those objections. (1910) 5 Ind Cas 546 (547) (DB) (All) ** (1870) 14 Suth WR 155 (155) (DB) ** (1895) 22 Cal 558 (561) (DB).

(2) There is no particular form in which the objections are to be presented and, if in writing, they need not be verified. (1867) 8 Suth WR 200 (200) (DB).

(3) Objections should go to the root of the executability of the decree. AIR 1956 Raj 1 (5): ILR (1956) 6 Raj 23 (DB) ** (1886) 8 All 377 (380) (DB).

(4) The objections should not be merely formal or immaterial ones which do not prevent execution. AIR 1956 Raj 1 (5): ILR (1956) 6 Raj 23 (DB).

[See ('91) 13 All 343 (344) (DB).]

(5) Sub-rule (2) does not contemplate appearance of a judgment-debtor at a subsequent stage; sub-rules (1) and (2) deal with the same stage of proceedings; sub rule (1) contemplates the non-appearance of a judgment-debtor; sub-rule (2) his

PROCESS FOR EXECUTION

R. 24. Process for execution.—(1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

(2) Every such process shall bear date the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed.

[1882, Ss. 250, 251, para. 1; 1877, Ss. 250, 251 (1), 343; 1859, Ss. 221, 222. Cf. R. S. C., O. 42, Rr. 14 and 16. See S. 51.]

HIGH COURT AMENDMENTS

Allahabad

After the words at the end of sub-rule (3) "be executed," add the words "and a day shall be specified on or before which it shall be returned to Court."

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta—See Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 (1-12-1963).

Bombay: Dadra and Nagar Haveli

In Order XXI, for the existing Rule 24 and its marginal note, substitute the following as Rule 24 and marginal note :—

Order 21, Rule 23 — Note 2 (contd.)
appearance, but at the same stage of the proceedings. AIR 1951 Assam 75 (76): ILR (1950) 2 Assam 215 (DB).

(6) Notice served by affixture on two judgment-debtors, who were brothers. One brother appeared — **Held,** service on the other was valid and ex parte order passed was upheld. AIR 1962 Andh Pra 156 (157): 1961 Andh LT 136.

3. Appeal.— (1) An order allowing or refusing execution under this rule is appealable as a decree. AIR 1941 Mad 440 (442) (DB) ** (1911) 9 Ind Cas 823 (823) (Lah) ** AIR 1963 Guj 1 (2): (1962) 3 Guj LR 1032.

ORDER 21, RULE 24 — SYNOPSIS

1. "Shall issue process".
2. "Shall be sealed".
3. Delivery of process for execution.
4. Delegation of authority to execute.
5. Arrest or attachment without warrant.
6. "Shall be signed".
7. Specification of day on or before which process has to be executed.
8. Revenue Courts.

1. "Shall issue process".— (1) If the preliminary measures prescribed by the previous rules have been taken, the Court is bound to issue process and cannot refuse to do so, unless "it sees cause to the contrary" such as the judgment-debtor being entitled to a right to set off, or the applicant asking for simultaneous execution. (1884) 10 Cal 817 (819) (DB) ** 1897 Pun Re No. 57, p. 252 (255).

(2) The fact that a previous execution application proved infructuous will not justify a refusal. (1871) 17 Suth WR 165 (168) (DB).

(3) Executing Court is not bound by an injunction for stay of its proceedings issued by another Court of co-ordinate jurisdiction and is bound to proceed with execution under Order 21, Rule 24. AIR 1951 Pepsu 78 (80): 3 Pepsu LR 214.

(4) In India warrants for attachment are issued on the ex parte application of the creditor who is bound to specify the property which he desires to attach and its estimated value. AIR 1949 Cal 457 (459): ILR (1950) 2 Cal 171.

(5) Provisions in the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, directing stay of ejectment proceedings against non-agricultural tenants prevail over this rule. AIR 1942 Cal 49 (50): ILR (1942) 1 Cal 497 (SB).

(6) The procedure in cases of execution of decrees under this rule should not be interfered with by District Court by issuing administrative orders. AIR 1962 Manipur 24 (26).

(7) Mode of attachment in ordinary cases is provided for under Order 21, Rule 24 — Property outside jurisdiction of executing Court can be attached under Order 21, Rule 52. in certain exceptional circumstances. AIR 1965 Raj 41 (42): 1964 Raj LW 500.

24. Process for execution.—(1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

(2) Every such process shall bear date the day on which it is issued and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed:

Provided that a Civil Judge, Senior Division, may, in his special jurisdiction, send the process to another subordinate Court in the same District for execution by the proper officer in that Court.

(3) In every such process a day shall be specified on or before which it shall be returned to the Court after its due execution [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Calcutta: Andaman and Nicobar Islands

Add the following to sub-rule (3):

"and a day shall also be specified on or before which it shall be returned to the Court".

Gujarat

Add the following proviso to R. 24 (2):—

"Provided that a Civil Judge, Senior Division, may, in exercise of his special jurisdiction, send a process to another subordinate Court in the same district for execution by the proper officer in that Court." (17-8-1961).

Order 21, Rule 24 (contd.)

2. "Shall be sealed".— (1) Every process issued under this rule shall be sealed. The provision is mandatory and without the seal the process will be invalid and its execution illegal. AIR 1919 Pat 404 (405): 3 Pat L Jour 636 (DB) ** AIR 1935 All 214 (215): 57 All 660.

[But see AIR 1948 All 167 (167, 168): ILR (1948) All 132.]

(2) Resistance to the execution of a process which is not sealed with the seal of the Court will constitute no offence. AIR 1939 Rang 320 (320): 1939 Rang LR 445 ** AIR 1926 Pat 237 (238, 239): 5 Pat 216 (DB).

3. Delivery of process for execution.— (1) The person to whom the warrant of arrest or attachment is entrusted for execution must be named on the face of the warrant. A warrant which is blank and is addressed to no one is illegal. ILR (1954) 4 Raj 504 (505, 506) (DB) ** AIR 1942 Pat 480 (480) ** AIR 1962 Ker 258 (260): 1962 Ker LT 169: 1962 (2) Cri LJ 372 (DB).

4. Delegation of authority to execute.— (1) The rule only says that the process shall be delivered to the proper officer to be executed. It is not necessary that the "proper officer" should himself execute the process. (1895) 22 Cal 596 (604, 605) (DB).

(2) There is nothing to prevent the "proper officer" to whom the process is delivered for execution from delegating a subordinate of his to execute the process. ILR (1954) 4 Raj 504 (506) (DB) ** AIR 1945 Nag 210 (212): ILR (1945) Nag 685 ** AIR 1962 Ker 258 (259): 1962 Ker LT 169: 1962 (2) Cri LJ 372 (DB).

(3) The delegation of authority to execute should be made by a proper endorsement on the warrant. A delivery by hand unaccompanied by endorsement suffers from the same defect as if it had not been addressed to the proper officer. ILR (1954) 4 Raj 504 (506) (DB).

(4) A process issued to a bailiff cannot be executed by nazir. AIR 1916 Pat 272 (272): 1 Pat L Jour 550 (DB).

5. Arrest or attachment without warrant.— (1) An officer effecting an arrest or attachment should have the warrant in his possession; otherwise the arrest or attachment will be illegal. (1883) 5 All 318 (321) ** (1905) 27 All 258 (259).

6. "Shall be signed".— (1) A process issued under this rule which is not signed by the Judge is illegal. (1885) 7 All 506 (509, 510) (PC) ** AIR 1935 All 214 (215): 57 All 860.

(2) If, any other officer of the Court is specially authorized in this behalf, it is enough if it is signed by him. (1902) 6 Cal WN 845 (846, 847) (DB) ** AIR 1920 All 51 (52).

(3) Authority given under sub-rule (2), is not the authority conferred on any particular individual but is a general authority available to anybody who holds that office for the time being. AIR 1957 Ker 174 (175): ILR (1957) Ker 586: 1957 Cri L Jour 1264. (Authority to sign warrants given to Head clerk — Deputy Nazir acting as Head-clerk signing it.)

(4) Authority should be in writing and kept in the Court. 1887 All WN 42 (42) (DB).

(5) If, process is signed by a sheristadar "by order", the presumption will be that he was authorized in this behalf. AIR 1923 Cal 584 (585) (DB).

(6) Onus of showing that the officer signing had no such authority will be on

Kerala : Laccadive, Minicoy and Amindivi Islands

Same as that of Madras (9-6-1959); see Act 37 of 1956, S. 60 and Reg. 8 of 1965, Section 3.

Madhya Pradesh

In sub-rule (3), for the word "executed," occurring at the end substitute the words "returned to the Court" [16-9-1950].

Madras and Pondicherry

Delete the full stop at the end of sub-rule (3) and add the following words :

"and a day shall be specified on or before which it shall be returned to Court" [13-10-1936]; see Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-1968].

Mysore

Add following as sub-rule (3) :—

(3) In every such process a day shall be specified on or before which the process shall be executed and a day shall be specified on or before which it shall be returned to the Court" [30-3-1967].

Orissa

For the existing sub-rule (3), substitute the following :

"(3) In every such process a date shall be specified on or before which it shall be executed and a date shall be specified on or before which it shall be returned to Court" [29-12-1961].

R. 25. Endorsement on process.—(1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which, it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

Order 21, Rule 24 — Note 6 (contd.)

the party who denies the authority. AIR 1919 Pat 404 (406): 3 Pat L Jour 636 (DB).

(7) Every one of the conditions required by Clause (2) has to be satisfied by the warrant for arrest of judgment-debtors, which is also a process for execution of the decree. AIR 1962 Ker 258 (259): 1962 Ker LT 169: 1962 (2) Cri LJ 372 (DB).

(8) Under Order 21, Rule 24, C. P. Code, read with Clause (3) of Rule 508 of the General Rules (Civil) laid down by the Rajasthan High Court, the Munserim who is the chief ministerial officer of the Court would be within his authority in signing a proclamation under Order 21, Rule 66, provided of course, there is an order of the Court in compliance with Clause (3) of the said Rule 508. ILR (1960) 10 Raj 1088 (1095): 1960 Raj LW 550 (DB).

7. Specification of day on or before which process has to be executed.— (1) A warrant which does not specify the date on or before which it is to be executed is invalid and its execution is illegal. AIR 1942 Pat 480 (481) ** (1910) 37 Cal 122 (126) (DB).

(2) If date is specified the process should be executed on or before that date; its execution later is illegal. AIR 1924 Nag 68 (69): 19 Nag LR 183 ** (1913) 40 Cal 849 (851) (DB) **** AIR 1964 SC 986 (989): (1964) 5 SCR 916: 1964 (2) Cri LJ 57.**

(3) If the time has been extended the extended date should be specified; otherwise the execution of the process will be illegal. (1910) 37 Cal 122 (126) (DB).

[See also (1943) 47 Cal WN 656 (658).]

(4) Under the rule as amended by the High Court of Allahabad a date has to be fixed also for the return of the process. When it is so fixed the process cannot be executed after that date. AIR 1933 All 46 (47): 55 All 119.

8. Revenue Courts.— (1) The provisions of this rule have been held to apply to warrants issued under Section 131 of the Central Provinces Land Revenue Act. AIR 1924 Nag 68 (69): 19 Nag LR 183.

ORDER 21, RULE 25 — SYNOPSIS

1. **"Officer entrusted with the execution".**
2. **Delegation of process** — See Order 21, Rule 24.
3. **Execution of process.**
4. **Proof of execution.**

1. "Officer entrusted with the execution".— (1) The "officer entrusted with execution " is the peon who himself executed the process and not the Nazir. (1913) 40 Cal 849 ((852) (DB).

2. Delegation of process. — See Order 21, Rule 24.

3. Execution of process.— (1) Where a judgment-debtor is actually arrested and brought before the Court the warrant of arrest should be deemed to have been

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

[1882, Ss. 343 and 251, last para.; 1877, S. 251, last para.; 1859, S. 222, last para.]

HIGH COURT AMENDMENTS

Allahabad

Substitute the following for paragraph (2):

"(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result."

Andhra Pradesh

Same as that of Madras.

Bombay: Dadra and Nagar Haveli

The following proviso shall be added to sub-rule (2) of Rule 25:

"Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this rule" [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Gujarat

Same as that of Bombay but without the words "or the Deputy Nazir" [17-8-1961].

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras [9-6-1959]; see Act 37 of 1956, S. 60 and Reg. 8 of 1965 S. 3 (2).

Madras: Pondicherry

(1) Substitute the following in the place of the present sub-rule (2):

"(2) Where in the case of a decree for the payment of money the process is not executed owing to the decree having been satisfied, such officer shall also obtain an endorsement on the process to that effect signed by the decree-holder and attested by two respectable witnesses who can identify the decree-holder."

(2) Add the following as sub-rule (3):

"(3) Where the endorsement of such officer is to the effect that he is unable to execute the process, the Court shall examine him or cause him to be examined by any other Court touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result."

[Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause. Dis. No. 2282 of 1916].

Where the inability to execute the process is stated to be due to the satisfaction of the decree and such satisfaction has been endorsed on the process as mentioned in sub-rule (2) above, the Court shall issue notice to the decree-holder to

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Order 21, Rule 25 — Note 3 (contd.)

executed and to have exhausted itself even though the judgment-debtor is released by the Court under Section 135 on the ground that the arrest was made while he was on his way back from attending Court. In such a case he cannot be re-arrested under the same warrant merely because, the requisite endorsement under this rule has not been made. AIR 1940 Rang 112 (112, 113): 1940 Rang LR 253.

(2) Execution of decree to be completed by date specified on process for this purpose — Warrants for delivery of possession cease to be executable after expiry of date fixed for execution. AIR 1964 SC 986 (989): (1964) 5 SCR 916: 1964 (2) Cri LJ 57.

4. Proof of execution. — (1) The report of the Nazir regarding execution of process is by itself not evidence. It must be proved like any other documentary evidence. (1881) 7 Cal 34 (38) (DB) ** (1865) 3 Suth WR (Misc) 11 (15) (SB).

show cause on a day to be fixed by the Court, why such satisfaction should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the satisfaction should not be recorded as certified the Court shall record the same accordingly.

A record of satisfaction under the provisions of this sub-rule shall have the same effect as one under the provisions of Order 21, Rule 2, sub-rule (2)."

For extension to Pondicherry, see Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-1968].

Mysore

Delete Rule 25 and substitute the following :—

25. (1) The officer entrusted with the execution of the process shall endorse thereon the day on which and the manner in which it was executed, and if the latest day specified in the process for the return thereof has been exceeded, the reason for the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court may on its own motion and shall upon an application by the petitioner in the execution application examine the officer touching his alleged inability and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result. Such examination of the process-server as well as of witnesses summoned under this rule shall be made after notice to the petitioner in execution application or his pleader.

(3) Where in the case of a decree for the payment of money the process is not executed owing to the decree having been satisfied, such officer shall also obtain an endorsement on the process to that effect signed by the decree-holder and attested by two respectable witnesses who can identify the decree-holder. On receipt of the process with an endorsement so signed and attested, the Court shall issue notice to the decree-holder to show cause, on a day to be fixed by the Court, why such satisfaction should not be recorded as certified and if after service of such notice the decree-holder fails to show such cause the Court shall record the same accordingly. A record of satisfaction under the provisions of this sub-rule shall have the same effect as one made under the provisions of sub-rule (2) of Rule 2 of this Order. [30-3-1967].

STAY OF EXECUTION

R. 26. When Court may stay execution.—(1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

Order 21, Rule 26

1. Scope.— (1) The question of the legality of the order under which the decree was sent to it for execution, or the question whether the decree was barred by limitation on the date of the order, can properly be dealt with only by the Court which passed the decree and not by the Court to which the decree is sent for execution and, therefore, to enable the judgment-debtor to apply to such Court for an order in respect of the decree which is sought to be executed, the Court to which a decree is sent for execution may order stay of execution under this rule. (1880) 5 Cal 736 (737) (DB) ** (1875) 23 Suth WR 154 (155) (DB).

[See also AIR 1937 Rang 477 (479): 1937 Rang LR 287 (DB).]

(2) The executing Court may order stay of execution —

(a) to enable the judgment-debtor to get the decree amended. 1889 Pun Re No. 78, p. 294 (295).

(b) to enable him to show that the decree is satisfied, or is not existing.

(2) Where the property or person of the judgment-debtor has been seized under an execution the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) **Power to require security from, or impose conditions upon, judgment-debtor.**—Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

[1882 and 1877, Ss. 239, 240; 1859, Ss. 290, 291. Cf. R. S. C., O. 42, R. 17, Cl. (b). See Ss. 42 and 47.]

HIGH COURT AMENDMENTS

Allahabad

In sub-rule (3) for the words "the Court may" read the words "the Court shall, unless good cause to the contrary is shown".

Assam and Nagaland

Same as that of Calcutta—See Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 (1-12-1963).

Bombay: Dadra and Nagar Haveli[a]

For the existing sub-rule (3), substitute the following:—

"(3) **Power to require security from, or impose conditions upon, judgment-debtor.**—Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the Court shall, unless good cause to the contrary is shown, require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit." [1-11-1966.]

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Order 21, Rule 26 — Note 1 (contd.)

(1868) 9 Suth WR 361 (361) (DB) ** AIR 1927 Rang 104 (105): 4 Rang 562 (DB).

(c) to enable him to get the decree passed ex parte against him set aside. (1867) 8 Suth WR 202 (203) (DB).

(d) to enable him to get the decree passed against him set aside on the ground that it was obtained by fraud. (1882) 4 Mad 324 (325) (DB).

(e) for deciding if the decree is barred. (1886) 13 Cal 257 (261) (DB).

[See also AIR 1936 Rang 271 (273): 14 Rang 550.]

(3) An order for stay of execution under this rule can only be passed on the application of the judgment-debtor and no stay can be granted on the application of third parties or of the decree-holder. AIR 1931 Lah 690 (691) ** (1886) 12 Cal 515 (519) (DB).

(4) Under sub-rule (3) of this rule, the Court may impose conditions or require security, as it thinks fit, before directing stay of execution. AIR 1925 Lah 552 (554).

(5) A Court to which a decree has been sent for execution has no power to refuse to execute the decree even for a short period except in the circumstances set out in this rule. AIR 1936 Rang 184 (187).

(6) Where an appeal against a decree is dismissed for default and an application for its restoration is filed, the appellate Court has power under this rule read with Section 107 of the Court to stay the execution of the decree till the disposal of the restoration application and in an appeal from an order of dismissal of the restoration application, the High Court has also the power to order stay of execution during the pendency of appeal before it. AIR 1956 Raj 49 (50): ILR (1955) 5 Raj 175.

(7) The general practice of staying the execution of the decree by the lower Courts, even though an application for stay in a civil miscellaneous application or civil revision petition is dismissed by the High Court, till the disposal of the main matter on the ground that the record is not with them is deprecated and the lower Courts are advised to retain with them sufficient papers to proceed with execution. AIR 1953 Mad 876 (877).

(8) Sub-rule (3) applies only when request for stay of execution is made — But when Court holds that execution cannot proceed no question of stay arises. AIR 1964 Madh Pra 226 (227): 1963 MPLJ 350 (DB).

(9) See also the following case. 1955 All L Jour 722 (724). (Decree for ejectment from premises put in execution — Order requisitioning premises passed under U. P. (Temporary) Accommodation Requisition Act (25 of 1947) during pendency of execution proceeding — Order has not effect of staying execution of decree.)

2. Appeal. — (1) As to whether an order directing security under sub-rule (3) is an order determining the rights of parties and is therefore, appealable as a decree under Section 47, see Section 47.

Calcutta : Andaman and Nicobar Islands

In sub-rule (3) cancel the words "the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit" and substitute therefor the following words :

"the Court shall require security from the judgment-debtor unless sufficient cause is shown to the contrary".

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Madhya Pradesh

In sub-rule (3), for the word "may" substitute the words "shall, unless good cause to the contrary is shown" [16-9-1960].

Orissa

Same as that of Patna.

Patna

In sub-rule (3) substitute the words "shall, unless sufficient cause is shown to the contrary," for the word "may".

Punjab, Haryana and Chandigarh

In sub-rule (3) for the words "the Court may" substitute the words "the Court shall, unless sufficient cause is shown to the contrary" [7-4-1932]; see Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

R. 27. Liability of judgment-debtor discharged.—No order of restitution or discharge under Rule 26 shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution.

[1882 and 1877, S. 241; 1859, S. 293. See S. 58, sub-sec. (2) and O. 21, R. 40, sub-rule (4).]

R. 28. Order of Court which passed decree or of appellate Court to be binding upon Court applied to.—Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

[1882 and 1877, S. 242; 1859, S. 292. See S. 42 and O. 21, R. 26.]

Order 21, Rule 27 — Note 1

(1) Under Section 58, sub-section (2) a judgment-debtor released from detention under that section is not liable to be re-arrested in execution of the same decree. But an order of discharge of the judgment-debtor consequent on the stay of execution under Rule 26 will not prevent the judgment-debtor from being re-arrested in execution of the decree. (1886) 12 Cal 652 (657) ** (1893) 20 Cal 874 (878).

[See also (1902) 26 Bom 652 (659) (DB).]

Order 21, Rule 28 — Note 1

(1) This rule states that any order of the Court which passed the decree in relation to execution of such decree shall be binding on the Court executing the decree. In the absence of any such order, it is the duty of the Court executing the decree to enforce the decree in the same manner and to exercise the same powers as if the decree had been passed by itself. AIR 1951 Nag 270 (274): ILR (1950) Nag 491 (DB) ** AIR 1930 Oudh 305 (308) (DB).

[See also AIR 1954 Mys 1 (3): ILR (1954) Mys 193 (FB).]

(2) See also Section 42, and the following cases. AIR 1953 Cal 765 (766) (DB). (Objections to order of transfer raised but not decided by transferee Court — Principles analogous to constructive res judicata do not apply.) ** AIR 1939 All 97 (101): ILR (1939) All 131 (FB). (Allahabad Court sending decree for execution to Court in Calcutta — Former Court receiving stay order under the U. P. Encumbered Estates Act should recall decree from Calcutta Court.) ** AIR 1962 Him Pra 14 (15). ((Plea of limitation against executability of decree — Transferee Court is competent to decide question — Order 21, Rule 28 is no bar.)

R. 29. Stay of execution pending suit between decree-holder and judgment-debtor.—Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

[1882 and 1877, S. 243; 1859, S. 209.]

HIGH COURT AMENDMENTS

Allahabad

In Rule 29—

(1) insert a comma and thereafter the words "or any person whose interests are affected by the decree, or by any order made in execution thereof" after the words "was passed" and before the words "the Court may";

(2) delete the words "on such terms as to security or otherwise" occurring in the rule;

(3) substitute "if" for "as" before the words "it thinks fit"; and

(4) Add the following as proviso to the said rule, namely:—

"Provided that in all cases where execution of the decree is stayed under this rule the Court shall require the person seeking such stay to furnish such security as it may deem fit." [1-6-1957.]

Mysore

Delete Rule 29 and substitute the following:—

29. Where a suit is pending in any Court against the holder of a decree of such Court instituted by the person against whom the said decree was passed the Court may, on such terms as to security or otherwise, as it thinks fit, stay the execution of the decree until the pending suit has been decided [30-3-1967].

ORDER 21, RULE 29 — SYNOPSIS

1. Scope.
2. "Holder of a decree".
3. "Such Court".
4. "On such terms as to security or otherwise".
5. "Until the pending suit has been decided."
6. Appeal.

1. Scope. — (1) If a suit by a judgment-debtor is pending in a Court against the holder of a decree of that Court, the execution of the decree may, under this rule, be stayed until the disposal of the suit. (1874) 6 NWPHCR 181 (182) (DB).

[See also AIR 1934 Pat 637 (637).]

(2) The object of this rule is twofold — (i) to enable the judgment-debtor and the decree-holder to adjust their claims against each other, and (ii) to prevent a multiplicity of execution proceedings. AIR 1928 Cal 222 (224): 55 Cal 512 (DB) ** AIR 1936 Mad 102 (103).

(3) The execution Court has no power, under this rule, to stay execution of the decree if, at that time, no suit is pending against the holder of the decree or if the suit is against the decree-holder but filed by third parties. AIR 1923 Lah 514 (515) ** (1884) 8 Bom 532 (534) (DB).

(4) If the execution of the decree has been carried out and the decree-holder has obtained possession of the property, the Court has no power under this rule to order restitution of such property. (1885) 7 All 73 (78, 79) (DB) ** AIR 1930 Lah 961 (968).

(5) The power to stay execution under this rule is purely a discretionary one and will be granted only on sufficient grounds being made out. AIR 1956 Madh B 229 (230) ** AIR 1936 Mad 102 (103) ** (1867) 8 Suth WR 392 (392, 393) (DB).

(6) If the suit against the decree-holder is for a declaration that the decree is satisfied by an uncertified adjustment out of Court, no stay of execution of the decree can be granted under this rule. AIR 1923 Cal 645 (646) (DB).

(7) This rule embraces every kind of suit which is maintainable. Thus, according to the Madras High Court a suit by the judgment-debtor for damages for breach of an agreement whereby the defendant had agreed to receive in satisfaction of his decree certain bonds and to get satisfaction entered up is a suit to which this rule will apply. AIR 1936 Mad 102 (103).

(8) This rule must be read with Order 21, Rule 92. Hence, after a sale in execution has taken place, the Court cannot stay the confirmation of the sale. AIR 1935 Rang 151 (152): 13 Rang 351 (DB).

(9) Execution of an order awarding costs can be stayed under this rule as under Section 36 the provisions relating to the execution of a decree are deemed to apply also to the execution of orders. AIR 1956 Madh B 229 (230).

Order 21, Rule 29 — Note 1 (contd.)

(9-A) An application for stay of execution of decree for costs in another suit is not the proper remedy. The remedy lies in filing application for injunction. AIR 1969 Andh Pra 236 (237).

(10) This rule has no application to the granting of injunctions and no security can be demanded in such applications on principles analogous to this rule. AIR 1933 Nag 153 (155).

(11) The distinction between a temporary injunction restraining the execution of a decree and a stay order is that the former is not directed to a Court but to an individual. Proceedings taken in contravention of a temporary injunction are not a nullity as being without jurisdiction, and the effect of non-compliance with a temporary injunction is only to make the offender liable to punishment. But proceedings in contravention of a stay order are a nullity. AIR 1938 Lah 220 (221).

(12) Temporary injunction restraining execution pending suit to set aside decree — Court passing order that attachment is to subsist till decision of suit and that application for execution is to stand dismissed for time being — Order is not warranted by law — It is merely suspensary order keeping execution case pending. AIR 1936 Cal 239 (240): 63 Cal 57 (DB).

(13) An application for stay of execution under Order 21, Rule 29 is maintainable even though the decree-holder has assigned his decree, in favour of a stranger pending the suit by the judgment-debtor and the assignee is not on the party array. AIR 1959 Ker 402 (402): 1958 Ker LT 1012.

(14) Widow of deceased employee of Bank, obtaining decree against Bank in respect of provident fund amount to credit of employee — Bank filing appeal and praying for interim order of stay pending appeal alleging misappropriation by employee of bigger amount than claimed — Widow not in position to furnish adequate security — **Held,** that neither Order 21, Rule 29 nor principle of the Rule applied. **AIR 1963 Mad 143 (144) (DB).**

(15) The provisions of Order 21, R. 29 are inapplicable to a proceeding under Section 144. (1965) 1 LR 763 (766) (Mys).

(16) Mere fact that injunction is not prayed for in suit is no ground to refuse to exercise jurisdiction under this rule. 1968 Pat LJR 136 (137, 138).

(17) Order 21, Rule 29 does not by itself operate as vesting some equity in the judgment-debtor. The equity, if any may arise after the Court has passed an order for stay of the execution. AIR 1962 Raj 223 (225): 1962 Raj LW 542 (DB). (ILR 16 Cal 619, Dissent. from.)

2. "Holder of a decree". — (1) This term will include an assignee of a decree and a suit by the judgment-debtor against such assignee is within this rule. AIR 1936 Mad 102 (103).

3. "Such Court."— (1) The Court in which the suit is pending has power to stay execution of the decree under this rule, only if the decree is a decree of that Court. (1867) 8 Suth WR 392 (393) (DB) ** AIR 1930 Lah 961 (968) ** (1904) 1904 Pun Re No. 41, p. 127 (128).

(2) The Court has power in a claim suit to stay the execution of the decree in the course of execution of which the claim application is filed. The same principle should apply even if the decree the execution of which is sought to be stayed, is that of superior Court. AIR 1969 Andh Pra 236 (237). (AIR 1951 Mad 321, Rel. on.)

(3) Power to stay can be exercised by the Court where the suit is pending, even if its decree has been transferred for execution to another Court. AIR 1931 Bom 247 (248, 249) (DB) ** 1968 Pat LJR 136 (137, 138).

(4) If the judgment-debtor's suit is pending before the transferee Court, the transferee Court has no power, under this rule, to stay execution of the decree. AIR 1930 All 121 (121) (DB) ** AIR 1958 Madh Pra 131 (132, 133). (AIR 1934 Cal 4, **Dissented from.)** ** 1967 BLJR 973 (975) ** AIR 1963 Raj 4 (5): 1962 Raj LW 353 ** AIR 1962 Mys 89 (91): 40 Mys LJ 365.

[But see (1908) 1908 Pun Re No. 130, p. 588 (589) ** AIR 1934 Cal 4 (5): 60 Cal 1119 (DB).]

(5) The words "decree of such Court" include also the decree passed on appeal from the decree of that Court. AIR 1956 Madh B 229 (230) ** (1888) 10 All 389 (393, 394).

(6) The words "such Court" refer only to the Court and not to the Judge presiding over the Court. Where there are two Judges attached to the Court, and the suit is pending before one Judge and the decree is sought to be executed before the other, the Judge before whom the suit is pending has power under this rule to stay execution of the decree. AIR 1956 Madh B 229 (230) ** AIR 1953 Madh B 181 (182) ** AIR 1931 Bom 247 (248, 249) (DB).

(7) The rule does not provide that the application for stay under it should be made on the execution side, and not on the original side. If anything, the words of the rule suggest that generally speaking the application should be made on the original side when the suit is filed. AIR 1957 Raj 219 (220): ILR (1956) 6 Raj 294 (DB).

4. "On such terms as to security or otherwise."— (1) The Court has under this rule ample discretion in passing an order as to the terms on which the execution of the decree can be stayed. AIR 1956 Madh B 229 (230).

(2) While granting the stay of execution the Court should consider various circumstances before deciding that security should be furnished up to the entire decretal amount of the former suit. AIR 1957 Raj

MODE OF EXECUTION

[See Section 51]

R. 30. Decree for payment of money.—Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both.

[1882 and 1877, S. 254; 1859, Ss. 201, 232.]

HIGH COURT AMENDMENT

Allahabad

Insert the words "or any other kind of transfer" between the words "and sale" and "of his property" occurring at the end of the rule [13-2-60].

Order 21, Rule 29 — Note 4 (contd.)

219 (220): ILR (1956) 6 Raj 294 (DB). (Former decree on mortgage — Considerations for deciding amount of security, stated.)

5. "Until the pending suit has been decided."— (1) The words "until the pending suit has been decided" should be interpreted to mean until the claim in the pending suit has been finally decided after an exhaustion of all rights of appeal and not merely after a decree has been passed by the Court in which the suit is pending. AIR 1928 Cal 222 (224): 55 Cal 512 (DB) ** AIR 1935 Rang 389 (390) (DB).

[But see AIR 1932 Cal 19 (20): 58 Cal 1113 (DB) ** 1910 Pun Re No. 82 ** AIR 1944 Mad 73 (74) (DB). (Suit does not include appeal.)]

6. Appeal.— (1) An order directing security to be given is not appealable as it does not determine conclusively the rights of the parties; but the High Court may, if the discretion is not judicially exercised, interfere in revision. AIR 1929 Sind 110 (111) (DB).

(2) Similarly no appeal lies against an order staying execution of a decree made under this rule as it is not an order determining a question relating to the execution of a decree within the meaning of Section 47 read with Section 2, Civil P. C. AIR 1956 Madh B 229 (231) ** AIR 1952 Assam 30 (31): ILR (1952) 4 Assam 106 (DB) ** AIR 1963 Raj 4 (5): 1962 Raj LW 353.

ORDER 21, RULE 30 — SYNOPSIS

1. "Decree for the payment of money."
2. As an alternative to some other relief. See Notes on Order 20, Rule 10.
3. Option as to mode of execution.
4. Detention of surety in civil prison. See Section 145.
5. Attachment and sale.
6. Rule not exhaustive of modes of execution.
7. Notice to judgment-debtor.

1. "Decree for the payment of money."— (1) A decree under which maintenance is payable periodically at a certain rate is a decree for the payment of money even if it was made a charge on immovable property. AIR 1958 Pat 2 (3) (DB). (Creation of a charge is for benefit of decree-holder.) ** (1871) 15 Suth WR 128 (129) (DB) ** AIR 1920 Pat 636 (639) (DB).

2. As an alternative to some other relief.— See Notes on Order 20, R. 10.

3. Option as to mode of execution.— (1) There is nothing in the Code or in any other law which lays down positively that several applications for execution of a decree cannot be filed simultaneously. AIR 1955 All 382 (383) (DB) ** AIR 1957 Mad 777 (779). (Court has a discretion under Order 21, Rule 21, C. P. C. to refuse simultaneous execution and to allow the decree-holder to avail himself of only one mode of execution at a time.)

(2) It is for the decree-holder to decide how he should execute his decree for the payment of money. Court cannot compel the decree-holder to adopt any particular mode of execution. AIR 1956 Hyd 7 (9): ILR (1955) Hyd 797 (FB) ** AIR 1955 All 382 (383) (DB).

[See AIR 1943 Lah 166 (168).]
[See also AIR 1946 All 385 (387): ILR (1946) All 511 (DB) ** AIR 1935 All 179 (180) ** AIR 1933 Lah 831 (832) ** AIR 1933 Mad 33 (33): 56 Mad 343 (DB).]
[But see (1882) 4 All 497 (498).]

(3) Where a simple money decree declares a charge on certain immovable property the decree-holder is not precluded from attaching and bringing to sale any other property of the judgment-debtor. AIR 1948 Bom 143 (143) (DB). (Maintenance decree. AIR 1941 Bom 90: ILR (1941) Bom 299 (FB), Relied on; AIR 1941 Bom 71: ILR (1941) Bom 136 and AIR 1943 Bom 158: ILR (1943) Bom 292, Not approved.) ** AIR 1942 Sind 83 (85): ILR (1942) Kar 168.

(4) Simultaneous execution against different judgment-debtors for same amount — Not barred. AIR 1961 Andh Pra 63 (64): (1960) 2 An WR 66.

(5) There is no legal bar to filing of execution petitions one after other — Second petition filed before final order on

R. 31. Decree for specific moveable property.—(1) Where the decree is for any specific moveable, or for any share in a specific moveable, it may be executed by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both.

(2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

Order 21, Rule 30 — Note 3 (contd.)

first — Not barred under Article 160, Hyderabad Limitation Act. AIR 1961 Bom 258 (260, 261): 63 Bom LR 54.

(6) Execution of maintenance decree by wife for arrears of maintenance — Charged properties purchased by wife at Court sale — Subsequent execution for subsequent maintenance — Personal liability of husband is not extinguished by sale of charged properties — Execution can be taken out against other property. AIR 1960 Mad 442 (443): (1960) 2 Mad LJ 18.

(7) Where by a compromise decree, in a suit by a widow, the widow was to get certain amount in full claim of her maintenance and the amount was charged on certain property of the defendants, the widow is entitled to execute the decree against the uncharged property of one of the defendants, unless, it is shown that her execution application is mala fide. AIR 1961 Andh Pra 305 (308, 309, 310): (1961) 1 Andh WR 202 (DB).

4. Detention of surety in civil prison.— See Section 145.

5. Attachment and sale.— (1) This rule applies only to cases of decrees for money which do not affect any specific immovable property. Where a consent decree provided that if a certain sum of money is not paid by a certain date, some specific immoveable property should be sold, no attachment is necessary under this rule. AIR 1924 Pat 258 (258): 2 Pat 768 (DB) ** AIR 1934 Pat 608 (609): 13 Pat 387 (DB).

[See also (1880) 4 Bom 515 (520) (FB) ** AIR 1936 Lah 573 (573).]

(2) The holder of a decree for arrears of rent is not bound to proceed in the first instance against the property in respect of which the arrears are due but may proceed against other property of the judgment-debtor. AIR 1935 Cal 544 (544) (DB).

(3) Dismissal of execution petition — Attachment made before judgment ordered to continue for specified period — Fresh attachment necessary if second application is filed after the period. AIR 1962 Mad 383 (384): (1962) 2 Mad LJ 132.

6. Rule not exhaustive of modes of execution.— (1) The words "may be executed" in this rule show that it does not purport to be exhaustive of the modes of execution of money decree. Rateable distribution of assets is a mode of execution of a decree for the payment of money. AIR 1926 Oudh 616 (617): 1 Luck 569 (DB) ** AIR 1961 Madh Pra 145 (146, 147): 1961 MPLJ 256 (FB).

[See AIR 1928 Lah 7 (9).]

[But see AIR 1925 Nag 382 (383).]

(2) Though Section 51 prescribes the appointment of a receiver as one of the modes of execution, nothing is mentioned about it in this rule, since the subject is dealt with in Order 40. AIR 1915 Nag 98 (99): 11 Nag LR 113 ** AIR 1939 Oudh 116 (117, 118): 14 Luck 538 (DB).

(3) Execution of money decree by ejectment of a tenant is a method provided by Section 61 of the Oudh Rent Act in addition to the modes prescribed by this Code. (1913) 15 Oudh Cas 381 (384) (DB).

(4) Application for issuance of a cheque for the amount lying in Court deposit is not in the nature of any of the modes of execution contemplated by Order 21, Rule 30. (1968) 2 An LT 236: (1969) 1 An WR 448.

7. Notice to judgment-debtor.— (1) The Court has ample jurisdiction to issue a warrant of arrest under this section without previously serving a notice on the judgment-debtor. AIR 1932 Cal 847 (849).

ORDER 21, RULE 31 — SYNOPSIS

1. Scope.
2. Decree for specific moveable property.
3. Seizure of property not in possession of judgment-debtor.
4. Modes of execution.
5. Alternative damages — Sub-rule (2).
6. Payment of compensation.

1. Scope.— (1) This rule does not apply to a case where the property sought to be seized is not in the possession of the judgment-debtor, but in the custody of a third party. (1897) 1 Cal WN 170 (172).

(2) In order to enable a person to obtain delivery of specific moveable property by suit and to enforce the decree by the

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

[1882, S. 259; 1877, Ss. 259, 260; 1859, S. 200.]

HIGH COURT AMENDMENTS

Allahabad

For the words, wherever they occur in each sub-rule, "six months," read the words "three months, or such extended time as the Court may for good cause direct."

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta; See Act 27 of 1962, Ss. 13 and 15 [w.e.f. 1-12-1963].

Bombay: Dadra and Nagar Haveli[a]

For the existing sub-rules (2) and (3), substitute the following:—

(2) Where any attachment under sub-rule (1) has remained in force for three months (or such further time as the Court may, in any special case for good cause shown, direct), if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and in other cases, such compensation, as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

Order 21, Rule 31 — Note 1 (contd.)

stringent methods prescribed in this rule, the plaintiff must allege and prove facts which give him a right to compel the delivery of the specific moveables under Section 11 of the Specific Relief Act (1 of 1877). AIR 1916 Mad 314 (317): 39 Mad 1 (FB) ** AIR 1938 Cal 471 (474) (DB).

(3) Sub-rule (2) applies not only where the specific moveables are in existence but also where they are either non-existent or are contumaciously held back by the judgment-debtor. AIR 1953 Vind Pra 20 (21).

2. Decree for specific moveable property.— (1) A decree for possession of three-fourths of a person's estate consisting of moveable and immoveable property is a decree that can be executed under this rule so far as the moveable property is concerned. 1908 Pun WR No. 60.

(2) The words "specific moveable" in this rule do not include money and therefore a decree for money cannot be executed under the provisions of this rule. AIR 1914 Mad 571 (573): 37 Mad 381 (DB) ** AIR 1938 Cal 471 (474) (DB).

3. Seizure of property not in possession of judgment-debtor.— (1) Rule 58 is applicable not only to attachments in execution of money decrees, but also to seizures under this rule. (1894) 7 CPLR 105 (109, 110).

4. Modes of execution.— (1) A decree-holder is entitled to apply for simultaneous execution of the decree by more than one of the modes provided by sub-rule (1) and, consequently, he cannot be compelled to exhaust his remedy for delivery of the specific moveables before he can be permitted to seek his remedies by the other two modes. AIR 1953 Cal 717 (718) (DB).

(2) Where in the circumstances of a case a Court has the power to direct attachment under the rule, it is empowered to direct conditional attachment so that the exercise of the power of ordering attachment may not be rendered infructuous. AIR 1953 Cal 717 (719) (DB).

(3) The word "attachment" in this rule refers to the attachment of properties other than the specific moveables which, if possible, have to be seized at the first instance. AIR 1953 Vindh Pra 20 (21).

5. Alternative damages — Sub-rule (2).— (1) Sub-rule (2) provides that if the goods are capable of delivery they must be delivered and that if they are not, then the assessed damages should be paid. (1871) 16 Suth WR 240 (244) (DB) ** 1890 Pun Re No. 64, p. 170 (174).

[See also AIR 1940 Cal 337 (343): ILR (1940) 1 Cal 372 (DB).]

(2) Where a decree is passed as provided by Order 20, Rule 10, the decree-holder cannot execute the money portion of the decree alone without following the procedure prescribed by this rule, i.e., without applying for delivery of the moveable property. AIR 1935 Cal 39 (51): 61 Cal 711

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of three months (or such further time as the Court may, in any special case, for good cause shown, direct), from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 8 (1-7-1965).

Calcutta : Andaman and Nicobar Islands

In sub-rules (2) and (3), substitute the words "three months" for the words "six months."

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Kerala : Laccadive, Minicoy and Amindivi Islands

Same as that of Madras [9-6-1959]; see Act 37 of 1956, S. 60 and Reg. 8 of 1965 S. 3 (2).

Madhya Pradesh

In sub-rules (2) and (3) for the words "six months" wherever they occur, substitute the words "three months or such further time as the Court may, in any special case, for good cause shown, direct" [16-9-1960].

Madras and Pondicherry

In sub-rules (2) and (3), for the words "six months", substitute the words "three months", and add the following as sub-rule (4) :

"(4) The Court may on application extend the period of three months mentioned in sub-rules (2) and (3) to such period not exceeding six months on the whole as it may think fit" [13-10-1936]; see Act 26 of 1968, Sec. 3 and Sch., Pt. II [w.e.f. 5-9-1968].

Mysore

In Rule 31 delete sub-rules (2) and (3) and substitute the following :—

(2) Where any attachment under sub-rule (1) has remained in force for three months, if the judgment-debtor has not obeyed the decree and the decree-holder

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Order 21, Rule 31 — Note 5 (contd.)

(DB) ** (1903) 13 Mad L Jour 444 (444) (DB).

[See also AIR 1959 Mys 164 (165): 36 Mys LJ 916. (Decree entitling decree-holder to 2 bullocks or their price — Decree-holder held had no option of refusing to take delivery of moveable property and insisting upon money value.)]

(3) Decree fixing time for delivery of moveable property — In default decree-holder entitled to a decree for certain sum — Decree not under Order 20, Rule 10 — Order 21, Rule 31 not applicable — Decree-holder not bound to exhaust his remedy for recovery of property before proceeding to recover the money. AIR 1961 Raj 241 (242, 243): 1961 Raj LW 330.

(4) There is no option with the judgment-debtor as to whether he would deliver the specific moveables or pay the assessed value thereof. AIR 1951 Trav-Co 176 (177): 1950 Trav-Co LR 504 (DB).

6. Payment of compensation.— (1) A decree for the delivery of specific moveables need not, in all cases, be in the alternative form, and an enquiry as to damages in such cases may more profitably be held in execution. AIR 1935 Cal 39 (63): 61 Cal 711 (DB).

(2) Where the decree does not state the amount of money to be paid in the alternative as required by Order 20, Rule 10, the executing Court cannot fix the value of the property; it can only fix the amount of compensation. AIR 1953 Hyd 173 (173): ILR (1951) Hyd 89 ** AIR 1953 Vindh Pra 20 (20).

(3) The executing Court cannot straightway fix the amount of compensation which should be fixed only when every reasonable attempt to execute the decree by delivery has failed. 1942-2 Mad L Jour 154 (155).

(4) The compensation payable to the decree-holder should be market value of moveables on the date of the decree. AIR 1953 Vindh Pra 20 (21).

[See also ILR (1953) 3 Raj 1009 (1012).]

(5) Under this rule the executing Court has got the power to determine the amount of compensation where the property is not delivered to the decree-holder in the same condition in which he was entitled to get it and this principle may well be applied to the cases of immovable property. AIR 1955 All 686 (687) (DB).

(6) Decree against agent to deliver possession of goods entrusted for sale — Agent unlawfully withholding goods after order — Decree-holder held entitled to recover goods or value on date of decree, even at higher rate — Such a course is sanctioned by Order 21, Rule 31. ILR (1958) 1 All 96 (108).

has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and in other cases such compensation as it thinks fit, and shall pay the balance if any to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing it which he is bound to pay, or where, at the end of three months from the date of attachment no application to have the property sold has been made, or, if made, has been refused the attachment shall cease.

Add the following as sub-rule (4) to Rule 31 :—

(4) The Court may on application extend the period of three months mentioned in sub-rules (2) and (3) to such period not exceeding six months on the whole as it may think fit [30-3-1967].

Orissa

Same as that of Patna.

Patna

In sub-rules (2) and (3), for the words "six months" substitute "three months", and add the following as sub-rule (4) :

"(4) The Court may, for sufficient cause, extend the period of three months mentioned in sub-rules (2) and (3) to such period, not exceeding six months in the whole, as it may think fit."

Punjab, Haryana and Chandigarh

(1) In sub-rule (2) for the word "six" substitute the word "three".

(2) Add the following proviso after sub-rule (2) :

"Provided that the Court may, in any special case, according to the special circumstances thereof, extend the period beyond three months; but it shall in no case exceed six months in all."

See Act 31 of 1966, Ss. 29 and 32 [w.e.f. 1-11-1956].

R. 32. Decree for specific performance, for restitution of conjugal rights, or for an injunction.—(1) Where the party against whom a decree for specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced [a][in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction] by his detention in the civil prison, or by the attachment of his property, or by both.

ORDER 21, RULE 32 — SYNOPSIS

1. Scope.
2. Decree for specific performance.
3. Restitution of conjugal rights.
4. Form of decree for restitution of conjugal rights.
5. Decree for injunction.
6. "Opportunity of obeying the decree."
7. Sale of property — Sub-rule (3).
8. Disobedience of order for injunction or specific performance.
9. Disobedience of decree for restitution of conjugal rights.
10. Effect of procedure under this rule.
11. Limitation — See Limitation Act (1963), Articles 136 and 137.

1. Scope.— (1) The question of executability of a decree has to be settled primarily upon the form of the language of the decree itself. 1959 BLJR 272 (274): 1959 Pat LR 12. (Decree declaring right of decree-holder to put up a bund and prohibitory injunction against judgment-debtors from interfering with it — Decree is not capable of execution till there is an attempt to put a bund and there is an obstruction on part of judgment-debtors.)

(2) A decree, which does not contain any direction to the defendant to do or to refrain from doing any act, but is merely a declaratory one, cannot be executed under this rule. (1904) 1 All L Jour 541 (542).

(3) The rule vests the executing Court with a discretion but the discretion has to be exercised in judicial manner. AIR 1949 Mad 374 (375): ILR (1949) Mad 589.

(4) It is no doubt true that Order 21, Rule 32, does not in express terms, refer

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Order 21, Rule 32 — Note 1 (contd.)

to a decree under Section 92 of the C. P. Code. But where the directions embodied in a scheme decree are in the nature of an injunction, the scheme decree falls within the ambit of Order 21, Rule 32. AIR 1960 Andh Pra 312 (313): (1960) 1 Andh WR 31 (DB).

(5) Order 21, Rule 32 is not intended to apply to temporary injunctions issued under Order 39. The object of this rule is to enforce injunctions contained in the decrees or orders and not to punish a party guilty of disobedience. AIR 1963 Andh Pra 136 (137): (1962) 2 Andh WR 25 (DB). (AIR 1941 All 140 and AIR 1945 Nag 134, **Dissented from.**) ** AIR 1969 Guj 28 (32).

(6) Suit for return of the goods in specie along with claim for rent of premises — Court empowered to pass a decree for value of the goods in the event of their not being delivered — Jurisdiction which could be exercised under Rule 32 of O. 21 in execution proceedings is equally capable of exercise even at the stage of decree. (1967) 2 Mys LJ 73 (74): 11 Law Rep 264.

2. Decree for specific performance.— (1) A decree for specific performance of a contract for sale of immovable property does not by itself pass title. AIR 1938 All 432 (433): ILR (1938) All 677 (DB) ** AIR 1966 Mys 299 (301, 302, 303, 304): (1965) 2 Mys LJ 692.

[See however (1881) 5 Bom 554 (560) (DB).]

(2) The Court executing a decree for specific performance of a contract of sale is competent to grant possession of the property to the decree-holder, even though no relief for possession was either asked for in the plaint or awarded by the decree. AIR 1957 Pat 701 (702) (DB) ** AIR 1954 All 643 (644) (DB) ** AIR 1955 Cal 267 (269) (DB) ** AIR 1963 Madh Pra 86 (88): 1963 Jab LJ 234.

[See also AIR 1955 Cal 402 (409).]

(3) A decree for specific performance operates in favour of both parties. The defendant is as much entitled to enforce it as the plaintiff. AIR 1954 Pat 497 (501) (DB) ** AIR 1932 Cal 579 (582, 583): 59 Cal 501 (DB).

[See also AIR 1933 Mad 386 (387, 388): 56 Mad 796 (DB).]

(4) The remedy provided by sub-rule (1) of this rule can only be used by a person who is entitled to execute the decree, and if by reason of his own incapacity to perform his part, he is precluded from seeking execution, the sub-rule cannot apply. Different considerations will, of course, arise if such incapacity is due to fraud or other wrongful act of the other party. **AIR 1956 SC 359 (363): 1956 SCR 62: 35 Pat 347** ** AIR 1954 Pat 497 (501) (DB).

(5) Suit by vendee for specific performance of contract to sell — Subsequent purchaser made party — Plaintiff succeeding — Subsequent purchaser should be directed to join vendor to execute sale-deed. AIR 1961 Pat 466 (467, 468): 1961 BLJR 326.

(6) Decree for specific performance of contract of sale — Defendant directed to execute sale-deed within 30 days — No provision as to when sale price was to be paid or whether it was to be paid prior to execution of sale deed — Decree cannot be said to be not executable on ground that sale-price is not paid. AIR 1963 All 49 (50, 51): 1962 All LJ 1082.

3. Restitution of conjugal rights.— (1) A decree for the restitution of conjugal rights passed between Hindus or Mahome-

Illustration

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B. A, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the costs of such removal from A in the execution proceedings.

[1882, S. 260; 1877, Ss. 259, 260; 1859, S. 200, Cf. R. S. C., O. 42, Rr. 7 and 30.]

[a] Inserted by the Code of Civil Procedure (Amendment) Act, XXIX of 1923, Section 2.

HIGH COURT AMENDMENTS

Allahabad

For the words "one year," in sub-rule (3), read the words "three months" and after the words at the end of the sub-rule, "on his application," add the words "the Court may for good cause extend the time".

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta—See Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 (w.e.f. 1-12-1963).

Calcutta : Andaman and Nicobar Islands

In sub-rule (3) substitute the words "three months" for the words "one year".

Order 21, Rule 32 — Note 3 (contd.)

dans can be enforced under this rule by the attachment of the defendant's property. (1875) 1 Bom 164 (167) (DB).

(2) A wife is not a chattel and cannot, therefore, be delivered as such in execution under the previous rule or this rule. AIR 1936 All 657 (658): ILR (1937) All 82 (DB).

4. Form of decree for restitution of conjugal rights.— (1) In a suit for the restitution of conjugal rights against the wife and other defendants who prevent her from going to her husband, the decree should declare the husband's right and direct that the other defendants do refrain from preventing the plaintiff's wife from returning to him. Where they do not obey the decree, execution can proceed against them under this rule. AIR 1920 Pat 798 (799) ** ('73) 20 Suth WR 92 (92) (DB) ** AIR 1914 Mad 219 (221) (DB).

[See however AIR 1920 Bom 112 (113): 44 Bom 454 (DB).]

(2) Where, in a decree for the restitution of conjugal rights, the plaintiff's mother-in-law who was impleaded as a defendant in the suit, was directed to refrain from preventing the plaintiff's wife from returning to him, it was held that her action in merely permitting her daughter, who was of age, to reside in her home after decree, did not justify the attachment of her property under this rule. (1778) 1 All 501 (503) (DB).

5. Decree for injunction.— (1) This rule applies to cases where a party is directed to do some act as well as to cases where he is directed to abstain from doing an act. AIR 1946 Pat 392 (397): 25 Pat 397 (DB) ** AIR 1945 Oudh 81 (82) ** 1930 Mad WN (809) (810) (DB) ** AIR 1969 Ker 232 (233): 1968 Ker LT 711. (Preventive injunction.)

(2) An interim injunction may be enforced under this rule read with Section 36. (1910) 8 Ind Cas 7 (8) (DB). (Obiter dictum.)

(3) An order requiring the defendant to furnish accounts is not an injunction within the meaning of this rule. AIR 1918 Pat 451 (452): 3 Pat L Jour 106 (DB).

(4) A decree for injunction can only be executed in the manner given in this rule. AIR 1954 Punj 197 (198).

(5) Where a plaintiff obtains a decree restraining a municipality from levying and recovering terminal tax from him, if a tax other than the terminal tax is levied, he cannot invoke the aid of an executing Court to stop the imposition of that tax. AIR 1954 Punj 197 (198).

(6) A decree for a prohibitory injunction cannot be executed as provided for in Order 21, Rule 32 (5) and the mode of execution for such a decree is the one laid down in sub-rule (1) of the rule. AIR 1961 Punj 547 (548, 549): 63 Punj LR 756 (DB).

(7) Where the directions embodied in a scheme decree passed under S. 92 of the Code are in the nature of an injunction, the scheme decree falls within the ambit of Order 21, Rule 32. AIR 1960 Andh Pra 312 (313): (1960) 1 Andh WR 31 (DB).

(8) Decree for injunction in a representative suit can be executed under

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1963, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras [9-6-1959]; see Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 (2).

Madhya Pradesh

(1) In sub-rule (3):

(i) for the words "one year" substitute the words "three months";

(ii) after the word "application" insert the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year"; and

(2) In sub-rule (4), for the words "one year" substitute the words "three months, or such further time as may have been fixed by the Court under sub-rule (3)" [16-9-1960].

Madras and Pondicherry

(1) In sub-rule (3):

(i) for the words "one year" substitute the words "three months";

(ii) after the word "application" insert the words "The Court may on application extend the period of three months mentioned herein to such period not exceeding one year on the whole as it may think fit."

Order 21, Rule 32 — Note 5 (contd.)

Order 21, Rule 32 against those defendants who were not eo nomine parties to suit. AIR 1960 Cal 623 (626): 64 Cal WN 780.

6. "Opportunity of obeying the decree."— (1) Before allowing execution under this rule against a judgment-debtor, the Court should see if he has had an opportunity of obeying the decree and whether he has wilfully failed to obey it. A demand is not necessary to be made upon the party against whom execution is sought. AIR 1954 Pat 497 (501) (DB) ** (1870) 7 Bom HCR (OC) 122 (136) ** ('06) 33 Cal 306 (312) (DB).

(2) The expression "wilfully," cannot be construed as "unreasonably." AIR 1949 Mad 374 (375): ILR (1949) Mad 589.

(3) If the judgment-debtor has had an opportunity of obeying the decree then execution may issue against him without giving him a further opportunity to obey the decree and the Court is not bound to issue notice calling upon him to obey the decree. (1906) 33 Cal 306 (312) (DB).

[See also AIR 1936 Mad 706 (706, 707).]

(4) The question whether the party had an opportunity or not to obey the decree or whether he wilfully disobeyed it is a question of fact and must be decided on the facts of each particular case. The appellate Court having the same powers as the original Court can decide the question for itself to avoid unnecessary delay. AIR 1954 Pat 497 (499) (DB).

(5) Where an application for enforcing a decree under this rule has been dismissed on the ground that the judgment-debtor had no opportunity of obeying the decree, a second application after such opportunity has been given is not barred. (1894) 21 Cal 784 (788): 21 Ind App 89 (PC).

(6) Where the decree declared the right of the inhabitants of D village to repair and put up a bund at the junction of two plots and the inhabitants of M village were also restrained from cutting the bund or interfering with it in any manner, the decree is not capable of execution under Order 21, Rule 32, till the inhabitants of D village had actually attempted to construct the bund. 1959 BLJR 272 (274, 275): 1959 Pat LR 12.

7. Sale of property — Sub-rule (3).— (1) This rule is a highly penal one and must be construed strictly. Before a sale is ordered under sub-rule (3), the following three conditions must exist: a valid original attachment, an application within one year of the attachment by the decree-holder, and lapse of one year from date of attachment. 1911 Pun Re No. 69 (DB).

(2) Where an order of attachment was made on 29-6-1908 and was carried out on 20-7-1908 and no application for sale was made before 20-7-1909, it was held that the attachment ceased to exist and the order for sale was, therefore, set aside. 1911 Pun Re No. 69 (DB).

(3) A sale held under sub-rule (3) cannot be set aside under Order 21, Rule 89, sub-rule (1) even where the execution of the decree under which the sale took place is restrained by an injunction granted subsequent to the sale in a separate suit. AIR 1933 Cal 96 (97).

(4) Where a decree is attached under this rule, the fact that this rule prohibits the sale of the attached property before the expiry of one year from the date of the attachment is no bar to the attached decree being executed by the holder thereof under Order 21, Rule 53, sub-rule (2) before the expiry of one year. AIR 1935 Mad 413 (414) (DB).

(2) In sub-rule (4), for the words "one year," substitute the words "three months," and after the words "the date of the attachment" add "or of such extended period which the Court may order under sub-rule (3)" [13-10-1936]; see Act 26 of 1968, S. 3 and Sch., Pt. II [w.e.f. 5-9-1968].

Orissa

Same as that of Patna.

Patna

In sub-rule (3), for the words "for one year" substitute the words "for three months or for such further period, not exceeding one year in the whole, as may, on sufficient cause shown, be fixed by the Court".

Punjab, Haryana and Chandigarh

(1) In sub-rule (3), for the words "one year," substitute the words "three months". Add the following proviso to sub-rule (3):

"Provided that the Court may for sufficient reasons, on the application of the judgment-debtor, extend the period beyond three months; but it shall in no case exceed one year in all."

(3) In sub-rule (4), for the words "one year", substitute the words "three months or such other period as may have been prescribed by the Court" [7-4-1932]; see Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

Order 21, Rule 32 — Note 7 (contd.)

(5) When the injunction requires the defendant to do a certain act, and upon his failure to do the act his property is attached, but subsequently within the period specified in the rule he carried out the directions in the decree, his property cannot be sold. But, where the injunction is one restraining the defendant from doing a certain act and he has disobeyed the decree by doing the act he has, by his own act, made it impossible for himself to obey the decree (so that there can be no question of a second disobedience); and in such a case, the judgment-debtor cannot escape the liability to have the attached property sold after the lapse of the prescribed period and have compensation paid to the decree-holder out of the sale proceeds. AIR 1935 All 480 (480, 481): 57 All 858 (DB).

8. Disobedience of order for injunction or specific performance.— (1) Where a defendant has wilfully failed to obey a decree for injunction or for specific performance passed against him, the decree may be enforced by his detention in the civil prison or by the attachment of his property or by both. (1884) 21 Cal 784 (788, 789): 21 Ind App 89 (PC) ** AIR 1938 Pat 522 (523) (DB) ** AIR 1935 All 480 (481): 57 All 858 (DB) ** ILR (1961) Mys 239.

[See also AIR 1955 All 385 (385) (DB).]

(2) Detention of judgment-debtor in civil prison on disobedience of order of permanent injunction — Detention for period beyond six weeks is not legal. 1965 Raj LW 466 (467): ILR (1965) 15 Raj 1087.

(3) Upon disobedience of order for injunction or specific performance, the Court has no power to order the defendant to execute a security bond for obeying the decree. See AIR 1917 Mad 656 (656, 657).

(4) The rule does not prevent the Court from passing a conditional order of detention. AIR 1945 Nag 134 (137, 138): ILR (1945) Nag 336 (DB).

(5) Under sub-rule (5) of this rule the Court has got the power to direct the act to be done so far as practicable by the decree-holder or by some other person appointed by the Court at the expense of the judgment-debtor. AIR 1919 Cal 674 (675): 46 Cal 103 (DB) ** **AIR 1930 PC 287 (290)** ** AIR 1938 Lah 369 (417) (FB) ** AIR 1961 Mys 166: 39 Mys LJ 86 ** AIR 1960 Madh Pra 1 (2): 1960 MPLJ 250.

(6) The Court is not justified in ordering the police to interfere in the matter, or in appointing a commissioner to see that the decree-holder performs without obstruction the acts required to be done. AIR 1918 All 152 (154): 40 All 648 (DB).

(7) Where, after a decree for injunction has been passed, the defendant does not obey it, the plaintiff's remedy is by execution under this rule and not by a separate suit. AIR 1954 Trav-Co 117 (118) ** AIR 1919 Cal 674 (675): 46 Cal 103 (DB) ** AIR 1935 All 480 (480): 57 All 858 (DB).

(8) The words "the act required to be done" in sub-rule (5) mean the act that has to be done to enforce the injunction granted by the decree. AIR 1919 Cal 674 (675): 46 Cal 103 (DB).

(9) Where a decree directs a wall to be demolished as being an obstruction to a right of way and is so demolished in execution of the decree, but the judgment-debtor erects another wall at a different place obstructing the right of way, the remedy of the decree-holder is a fresh suit for injunction. AIR 1921 Lah 376 (377) ** AIR 1957 Andh Pra 44 (47).

(10) The words "act required to be done" in sub-rule (5) show that this clause

Order 21, Rule 32 — Note 8 (contd.)
applies only to mandatory injunctions and not to prohibitory injunctions, though the other sub-rules apply to all injunctions generally. AIR 1954 Nag 245 (248): ILR (1954) Nag 332 (DB) ** AIR 1950 Mad 237 (238): ILR (1950) Mad 764 ** AIR 1938 All 416 (417, 418): ILR (1938) All 673 (DB) **AIR 1969 Andh Pra 92 (97). (AIR 1919 Cal 674, **Held no longer good law.**) ** AIR 1961 Punj 547 (548, 549): 63 Pun LR 756 (DB) ** AIR 1960 Ker 127 (129): 1959 Ker LT 1110 (DB) ** ILR (1960) 10 Raj 1031 (1036). (AIR 1919 Cal 674, **Dissented from.**)

[See also AIR 1961 Andh Pra 482 (483). (Disobedience of order for mandatory injunction — Order 21, Rule 32 (1) applies.)]

(11) In the case of prohibitory injunction, the decree-holder can enforce his right by way of a suit for damages and is not confined to remedy under this rule. AIR 1958 All 326 (329).

(12) Where a decree for injunction has been passed against several persons jointly restraining them from holding a fair on the plaintiff's land and all of them have been jointly and severally responsible for the disobedience of the decree as well as for the profit which they have made out of the plaintiff's land by holding the fair on such land, the mere fact that one of them is dead will not justify a reduction of the amount which the plaintiff is entitled to get as compensation out of the sale proceeds of the property of the defendants that has been attached and sold under sub-rule (3). AIR 1935 All 480 (481): 57 All 858.

(13) Order 21, Rule 34 merely sets out the procedure to be followed when the power sought to be exercised is the execution of a document. The actual power is conferred by Rule 32 (5). Thus, when the proviso to Section 11, C. P. and Berar Relief of Indebtedness Act, confers on the Debt Relief Court the power to take action under Rule 32 it necessarily includes the procedure prescribed by Rule 34. AIR 1949 Nag 370 (372): ILR (1949) Nag 633.

(14) A sale effected in consequence of decree for specific performance is not voluntary sale and is not liable to pre-emption under the Punjab Pre-emption Act. AIR 1949 Lah 72 (76): Pak LR (1948) Lah 94 (DB).

(15) Vagueness of decree in execution causing doubt as to the scope of injunction granted against judgment-debtor — Disobedience by him of the injunction cannot be said to be wilful. AIR 1965 All 44 (45).

(16) Finding in another suit holding judgment-debtor to have disobeyed the decree granting injunction — Finding does not operate as res judicata on the question of wilfulness of disobedience which has to be considered in execution proceedings instituted for the disobedience of the decree under Order 21, Rule 32. AIR 1965 All 44 (45).

(17) Disobedience of injunction — Court granting injunction can alone punish for contempt — Provisions in Section 36 read with Order 21, Rule 32 are not attracted. ILR (1952) 1 Cal 21.

(18) The question of taking action under Order 21, Rule 32 arises only when a party against whom a decree for injunction has been passed, wilfully fails to obey it. Courts have no power to enlarge the provisions of Rule 32 so as to take action even in the case of an attempt to act in contravention of the decree. AIR 1959 Ker 395 (396): 1959 Ker LT 275 (DB).

(19) Where the injunction restrained the judgment-debtor from impeding the free flow of water in the water course on to the decree-holder's land and the judgment-debtor by deepening his own land diverted the free flow of water in the water course, by making it percolate into his land:

Held, that the act of the judgment-debtor amounted to a clear disobedience to the injunction made against him. AIR 1961 Mys 268 (269, 270, 272): 1962 Mys LJ (Sup) 6.

(20) Disobedience of an order of temporary injunction by State — State is liable to be proceeded in contempt. **AIR 1961 SC 221 (227, 228): (1961) 1 SCR 728.**

(21) A decree even in very general terms that the defendant will specifically perform the suit contract or agreement of sale will entitle the decree-holder plaintiff to execute it by compelling the defendant to execute the deed of sale and also by compelling him to deliver possession of the property. (1966) 1 Mys LJ 799: (1966) 7 Law Rep 61.

9. Disobedience of decree for restitution of conjugal rights.— (1) The expression "wilfully" cannot be construed as unreasonably. Thus the refusal of the judgment-debtor to live with her husband expressed in unequivocal terms is wilful within the meaning of this rule. AIR 1949 Mad 374 (375): ILR (1949) Mad 589.

(2) The only remedy where the judgment-debtor in a decree for the restitution of conjugal rights wilfully refuses to obey the decree is to proceed to attach the property of the judgment-debtor. AIR 1936 All 657 (658): ILR (1937) All 82 (DB).

(3) The Court cannot compel the wife against whom such a decree has been passed, to go and live with her husband. (1934) 150 Ind Cas 307 (308) (Lah).

(4) It would be wrong in cases of disobedience of the decree for restitution of conjugal rights by the minor wife to pass an order under Section 25 of the Guardians and Wards Act, 1890, directing that her custody should be given to the husband. AIR 1936 All 657 (658): ILR (1957) All 82 (DB). (Reversing AIR 1936 All 267.)

(5) Decree for restitution of conjugal rights — Judgment-debtor willing to obey

R. 33. Discretion of Court in executing decrees for restitution of conjugal rights.—(1) Notwithstanding anything in Rule 32, the Court, either at the time of passing a decree [a][against a husband] for the restitution of conjugal rights or at any time afterwards, may order that the decree [b][shall be executed in the manner provided in this rule.]

(2) Where the Court has made an order under sub-rule (1) [c][* * *], it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holders such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

[See Section 56.]

[a] Inserted by the Code of Civil Procedure (Amendment) Act, XXIX of 1923, Section 3.

[b] Substituted by Section 3, ibid, for "shall not be executed by detention in prison."

[c] The words "and the decree-holder is the wife" repealed by S. 3, ibid.

R. 34. Decree for execution of document, or endorsement of negotiable instrument:— (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

Order 21, Rule 32 — Note 9 (contd.)

the decree — Decree-holder, however, obstructing performance without just cause — Court can record satisfaction of decree on application of judgment-debtor — Order 21, Rule 32, no bar. AIR 1965 Punj 54 (55, 56): ILR (1964) 2 Punj 803.

(6) Question relating to satisfaction of decree for restitution of conjugal rights — Question falls within the scope of Sec. 47 — Satisfaction can be recorded on application of judgment-debtor and Order 21, Rule 32 is not a bar. AIR 1966 Punj 506 (507). 1965 Pun LR (Supp) 135.

10. Effect of procedure under this rule.— (1) Where a decree for possession of a certain plot of land and for the demolition of a house situate thereon was passed, and the decree-holder had received some compensation under this rule by the attachment and sale of the house on the land, it was held that he could still enforce his right to the possession of the property. (1904) 1 All L Jour 431 (432).

11. Limitation.— See Limitation Act (1963), Articles 136 and 137.

ORDER 21, RULE 34

1. Decree for execution of document.— (1) A decree directing a defendant to execute a document in favour of the plaintiff is executable in the manner provided by this rule on the failure of the defendant to obey the directions given in the decree. AIR 1918 Cal 817 (818) (DB) ** 10 Cal 710 (712) (DB).

(2) The decree for the execution of a document need not have been passed in a suit for specific performance of a contract. AIR 1938 Cal 767 (767, 768) (DB).

(3) Where a document is executed by the Court under this rule on behalf of a party the admissions contained in such document are not binding on the party. 1942 Oudh WN 580 (581).

(4) Where a provision confers power on a Court to take action under Rule 32 it necessarily includes the procedure under this rule. AIR 1949 Nag 370 (371): ILR (1949) Nag 633.

(5) An instrument of mortgage executed by a Court in pursuance of a decree for specific performance needs no attestation by two witnesses as required by Section 59 of the Transfer of Property Act. AIR 1960 Andh Pra 465 (468, 469): (1960) 1 Andh WR 185 (DB).

(6) Contract for sale of plots made during pendency of suit for ejectment of

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely :—

"C. D., Judge of the Court of
(or as the case may be), for A. B., in a suit by E. F. against A. B.", and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.

[1882 and 1877, Ss. 261, 262; 1859, S. 202.]

35. Decree for immoveable property.—(1) Where a decree is for the delivery of any immoveable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

Order 21, Rule 34 — Note 1 (contd.)

tenant under U. P. Tenancy Act — Condition to execute sale-deed after passing of decree for ejectment — Ejectment suit dismissed in trial Court but dcreed in appeal — Failure to execute sale-deed.

Held, when contract itself had become impossible of performance, even appellate Court could not execute sale-deed. AIR 1966 All 185 (187): 1965 All LJ 446.

(7) The fact that decree appeared to be limited to execution of sale deed and does not mention delivery of possession does not stand in the way of executing the sale-deed under this rule. (1966) 1 Mys LJ 799 (801): 1966-7 Law Rep 61.

(8) Decree for specific performance of contract of sale — Relief of possession though claimed in suit, decree silent as to such relief — Executing Court has jurisdiction to grant both reliefs. AIR 1963 Madh Pra 86 (88): 1963 Jab LJ 234.

(9) Decree for specific performance of contract of sale of immovable property includes not only the execution of the sale-deed but also the right to recover possession. (1966) 1 Mys LJ 799: (1966) 7 LR 61.

(10) Suit for specific performance decreed — Vendor ordered to execute sale-deed — Failure — Court appointing Commissioner to execute sale-deed — **Held,** sale as per such sale-deed was pre-emptible. AIR 1965 Punj 346 (348): 67 Pun LR 74.

(11) A document executed according to Order 21, Rule 34 (5) has the same effect as the execution of a document by a party ordered to execute the same. ILR (1960) Ker 678 (697, 698).

(12) Special mode has been laid down in this rule with regard to execution of a decree for specific performance. AIR 1963 Bom 100 (106): 64 Bom LR 322 (DB).

1-A. Objections by judgment-debtor.— (1) An order which does not take into account the objections raised on behalf of the judgment-debtor cannot be deemed to be a legal or valid one. The provision being a mandatory one, non-compliance with that provision vitiates the order. AIR 1959 Andh Pra 666 (667): (1959) 2 Andh WR 508 (DB).

2. Appeal.— (1) Under Order 43, R. 1, Clause (i) an appeal lies against an order passed under this rule, on an objection to the draft of a document or of an endorsement, but a second appeal is prohibited by Section 104. AIR 1926 Cal 975 (976) (DB).

ORDER 21, RULE 35 — SYNOPSIS

1. Scope.
2. Delivery of possession — Symbolical and actual.
3. Effect of symbolical possession.
4. Joint possession — Undivided share.
5. Affixture of copy of warrant.
6. Removal of person bound by decree.

1. Scope.— (1) Where property is delivered to the decree-holder in execution of his decree for possession, the decree is satisfied and, therefore, a second application for possession, on the ground that he

(2) Where a decree is for the joint possession of immoveable property such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

[1882 and 1877, S. 263; 1859, Ss. 199, 223, Cf. R. S. C., O. 42, R. 5. See Rr. 36 and 95 to 103; See also S. 51, Cl. (a).]

HIGH COURT AMENDMENT

Madras: Pondicherry[a]

After sub-rule (3) of Rule 35, the following sub-rule shall be added, namely:

"(4) Where delivery of possession of a house is to be given and it is found to be locked, orders of Court shall be taken for breaking open the lock for delivery of possession of the same to the decree-holder.

Order 21, Rule 35 — Note 1 (contd.)

was dispossessed by the judgment-debtor is not maintainable. AIR 1957 Punj 17 (19): ILR (1957) Punj 243 ** (1882) 4 All 184 (185) (DB) ** AIR 1923 Mad 25 (26, 27) (DB).

(2) A subsequent application will lie when the first application has been ineffectual. AIR 1957 Assam 123 (124, 125) (DB) ** AIR 1933 Bom 457 (458) (FB) ** AIR 1933 All 201 (201, 203): 55 All 235 (DB).

(3) The Court which decided the case has jurisdiction to pass an order for delivery of possession on an execution application made to it even before it has drawn up the decree and signed it. AIR 1954 Pat 92 (93).

(4) In a suit for the specific performance of an agreement for sale as well as possession the decree should be so drawn up that, if necessary, the provisions of both this rule and Rule 32 could be availed of. AIR 1955 Cal 402 (409).

(5) A decree for specific performance to sell necessarily involves a direction not only to execute the contract of sale but also delivery of possession of property. (1966) 1 Mys LJ 799: (1966) 7 Law Rep 61.

(6) The decree confirming possession cannot be construed as one for recovery of possession under Order 21, Rule 35. 1958-1 Andh WR 403 (404).

(7) Decree against benamidar can be executed under this rule against real owner. **AIR 1969 SC 316 (318, 319): (1969) 1 SCJ 373.**

(8) Powers of Magistrate under Sec. 87 — **Held** though provisions of C. P. C. not attracted, order to enforce direction under Section 87 of Madras Act (19 of 1951) did not call for interference. (1962) 2 Andh LT 73.

(9) It is now well settled that in any litigation with a third party, the benamidar can sufficiently represent the real owner. The decision in any proceeding brought by or against benamidar will bind the real owner though he is not joined as a party unless it is shown that the benamidar could not or did not in fact represent the interest of the real owner in that proceeding. **AIR 1969 SC 316 (318): (1969) 1 SCJ 373.**

(10) A decree-holder can execute decree under Section 43 of Presidency Small Cause Courts Act (1882), as any other decree within period of limitation prescribed by law by virtue of Section 48 of aforesaid Act. AIR 1961 Mad 408 (409): (1961) 1 Mad LJ 136.

2. Delivery of possession — Symbolical and actual.— (1) If the property is of such a nature that the judgment-debtor cannot be in actual possession of it, as, for instance, where the property is in the possession of a tenant, then delivery should be effected by the officer of the Court by going through the process prescribed in Rule 36, and proclaiming to the occupant of the property that possession has been given to the decree-holder. AIR 1932 Pat 145 (147, 148): 11 Pat 165 (DB) ** 1956 All L Jour 955 (958) ** (1896) 18 All 440 (449, 450) (FB).

(2) Delivery effected through process of Court accepted by decree-holder — Person in occupation not removed — Decree-holder cannot seek fresh execution on ground that he has not obtained actual delivery. (1968) 1 Mys LJ 311.

(3) The term "symbolical possession" is applied where delivery is made under sub-rule (2) of this rule and Rules 36 and 96. AIR 1923 Nag 237 (238).

(4) A decree-holder who has been given symbolical possession is entitled to apply again under this rule to be put in actual possession, if he is entitled to it, unless he deliberately accepts such symbolical possession and does not repudiate it. AIR 1953 Nag 236 (237): ILR (1952) Nag 150 ** AIR 1955 Nag 79 (80): ILR (1955) Nag

If it is found at the time of delivery that there are movables in the home to which the decree-holder has no claim and the judgment-debtor is absent, or if present, does not immediately remove the same, the officer entrusted with the warrant for delivery shall make an inventory of the articles so found with their probable value, in the presence of respectable persons on the spot, have the same attested by them and leave the moveables in the custody of the decree-holder after taking a bond from him for keeping the articles in safe-custody pending orders of Court for disposal of the same.

The Officer shall then make a report to the Court and forward therewith the attested inventory taken by him.

The Court shall, thereupon, issue a notice to the judgment-debtor requiring him to take delivery of the said moveables within thirty days from the date of the notice and in default they will be sold in public auction at his risk and the proceeds applied for meeting all legitimate expenses of custody and sale and the balance, if any, will be refunded to the judgment-debtor :

Provided that if moveable articles referred to above are perishable, the Officer shall sell them in public auction immediately, and bring the proceeds into Court. The notice to the judgment-debtor shall in such a case call upon him to receive the amount from Court within three months" [17-8-66].

[a] See Act 26 of 1968, S. 3 and Pt. II [w. e. f. 5-9-68].

Order 21, Rule 35 — Note 2 (contd.)

561 (DB) ** AIR 1931 Cal 427 (430) (DB) ** 1967 Cur LJ 712 (Punj).

(5) Where the decree-holder is put in possession of land, such possession includes the standing crops. In such cases the decree-holder should be directed or made liable to pay the cost of the crops and the work. AIR 1953 Nag 9 (10): ILR (1952) Nag 936 ** AIR 1939 Rang 388 (389): 1940 Rang LR 157 ** AIR 1951 Trav-Co 188 (188, 189) (DB).

(6) In executing a decree for possession of land the Court has no power under this rule to direct its officers to pull down the structures put upon the land by the judgment-debtors and not voluntarily removed by them in order to deliver the land to the decree-holder. (1951) 88 Cal L Jour 27 (31, 32, 33).

[But see AIR 1954 Mad 985 (986, 987): ILR (1955) Mad 774.]

(7) A proceeding in pursuance of a decree for property or Court sale cannot affect a larger interest or larger group than the right, title and interest of the judgment-debtor. AIR 1968 Ker 179 (181): 1967 Ker LT 667.

(8) Where the amin reported that possession was delivered to the decree-holder, there was no obstruction to such delivery by any person and had been duly acknowledged by the decree-holder, there could be no further relief which could be made the subject-matter of further application for delivery of possession. ILR (1965) 17 Assam 48 (DB).

(9) It is open to the decree-holder to accept delivery of possession without actual removal of the person in possession. If he does that, then he cannot later say that he has not been given that possession to which he was entitled under the law. **AIR 1961 SC 137 (140, 141): (1961) 1 SCR 680.**

(10) Delivery effected through process of Court, accepted by decree-holder — Person in actual occupation not removed — Judgment-debtor not entitled to raise objection to delivery effected. (1963) 1 Mys LJ 311.

(11) Effective delivery of possession obtained by decree-holder although delivery was not recorded, and execution application kept pending by reason of stay ordered by appellate Court on appeal by judgment-debtor — Subsequent dispossession — Fresh application for delivery of possession not maintainable. 1962 Ker LJ 927: 1962 Ker LT 764.

(12) Decree in pre-emption suit — Title of pre-emptor — Tenant inducted on suit land by vendee after sale — Pre-emptor not bound by the tenancy — He is entitled to actual and not symbolical possession of land. AIR 1968 Punj 110 (119): 69 Pun LR 743 (FB). ((1966) 68 Pun LR 693, **Overruled.)**

(13) Decree for possession specifying shares of all the 3 decree-holders — Transfer of interest of shares by two decree-holders to judgment-debtors — Decree is not joint — Decree is executable to the extent of the share of the third decree-holder by delivery of symbolical possession. AIR 1965 J and K 2 (8): 1964 Kash LJ 238.

(14) Money decree against joint Hindu family — House of judgment-debtor sold to two different purchasers — Symbolical possession given — Subsequently one purchaser acquiring share of other purchaser — Application for delivery of entire property — Compromise of execution governing liability under decree and relating to manner of its enforcement — Court can enforce agreement in execution. AIR 1964 Mad 53 (56, 58): (1963) 2 Mad LJ 162 (FB). **(Held impliedly overruled by AIR 1966 SC 470** as interpreted AIR 1969 Mad 81.)

3. Effect of symbolical possession.— (1) The effect of delivery of symbolical possession in execution in cases where such

Order 21, Rule 35 — Note 3 (contd.)

possession alone can be delivered is the same as the actual transfer of possession from the judgment-debtor to the decree-holder. AIR 1955 Pat 158 (160) ** AIR 1957 Punj 17 (19): ILR (1957) Punj 246 ** AIR 1953 Pat 110 (111).

[See AIR 1959 Punj 518 (520): 61 Pun LR 522. (Vacant piece of land not in actual possession of anybody — Symbolical delivery of share — Amounts to actual possession.) ** AIR 1959 Punj 468 (471): ILR (1958) Punj 701. (Delivery of symbolical possession given in circumstances in which actual possession ought to have been given is a nullity.)]

(2) Where, subsequent to delivery of symbolical possession, the judgment-debtor dispossesses the decree-holder and remains in possession, such possession would be adverse to the decree-holder only from the date of the dispossession. AIR 1948 Pat 416 (418): 27 Pat 267 (DB) ** ('80) 5 Cal 584 (588) (FB). **(Overruling 24 Suth WR 418.) ** AIR 1917 PC 197 (201)** ** AIR 1928 Oudh 251 (254, 256): 3 Luck 506 (FB).

[But see AIR 1916 Mad 640 (640): 39 Mad 543.]

(3) Where the judgment-debtor dies after the issue of the sale certificate to the auction-purchaser the symbolical possession given to the auction-purchaser is not void on the ground that the legal representative was not impleaded before possession was taken. AIR 1954 Mad 760 (762): ILR (1954) Mad 1206 (DB).

(4) The delivery of symbolical possession has no operation as against third persons who are not parties to the decree. AIR 1953 Sau 135 (136) (DB) ** AIR 1923 Cal 82 (84) (DB) ** AIR 1936 Mad 571 (572).

(5) Giving of symbolical possession does not create any privity of estate between the decree-holder and the occupant of the property. AIR 1963 Bom 42 (45): 64 Bom LR 554 (DB).

(6) Once the auction-purchaser has obtained and accepted symbolical possession of property sold to him he cannot apply again asking for actual possession thereof because so far as the judgment-debtor is concerned symbolical possession is as effective as actual possession. 1968 MPLJ 293: 1968 Jab LJ 394.

(7) Symbolical delivery given — Decree-holder applying for actual possession — Application is in execution proceedings. AIR 1959 Punj 468 (471, 472): ILR (1958) Punj 701.

(8) Symbolical possession of immovable property delivered in execution — Such possession deemed equivalent to actual possession as against judgment-debtor or his representatives — Suit for actual possession can be brought within 12 years of date of symbolical possession. AIR 1961 Him Pra 18 (20) ** AIR 1959 Punj 515 (516, 517): 61 Pun LR 249.

(9) Symbolical possession has effect of giving fresh starting point of limitation. AIR 1969 Ker 121 (122) (DB).

(10) Undivided interest of coparcener sold in execution — Symbolical possession delivered to purchaser — Symbolical delivery though not correct in law does interrupt adverse possession against purchaser. AIR 1969 Mad 81 (82): (1968) 2 Mad LJ 103. (AIR 1955 Mad 288 and AIR 1964 Mad 53 (FB), **Held impliedly overruled by AIR 1966 SC 470.) ** AIR 1966 SC 470 (474).**

(11) Formal delivery of possession — Interrupts adverse possession of judgment-debtor and persons claiming through him and deriving title from him. AIR 1969 Manipur 49 (51, 52) ** AIR 1961 Assam 120 (121): ILR (1961) 13 Assam 171.

4. Joint possession — Undivided share.— (1) A person who is entitled to possession of immovable property jointly with others is not merely entitled to a decree declaring his rights in the land but also to a decree for joint possession. AIR 1922 All 314 (316): 44 All 1 (FB) ** (1912) 34 All 150 (154) (DB).

(2) The Court has a discretion in granting decree and the discretion must be exercised in accordance with the principles of justice, equity and good conscience. AIR 1928 All 472 (474): 51 All 303 (FB).

(3) The delivery of joint possession under this rule is merely a symbolical transaction. AIR 1928 Lah 719 (719) (DB) ** (1912) 36 Bom 373 (377) (FB) ** 1939 All L Jour 375 (376) ** AIR 1965 J & K 31 (32): 1965 Kash LJ 1.

(4) Purchase of an undivided share in joint family property in Court auction — Purchaser getting symbolic delivery interrupts adverse possession. AIR 1969 Mad 81 (82): (1968) 2 Mad LJ 103. (AIR 1955 Mad 288 and AIR 1964 Mad 53 (FB), **Held, impliedly overruled by AIR 1966 SC 470.)**

(5) Estate purchased at auction held under provisions of Bengal Land Revenue Sales Act, 1859 — Suit brought by purchaser to eject defendant from portion of estate occupied by him as tenant of other co-sharers — Defendant denying title of plaintiff — Such denial amounts to ouster — Decree for joint possession can be passed in favour of plaintiff — Decree need not be subjected to any condition as it can be executed under Order 21, Rule 35 (2). AIR 1963 Cal 209 (210, 211, 212, 213, 214) (FB).

(6) A decree for joint possession postulates that the right of possession of both the parties in the property are co-extensive but in certain specified shares. 1966 All LJ 510 (513).

(7) Sale in execution of undivided interest of coparcener — Sale confirmed — Court ordering delivery of symbolical joint possession to purchaser — Order though cannot be supported in law is not a nullity for this reason, because order was not

Order 21, Rule 35 — Note 4 (contd.)
without jurisdiction — Such an order has full effect if it is not set aside — The illegal order for possession is sufficient to interrupt adverse possession against purchaser. **AIR 1966 SC 470 (474): 1966 SCR 628.**

(8) Suit for partition by purchaser of undivided share of a member of joint Hindu family—Symbolical possession given under O. 21, R. 35 — Art. 120 applies and not Article 138 or Article 144 — Plaintiff entitled to possession only after his partition suit is decreed and hence no question of adverse possession arises. AIR 1968 Raj 1 (2): 1967 Raj LW 228.

5. Affixture of copy of warrant. — (1) The failure to comply with the procedure laid down in the rule is fatal to the delivery, which is no delivery at all in the eye of the law and cannot be the basis for a fresh suit for possession. AIR 1941 Pesh 25 (25) (DB) ** AIR 1923 Lah 693 (693).

(2) Where the parties concerned had actually come to know of the proceedings taken to give symbolical possession, it must be presumed that there had been a substantial compliance with the requirements of the rule. AIR 1929 Lah 545 (545) ** AIR 1937 Oudh 275 (276): 13 Luck 96.

(3) It must be assumed that a process recorded as served through Court was served with all the formalities required by law and the burden of proof lies on the person asserting the contrary to prove that the formalities, such as the fixing of copy of the warrant, had not been complied with. (1930) 132 Ind Cas 181 (182) (Lah) ** AIR 1928 Lah 910 (910, 911).

(4) Formalities as to affixture contained in Order 21, Rule 35 (2) satisfied — Mere fact that word 'Summons' instead of 'Warrant' has been wrongly used by peon in his endorsement as to affixture made on copy of order, does not change character of warrant. AIR 1965 J & K 31 (32): 1965 Kash LJ 1.

(5) Delivery of symbolical possession — Burden of proving that formalities required by law were not complied with at the time of giving symbolical possession to plaintiff, is on defendant and not on plaintiff. AIR 1965 J & K 31 (32): 1965 Kash LJ 1.

6. Removal of person bound by decree. — (1) The words "any person bound by the decree" in this rule include the judgment-debtor as well as any person who may be held under law as bound by the decree. AIR 1932 Cal 241 (241, 242): 59 Cal 739 (DB) ** AIR 1958 Tripura 11 (13).

(2) Where the tenants were inducted into the property after the decree they cannot claim any right as they will be persons bound by the decree. Even in cases where such tenants come in after the institution of the suit, their rights if any may be affected by the doctrine of lis pendens. (1965) 78 Mad LW 345: (1965) 2 Mad LJ 18.

(3) If the property for which a decree for possession has been made is in the occupancy of a person claiming under a title created by the defendant subsequent to the institution of the suit, actual possession under sub-rule (1) must be given to the decree-holder by removing, if necessary, the person bound by the decree and refusing to vacate the property. AIR 1925 Cal 1243 (1244) ** (1887) 15 Cal 94 (99) (DB) ** (1872) 18 Suth WR 526 (528) (DB).

(4) A sub-lessee would be bound by a decree for possession obtained by the lessor against the lessee if the eviction is based on a ground which determines the sub-lease also, and he can be ousted in execution against the lessor though he was not a party to the suit itself. **AIR 1953 SC 514 (517): 1954 SCR 235** ** AIR 1945 Cal 283 (292): ILR (1947) 1 Cal 270 (DB) ** **AIR 1965 SC 414 (427): (1964) 4 SCR 892.**

(5) Where there is a tenant under the judgment-debtor in adverse possession who is bound by the decree and the peon instead of delivering possession under this rule delivers possession erroneously under Rule 36 leaving the tenant in possession, this irregular delivery operates to break the adverse possession of the judgment-debtor. AIR 1944 Pat 77 (80, 82): 22 Pat 513 (DB).

(6) It is true that Rule 35 or 36 does not provide for an enquiry, but that alone does not mean that the Court has no power to do so. What is necessary is that there should be something before the Court on which the Court is prima facie satisfied as regards the question whether the other person is holding the property on behalf of the judgment-debtor and is bound by the decree or not for the purpose of delivery of possession under the rules in question. AIR 1958 Tripura 11 (13).

(7) Where delivery of possession of property ordered under Order 21, Rule 35, C. P. Code has been obstructed and a dispute arises as to whether the person causing obstruction is a sub-tenant of the judgment-debtor or not the execution Court cannot determine the question under Order 21, Rule 35. AIR 1962 Assam 150 (151, 152): ILR (1962) 14 Assam 445.

(8) Executing Court refusing to stay execution of decree of eviction without issuing notice to decree-holder — Order cannot ordinarily be interfered with in revision. AIR 1967 Delhi 37 (38): 69 Pun LR (D) 146.

(9) Decree giving option to decree-holder for possession of land with or without improvements made by judgment-debtor — Decree-holder electing to possession without improvements — Executing Court cannot go behind decree and has to get the improvements removed. AIR 1969 Manipur 1 (2).

(10) Suit for ejectment — Suit dismissed against one of defendants — Execution of

R. 36. Decree for delivery of immoveable property when in occupancy of tenant.—Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

[1882 and 1877, S. 264; 1859, S. 224. Cf. O. 21, R. 96.]

Order 21, Rule 35 — Note 6 (contd.)

decree against him is not maintainable. ILR (1961) 11 Raj 1067: 1961 Raj LW 503.

(11) Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), Section 26 — Eviction order against chief tenant — Sub-tenants not made parties to eviction petition — Order not binding on sub-tenants. (1968) 1 Mad LJ 386: 81 Mad LW 8 (DB).

(12) Dispossession of tenant after commencement of Act 25 of 1955 — Tenant inducted by landlord subsequent to dispossession not made party to proceedings for restoration — Application allowed — **Held,** order of restoration being based on ground which by itself could annul right to possession of landlord and therefore, of subsequent tenant claiming under him, same could be enforced against subsequent tenant by virtue of Order 21, Rule 35. ILR (1966) 1 Mad 538.

(13) Lease of shop on the site of shop-cum-flat purchased in auction — Loan taken from Government for construction of shop — Balance of loan recoverable as arrears of land revenue — Not only land purchased but shop property can be sold for recovery — Service of notice on tenant for vacant possession of shop is valid — Refusal to give vacant possession — Tenant can be evicted forcibly. 1968 Cur LJ 50: 70 Pun LR 556.

(14) Loan taken from Government for constructing building — Default in repayment — Property sold by auction — Forcible eviction of tenant imposed by defaulter is legal. 1968 Punj LJ 260.

Order 21, Rule 36

1. Scope and applicability. — (1) This rule does not apply to case of joint holding which is covered by Rule 35. AIR 1926 Lah 668 (669) (DB).

(2) Where the property which is the subject-matter of a suit for possession is in the possession of a tenant or of a usufructuary mortgagee whose term has not expired, or in the possession of a person having a right of residence, delivery of the property in execution should be made under this rule provided, of course, such person is not bound by the decree. (1896) 18 All 440 (449, 450, 451) (FB) ** AIR 1919 Oudh 39 (41): 22 Oudh Cas 278 ** AIR 1923 All 507 (508): 45 All 482 (DB).

(3) Where a third person claims to enter on the land under certain contractual rights and has not derived title from the defendant in the suit, he cannot be regarded as a tenant against whom an order under this rule can be made. AIR 1923 Mad 25 (27) (DB).

(4) Where the property is in the occupation of the tenant of the judgment-debtor, the giving of 'symbolical possession effectively terminates the possession of the judgment-debtor and his tenant. AIR 1949 PC 124 (126): 28 Pat 207.

(5) Where the warrant for delivery of possession is issued under Rule 35, it cannot be said that, merely because the proclamation about delivery of possession is made on the spot the delivery of possession is under this rule and not under Rule 35. 1956 All L Jour 955 (958).

(6) An order of reinstatement under Section 27 of Act (10 of 1947) is not made executable and hence this rule does not apply to such a case. ILR (1962) 2 All 67 (71).

(7) Tenant inducted by mortgagee under power given under mortgage deed — Decree for redemption — Eviction of tenant — Decree-holder cannot get physical possession but only constructive possession. 1959 Pat LR 234 (236) (DB).

(8) Execution of decree — Rights created by decree not affected by Tenancy Act — Enforcement of decree of Civil Court — Not included in functions of Mamlatdar under Section 70, Bombay Tenancy Act 1948 — Decree-holder not a landlord — Order 21, Rule 36 not applicable. (1963) 4 Guj LR 29.

(9) Delivery of symbolical possession to D. H. — Suit for recovery of possession of property on the basis of execution sale maintainable within 12 years of delivery of symbolical possession. AIR 1969 Ker 121 (122) (DB).

(10) If a tenant in possession purchases land of his tenancy and a successful pre-emptor obtains a pre-emption decree in regard to that sale, the pre-emptor decree-holder cannot evict the vendee-tenant in execution of his decree for pre-emption. (1968) 70 Punj LR (D) 11 (12).

(11) A decree for partition of immovable property is essentially a decree for delivery of immovable property and hence this rule governs such a case. Where the property is in the occupation of a tenant he is not bound by the decree. AIR 1966 All 528 (530): 1966 All LJ 393.

(12) Punjab Revenue Rules, Rule 43 — Loan taken from Government for constructing building — Default in repayment —

ARREST AND DETENTION IN THE CIVIL PRISON

[See Sections 55 to 59 and 134 to 136.]

R. 37. Discretionary power to permit judgment-debtor to show cause against detention in prison.—(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court [a][shall], instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison :

[b][Provided that such notice shall not be necessary if the Court is satisfied by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.]

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

(a) Substituted by the Code of Civil Procedure (Amendment) Act, XXI of 1936, S. 3. for "may".

(b) The proviso was inserted, ibid.

HIGH COURT AMENDMENTS

Allahabad

In Rule 37 (1) substitute the word "may" for the word "shall" between the words "the Court" and "instead" and delete the proviso to that Rule [1-6-1957].

Patna

In sub-rule (1), substitute the word "may" for the word "shall" occurring after the words "the Court" and before the word "instead" in the rule [5-4-1961].

Order 21, Rule 36 — Note 1 (contd.)

Property sold by auction — Forcible eviction of tenant imposed by defaulter is legal. 1968 Punj LJ 260.

2. Possession without the intervention of the Court.— (1) A person who has obtained a decree for possession of immovable property may take possession of such property otherwise than in execution and may rely, for the support of his possession, on the title vested in him under the decree. ILR (1954) Cut 204 (208) ** (1891) 15 Bom 238 (241) (DB).

(2) Where, after having obtained possession without the aid of the Court, the person is subsequently dispossessed, he can maintain an action against the persons who have dispossessed him, although he has not taken out execution of his decree. AIR 1941 Oudh 615 (618): 17 Luck 109 (DB) ** AIR 1916 All 163 (163, 164): 38 All 509 (DB).

3. Appeal and Revision.— (1) Tenant of premises objecting to mode of partition of premises in execution of partition decree — Objection allowed by order made under Order 21, Rule 36 — Tenancy commenced prior to institution of partition suit and tenant not made party to such suit — Order is not appealable. AIR 1966 All 528 (529): 1966 All LJ 393.

(2) Suit for redemption — Tenant of mortgagee made party to suit but not party to compromise between mortgagor and mortgagee — Decree not binding on tenant — Lease in favour of tenant however came to an end on decree for redemption of mortgage and he could not continue in possession — Remedy of mortgagor against order of trial Court ordering symbolical possession was by way of appeal and not suit. AIR 1963 Guj 328 (329): 1963-4 Guj LR 780.

(3) Order of executing Court refusing stay of execution of decree of eviction — Cannot be interfered with in revision. AIR 1967 Delhi 37 (38): 69 Pun LR (D) 146.

Order 21, Rule 37

1. Notice to show cause.— (1) Where an application is made for the execution of a money decree by the imprisonment of the judgment-debtor the Court is bound under this rule to issue, in the first instance, a notice to the judgment-debtor to appear and show cause why he should not be committed to the civil prison in execution of the decree. The Court cannot issue a notice and a warrant of arrest at the same time with directions for arrest in case the judgment-debtor intimates he does not propose to appear. AIR 1932 Pat 315 (316): 11 Pat 743 ** AIR 1932 All 692 (693): 55 All 109 (DB) ** AIR 1959 Mys 79 (80): 36 Mys LJ 364.

(2) The nature of the decree should be such that it can be executed by the arrest of the judgment-debtor and circumstances mentioned in Clauses (a) to (c) to proviso

38. Warrant for arrest to direct Judgment-debtor to be brought up.—Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

[1882, S. 337; 1877, Ss. 251, 343; 1859, S. 222.]

Order 21, Rule 37 — Note 1 (contd.)

to Section 51 should exist. Unless those circumstances exist the judgment-debtor cannot be ordered to be arrested. AIR 1955 All 402 (403) (DB).

(3) Though a judgment-debtor cannot be arrested because he is outside the jurisdiction of the Court at the time of the arrest, a notice under this rule may nevertheless be issued. AIR 1926 Sind 51 (53).

[See also AIR 1947 Cal 262 (266): ILR (1944) 2 Cal 588 ** AIR 1918 Pat 427 (428): 3 Pat L Jour 95 (DB).]

(4) If a Court has no jurisdiction at all to entertain the application for execution then no notice can be issued under this rule. AIR 1947 Cal 262 (264): ILR (1944) 2 Cal 588.

(5) Court cannot take action under this Rule or issue notice to the judgment-debtor why he should not be arrested unless circumstances laid down in Section 51 are alleged in the execution petition or in a separate application of affidavit accompanying the usual execution application. ILR (1960) Cut 33 (37) (DB) ** AIR 1954 Raj 1 (2, 3): 1953 Raj LW 370 (DB).

(6) Arrest of judgment-debtor — Compliance with proviso to Section 51 not a condition precedent — Simultaneous issue of notice under Order 21, Rule 37 and warrant of arrest does not by itself make the warrant illegal. AIR 1964 Ker 158 (160): 1964 Ker LJ 97: 1964 (1) Cri LJ 668 (DB) ** AIR 1961 Ker 331 (333): 1961 Ker LT 353: 1961 (2) Cri LJ 774 (DB) ** AIR 1959 Mys 94 (95): 36 Mys LJ 814 (DB).

(7) Where a Court issues a warrant under sub-rule (1) or sub-rule (2) it is to secure the presence of the person in Court and not for committing him to prison. Provisions of Section 51 or Order 21, R. 40 are not applicable at this stage. (1964) 2 Andh WR 38 (DB).

(8) Order 21, Rule 22 (2), Proviso (Kerala) — Notice under Order 21, Rule 37 issued — Omission to issue notice under Order 21, Rule 22 not fatal. AIR 1964 Ker 158 (162, 163): 1964 Ker LJ 97: 1964 (1) Cri LJ 668.

(9) Under Order 21, Rule 37 (1) the Court has a power to issue a warrant for the arrest of the person or issue notice — Judgment-debtor must appear in person on the day originally specified in the notice and also on subsequent day when the matter is taken up — Appearance through counsel is not sufficient. AIR 1961 Bom 23 (24): 62 Bom LR 599.

(10) Execution of decree by arrest and detention of J. D. in prison — Onus to bring a case within one or more clauses of proviso to Section 51 is on decree-holder. AIR 1968 Pat 218 (220): ILR 46 Pat 1142 (DB).

(11) Demand notice — Demand not clear — Demand does not constitute request for payment of decretal amount. 1964 BLJR 617 (622).

(12) Personal liability of owner of holding to pay municipal tax — Liability unaffected by Section 121-A, Bihar and Orissa Municipal Act. 1964 BLJR 617 (620).

(13) Failure to satisfy tax due by Hindu undivided family — Manager is not liable to be arrested and detained in prison. AIR 1969 SC 682 (684): (1969) 1 SCJ 882.

2. Privilege from arrest.— (1) Ex parte order for arrest of judgment-debtor in execution passed after notice and enquiry — Order operates as res judicata in subsequent execution proceedings regarding objections which he might and ought to have raised in earlier proceedings regarding means to pay. AIR 1965 Ker 16 (17): 1964 Ker LT 1101.

(2) Stage of Rule 40 not reached — Even warrant of arrest under Rule 37 (2) not issued — Judgment-debtor can object to his being committed to civil prison. 1964 BLJR 617 (620).

(3) Execution of decree by arrest and detention in prison — Judgment-debtor cannot waive privilege conferred by Section 51. AIR 1968 Pat 218 (221): ILR 46 Pat 1142 (DB).

(4) Arrest can never be ordered where detention is not possible except when enquiry into question whether or not execution by detention is permissible is pending. AIR 1966 Ker 65 (65): 1965 Ker LT 261.

(5) See also Notes on Section 135.

3. Powers of Revenue Courts.— (1) Collector has powers to arrest and detain a defaulter of Income-tax and can exercise the powers under this Rule. (1959) 37 ITR 375 (Andh Pra) (DB).

Order 21, Rule 38

1. "With all convenient speed".— (1) Detention, without authority, beyond such time as is reasonably necessary to bring the judgment-debtor to Court after arrest, is illegal. 1859 Bourke 59.

(2) The date for the return of the warrant should also be specified in the warrant. AIR 1918 Pat 427 (428): 3 Pat L Jour 95 (DB).

(3) Warrant of arrest giving wrong amount to be paid — Warrant is not illegal. Mistake can be got rectified by taking appropriate proceedings in Court.

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras [9-6-1959]; see Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 (2).

Madras and Pondicherry[a]

Substitute a comma for the full stop after the word "paid" and add the following:

"or unless satisfaction of the decree be endorsed by the decree-holder on the warrant in the manner provided in R. 25 (2) above."

Note.—Rule 25 (2) is a reference to that sub-rule as sustituted by the Madras High Court.

[a] See Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-68].

Mysore

At the end of Rule 38 convert the full stop into a comma and add the following:—

or unless satisfaction of the decree be endorsed by the decree-holder on the warrant in the manner provided in sub-rule (3) of Rule 25 of this Order [30-3-1967].

R. 39. Subsistence allowance.—(1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sums as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he

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Order 21, Rule 38 — Note 1 (contd.)

AIR 1961 Ker 331 (334): 1961 Ker LT 353: 1961 (2) Cri LJ 774 (DB).

2. Payment made to process-server.— (1) Payment by one of the joint judgment-debtors of the decretal amount to the process-server who was authorised to receive the same, is a "payment" within the meaning of Article 99 of the Limitation Act. AIR 1957 Orissa 224 (225): ILR (1957) Cut 474.

(2) It must appear clearly and unequivocally on the face of the warrant itself that the process server who comes to execute the same had authority to receive payment of the money if it is so made by the judgment-debtor or otherwise to arrest the judgment-debtor. 1968 All WR (HC) 629: 1968 All Cri R 409.

3. Arrest as mode for recovery.— (1) Where collector is required to recover arrears of income-tax, he has to recover it as arrears of revenue and arrest of the defaulter is one of its mode of recovery. (1959) 37 ITR 375 (Andh Pra) (DB).

(2) Legal representative of deceased appellant brought on record on his application — His application for stay of execution of decree against which appeal was pending, dismissed by order simpliciter with direction to pay costs — Order is executable by applicant's arrest and detention in civil prison. ILR (1965) Guj 297: (1965) 6 Guj LR 474.

Order 21, Rule 39

1. Subsistence money.— (1) This rule is to be strictly followed. The subsistence allowance payable to the officer-in-charge of the civil prison must always be paid for a whole month in advance. (1870) 5 Beng LR (App) 79 (79, 80) ** (1870) 5 Beng LR (App) 80 (81).

(2) The payment for the month of January must be actually made to the officer-in-charge of the civil prison before the 1st of January. AIR 1914 Mad 24 (24). (Remittance by postal money order must actually reach officer before the first day of the month.)

(3) The decree-holder is bound to pay, however, only the amount due as subsistence allowance according to the prescribed scales and not the costs of bedding, clothing, etc., for the prisoner which are governed by the Prison Rules. Bourke OC 52 ** Bourke OC 59 ** 1893 Pun Re No. 43, p. 202 (203) (DB).

(4) In case the judgment-debtor is not committed to prison, the decree-holder is entitled to a refund of any money unspent between the dates of arrest and release from custody. (1868) 5 Bom HCR 84 (85) (DB) ** (1879) 4 Bom 65 (69, 70) (DB).

2. Arrest before judgment.— (1) The same rules apply equally to cases of arrest before judgment. Bourke OC 423.

(2) Execution by arrest of judgment-debtor — Order for instalment payment. — Neither Sec. 51, Civil P. C. nor O. 21, Rules 39 and 40 provide for any instalment payment. AIR 1964 Ker 264 (264): 1962 Ker LJ 1397.

(3) Application for arrest — Court in suitable cases should first order payment by instalments. AIR 1955 Mad 409 (411): (1955) 2 Mad LJ 121 (DB).

may be entitled to according to the scales fixed under Section 57, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

[1882 and 1877, Ss. 339, 340; 1859, Ss. 276, 279. See S. 57.]

HIGH COURT AMENDMENTS

Allahabad

Delete the words "in the civil prison" in sub-rule (5).

Andhra Pradesh

Same as that of Madras.

Assam: Nagaland

Same as that of Calcutta—See Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 [1-12-1963].

Bombay: Dadra and Nagar Haveli[a]

In Order XXI, for the existing Rule 39 and its marginal note, substitute the following :—

39. Subsistence allowance.—(1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court and for the cost of conveyance of the judgment-debtor from the place of his arrest to the Court-house.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled according to the scales fixed under Section 57, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and costs of conveyance of the judgment-debtor for his journey from the Court-house to the civil prison and from the civil prison on his release, to his usual place of residence, together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and the cost of conveyance (if any) of the judgment-debtor shall be deemed to be cost in the suit :

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-65).

Calcutta: Andaman and Nicobar Islands

Omit the words "in the civil prison" in sub-rule (5). [3-2-1933].

Gujarat

(1) In Rule 39 (1) delete the full stop at the end of sub-rule (1) and add the following :

"and for the cost of conveyance of the judgment-debtor from the place of his arrest to the Court-house."

(2) New sub-rules (4) and (5) have been substituted. The substituted sub-rules (4) and (5) are the same as in Bombay [17-8-1961].

Delhi : Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Kerala: Laccadive, Minicoy and Amindivi Islands[a]

(i) Sub-rule (1) is the same as that in Madras (1) without the words put in brackets [10-9-1963].

(ii) Sub-rules (4) and (5) are the same as those of Madhya Pradesh, Item (b) [9-6-1959].

[a] See Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 (2).

Madhya Pradesh

(a) Delete the full stop at the end of sub-rule (1) and add the following namely :

"and for the costs of conveyance of the judgment-debtor from the place of his arrest to the Court-house".

(b) For sub-rules (4) and (5), the following sub-rules shall be substituted, namely :

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the civil prison and from the civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer-in-charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and the costs of the conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit" [16-9-1960].

Madras: Pondicherry[a]

For sub-rule (1), substitute the following:—

"(i) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into the Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court (and for payment of the charges for conveyance of the judgment-debtor by bus, train or otherwise whichever is available from the place of arrest to the Court-house)" [4-1-1967].

(ii) Sub-rules (4) and (5) are the same as those of Madhya Pradesh, Item (b).

[a] See Act 26 of 1968, S. 3 and Pt. II (w.e.f. 5-9-1968).

Mysore

In Rule 39 delete sub-rules (4) and (5) and substitute the following:—

(4) Such sum, if any, as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the civil prison and from the civil prison on his release to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and subsequent payments if any shall be made to the officer in charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and cost ot conveyance, if any, of the judgment-debtor shall be deemed to be costs in the suit :

Provided that the judgment-debtor shall not be detained in civil prison or arrested on account of any sum or sums so disbursed [30-3-1967].

Orissa

Same as that of Patna.

Patna

In sub-rule (5), delete the words "in the civil prison" in the first place where they occur [7-1-1936].

Punjab, Haryana and Chandigarh

Delete the words "in the civil prison" in sub-rule (5) [17-4-1932]; see Act 31 of 1966, Ss. 29 and 32 [1-11-66].

[a]**R. 40. Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.**—(1) When a judgment-debtor appears before the Court in obedience to a notice issued under Rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison.

(2) Pending the conclusion of the inquiry under sub-rule (1) the Court may, in its discretion, order the judgment-debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required

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ORDER 21, RULE 40 — SYNOPSIS

1. Scope.
2. Inquiry under sub-rule (1).
3. Order for instalments.
4. Appeal.
5. Powers of Revenue Officers.

1. Scope. — (1) The word 'may' in sub-rule (3) shows that the Court has discretion to order or to refuse to order arrest, where the judgment-debtor appears under this rule even when the decree-holder is not debarred from executing his decree by arrest of the judgment-debtor because of the proviso to Section 51. AIR 1944 Mad 191 (191, 192).

(2) A judgment-debtor committed to the civil prison will be deemed to be in unlawful detention if he is delivered to an officer other than the officer named in the warrant of committal issued under the rule, and will be entitled to be released from such custody. (1885) 11 Cal 527 (530).

(3) If the Court has no jurisdiction at all to entertain the application for execution then no notice can be issued under Rule 37 and there can be no question of any proceedings under this rule. AIR 1947 Cal 262 (264): ILR (1944) 2 Cal 588.

(4) Simultaneous execution both against the property and person of the judgment-debtor is allowed under Order 21, Rule 30. But the Court has a discretion under Order 21, Rule 21 to refuse simultaneous execution and to allow the decree-holder to avail himself of only one mode of execution at a time. AIR 1957 Mad 777 (779).

(5) Execution of decree by arrest and detention of judgment-debtor in prison — Judgment-debtor cannot waive privilege conferred on him by Section 51. AIR 1968 Pat 218 (222): ILR 46 Pat 1142 (DB).

(6) Requirements of Section 51 need not be complied with while acting under Rule 37 or under sub-rules (1) and (2) of Rule 40. Order under sub-rule (3) of Rule 40 has to be made subject to provisions of Section 51. AIR 1959 Mys 94 (95): 36 Mys LJ 814 (DB) ** AIR 1961 Bom 23 (24): 62 Bom LR 599.

(7) There must, be an order of the Munsif leaving the judgment-debtor in the custody of a particular officer of the Court and an order to produce the judgment-debtor at the expiration of the period specified. AIR 1962 Ker 258 (260): 1962 Ker LT 169: 1962 (2) Cri LJ 372 (DB).

2. Inquiry under sub-rule (1). — (1) The procedure to be followed, when the judgment-debtor appears in Court, should be according to what is laid down in this rule and it should be strictly followed. The judgment-debtor may or may not file any written reply. It is for the decree-holder to lead his evidence in the presence of the judgment-debtor. It is when the decree-holder has led prima facie evidence in support of his application that the judgment-debtor has to be given an opportunity of showing cause why he should not be committed to the civil prison. AIR 1955 All 402 (404) (DB) ** AIR 1953 Ajmer 16 (1) (16) ** AIR 1964 Ker 264 (265): 1962 Ker LJ 1397 (DB) ** ILR (1960) Cut 33 (39) (DB) ** AIR 1959 Mys 79 (80): 36 Mys LJ 364.

[See also AIR 1957 Mad 777 (779).]

(2) If the case falls within any of the clauses of the proviso to Section 51 then the Court has to record its reasons in writing that the judgment-debtor should be committed to prison for one of the five reasons set out therein. If the cause is insufficient the Court is bound to order

(3) Upon the conclusion of the inquiry under sub-rule (1) the Court may, subject to the provisions of Section 51 and to the other provisions of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:

Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the Court may, before making the order of detention, leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) When the Court does not make an order of detention under sub-rule (3) it shall disallow the application and, if the judgment-debtor is under arrest, direct his release.

(a) Substituted by Section 4 of the Code of Civil Procedure (Amendment) Act, XXI of 1936.

Order 21, Rule 40 — Note 2 (contd.)

arrest. If, on the other hand, the decree-holder fails in the discharge of his burden to prove that the circumstances specified in the section exist, the Court is equally bound to reject the application. AIR 1957 Mad 777 (779).

(3) There are two alternative stages at which a request for an inquiry can be made by the judgment-debtor. The first is where he appears before the Court in obedience to a notice issued under R. 37; and the alternative stage is where he is brought before the Court after being arrested in execution of a decree for payment of money. A request by the judgment-debtor for such an inquiry before even a notice under Rule 37 is issued is premature and cannot be granted. AIR 1953 Trav-Co 624 (624) (DB) ** (1964) 2 Andh WR 38 (DB).

(4) Decree-holder producing his evidence — Judgment-debtor is not entitled to adjournment of case to show cause on later date. AIR 1964 All 344 (344, 345): 1963 All WR (HC) 582 ** AIR 1968 Delhi 101 (104): (1967) 69 Pun LR (D) 328.

(5) Execution of decree by arrest and detention of J. D. in prison — Onus of proof to bring a case within one of more clauses of proviso to Section 51 is on the decree-hol er. AIR 1968 Pat 218 (220): ILR 46 Pa. 1142 (DB).

(6) Demand notice — Demand not clear — Demand does not constitute request for payment of decretal amount. 1964 BLJR 617 (621, 622).

(7) Decree-holder has to prove that the judgment-debtor refused or neglected to pay the decree-holder's dues. ILR (1960) Cut 33 (37, 38) (DB).

3. Order for instalments.— (1) Although this rule and Rule 39 do not specifically direct an order for instalments first, there is no impediment in adopting, in suitable cases under Section 51, the recognised practice in England not to make an order of committal to prison on the first application but to order payment by instalments. AIR 1955 Mad 409 (411) (DB).

(2) Execution by arrest of judgment-debtor — Order for instalment payment — (Doubtful whether Court has power to allow). AIR 1964 Ker 264 (265): 1962 Ker LJ 1397 (DB).

(3) Application for execution by arrest of judgment-debtor — Court can direct judgment-debtor to pay by instalment within period of six months, failing which he was to be arrested and detained in civil prison — Order is not without jurisdiction. AIR 1961 Raj 243 (244): 1960 Raj LW 530 (DB).

(4) Court ordering judgment-debtor to deposit part of decretal amount immediately and pay up balance in instalments within six months — Upon failure judgment-debtor to be arrested and detained in civil prison — Deposit made by judgment-debtor withdrawn by decree-holder — Decree-holder is estopped from challenging the order. AIR 1961 Raj 243 (244): 1960 Raj LW 530 (DB).

4. Appeal.— (1) By the operation of Sections 2 (2) and 47 of this Code, an appeal lies from an order disallowing an application for the arrest and imprisonment of the judgment-debtor as well as from an order refusing him exemption from arrest. AIR 1919 Lah 15 (16): 1 Lah 77 (DB) ** AIR 1933 Pat 248 (248) (DB) ** AIR 1917 Mad 187 (187) (DB).

5. Powers of Revenue Officers.— (1) When the income-tax defaulter is brought after arrest or appears before him, the Collector after hearing the decree-holder and the defaulter and giving the defaulter opportunity to show cause why he should not be committed to Civil prison, may issue orders for his detention, subject to provisions of the Civil P. C. (1959) 37 ITR 375 (379) (Andh Pra) (DB).

HIGH COURT AMENDMENTS

Allahabad

Under Section 4 of the Code of Civil Procedure (Amendment) Act XXI of 1936 the amendments to Rule 40 made by the above High Court prior to that Act have been repealed.

Andhra Pradesh

The following sub-rules shall be added to Rule 40:

"(6) During the temporary absence of the Judge who issued the warrant under Rule 37 or 38, the warrant of committal may be signed by any other Judge of the same Court or by any Judicial Officer superior in rank who has jurisdiction over the same locality or where the arrest is made on warrant issued by the District Judge, the warrant of committal may be signed by any Subordinate Judge or District Munsif empowered in writing by the District Judge in this behalf.

(7) No judgment-debtor shall be committed to the civil prison or brought before the Court from the custody to which he has been committed pending the consideration of any of the matters mentioned in sub-rule (1) unless and until the decree-holder pays into Court such as the Judge may think sufficient to meet the travelling and subsistence expenses of the judgment-debtor and the escort.

Sub-rule (5) of Rule 39 shall apply to such payments".

Bombay: Dadra and Nagar Haveli[a]

In Order XXI, Rule 40, after the existing sub-rule (5), add the following as new sub-rules (6), (7) and (8):—

(6) When a judgment-debtor is ordered to be detained in the custody of an officer of a Court under sub-rule (2) or the proviso to sub-rule (3) above, the Court may direct the decree-holder to deposit such amount as, having regard to the specified or probable length of detention, will provide:—

(a) for the subsistence of the judgment-debtor at the rate to which he is entitled under the scales fixed under Section 57, and

(b) for the payment to the officer of the Court in whose custody the judgment-debtor is placed of such fees (including lodging charges) in respect thereof as as the Court may by order fix:

Provided—

(i) that the subsistence allowance and the fees payable to the officer of the Court shall not be recovered for more than one month at a time, and

(ii) that the Court may from time to time require the decree-holder to deposit such further sums as it deems necessary.

(7) If a decree-holder fails to deposit any sum as required under sub-rule (6) above, the Court may disallow the application and direct the release of the judgment-debtor.

(8) Sums disbursed by the decree-holder under sub-rule (6) shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Gujarat

Sub-rules (6) and (7) added to Rule 40 are the same as those of Madhya Pradesh [17-8-1961].

Kerala: Laccadive, Minicoy and Amindivi Islands[a]

Sub-rules (6) and (7) are the same as in Madras with this difference that for the words "District Munsif" in sub-rule (6) the word "Munsif" is substituted [9-6-1959].

[a] See Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 (2).

Madhya Pradesh

Same as that of Bombay [16-9-1960].

Insert the following as sub-rules (6), (7) and (8):

"(6) When a judgment-debtor is ordered to be detained in the custody of an officer of the Court under sub-rule (2) or the proviso to sub-rule (3) above, the

Court may direct the decree-holder to deposit such amount as, having regard to the specified or probable length of detention, will provide :

(a) for the subsistence of the judgment-debtor at the rate to which he is entitled under the scales fixed under Section 57;

(b) for the payment to the officer of the Court in whose custody the judgment-debtor is placed of such fees (including lodging charges) in respect thereof as the Court may by order fix :

Provided (i) that the subsistence allowance and the fees payable to the officer of the Court shall not be recovered for more than one month at a time, and

(ii) that the Court may from time to time require the decree-holder to deposit such further sums as it deems necessary.

(7) If a decree-holder fails to deposit any sum as required under sub-rule (6) above, the Court may disallow the application and direct the release of the judgment-debtor.

(8) Sums disbursed by the decree-holder under sub-rule (6) shall be deemed to be costs in the suit :

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed" [16-9-1960].

Madras and Pondicherry

(i) For old sub-rule (6) substitute the following :

"(6) During the temporary absence of the Judge who issued the warrant under Rule 37 or 38 the warrant of committal may be signed by any other Judge of the same Court or by any Judicial Officer superior in rank who has jurisdiction over the same locality, or, where the arrest is made on a warrant issued by the District Judge, the warrant of committal may be signed by any Subordinate Judge or District Munsif, empowered in writing by the District Judge in this behalf, and the Judge signing the warrant of committal in the above cases shall also have the same powers as the Judge who issued the warrant in respect of passing such orders as may be appropriate under sub-rules (1), (3) and (5) of this rule" [17-3-1954].

(ii) Add the following sub-rule :

"(7) No judgment-debtor shall be committed to the civil prison or brought before the Court from the custody to which he has been committed pending the consideration of any of the matters mentioned in sub-rule (1) unless and until the decree-holder pays into Court such sum as the Judge may think sufficient to meet the travelling and subsistence expenses of the judgment-debtor and the escort.

Sub-rule (5) of Rule 39 shall apply to such payments". See Act 26 of 1968, S. 3 and Sch., Pt. II [w.e.f. 5-9-1968].

Mysore

To Rule 40 add the following as sub-rules (6) and (7) :

(6) During the temporary absence of the Judge who issued the warrant under Rule 37, the warrant of committal may be signed by any other Judge of the same Court or by any Judicial Officer superior in rank who has jurisdiction over the same locality, or, where the arrest is made on a warrant issued by the District Judge, the warrant of committal may be signed by any Judge empowered in writing by the District Judge in this behalf.

(7) No judgment-debtor shall be committed to the civil prison or brought before the Court from the custody to which he has been committed pending the consideration of any of the matters mentioned in sub-rule (1) unless and until the decree-holder pays into Court such sum as the Judge may think sufficient to meet the travelling and subsistence expenses of the judgment-debtor and the escort. The provisions of sub-rule (5) of Rule 39 shall apply to such payments [30-3-1967].

ATTACHMENT OF PROPERTY

[See Sections 60 to 64 and 136.]

R. 41. Examination of judgment-debtor as to his property.—Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—

(a) the judgment-debtor, or

(b) in the case of a corporation, any officer thereof, or

(c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

[1882 and 1877, S. 267; 1859, S. 219.]

ORDER 21, RULE 41 — SYNOPSIS

1. Scope and object.
2. "Decree for payment of money".
3. "Any other person".
4. Production of books of account.

1. Scope and object.— (1) The object of the rule is to obtain discovery for purposes of execution in cases where there is any difficulty or cause for delay in obtaining particulars of the judgment-debtor's property. AIR 1938 Mad 771 (772).

[See also AIR 1942 Sind 87 (88, 89): ILR (1942) Kar 173.]

(2) An application under this rule can be made at any stage, though it should not be allowed, if it is calculated to harass any person by personal examination when an order of examination or production is made ex parte. Except in very exceptional circumstances the Court should never make such an order without in the first instance giving a notice to the party against whom the order is sought. AIR 1942 Bom 100 (101): ILR (1942) Bom 128.

(3) It is open to the Court to hear the objections of the respondent without an application by him. AIR 1916 Cal 228 (229): 43 Cal 285.

(4) The provisions of this rule come into effect only after a decree has been passed and cannot be invoked in the suit stage. AIR 1934 Mad 199 (201): 57 Mad 635.

(5) The power of the Court under this rule is discretionary. AIR 1939 Mad 699 (702).

(6) When an application filed under Order 21, Rule 41 was pending, held it was not proper for the High Court to decide whether it was open to the judgment-debtor to contend in the executing Court that the decree was a nullity and hence could not be executed. (1967) 1 Com LJ 267: 39 Com Cas 313 (Pat).

2. "Decree for payment of money".— (1) A decree directing an enquiry as to damages is a decree for payment of money and a person who has obtained such a decree is entitled to invoke the aid of this rule in order to enable him to effect an attachment, in pursuance of the right given to him under Order 21, Rule 42, before the amount due from the judgment-debtor has been ascertained. AIR 1939 Mad 699 (699, 701).

3. "Any other person".— (1) The Court may order the examination of any person who is alleged to be a mortgagee in possession of the property of the judgment-debtor and if it finds such person not to be in possession, it may order the attachment of the property. (1893) 17 Bom 514 (518, 519) (DB).

(2) Permission should not be granted to a judgment-debtor to examine a garnishee on the affidavit filed by him denying his liability to the judgment-debtor. AIR 1933 Sind 350 (351).

(3) The discretionary power under this rule to examine a garnishee must ordinarily be limited to cases where the garnishee admits the debt. In such cases the executing Court may find out the exact extent of the debt before ordering execution. AIR 1938 Mad 771 (773, 774).

4. Production of books of account.— (1) To prevent the judgment-debtor from defeating the decree-holder's rights, the Court may require the former to produce his books of account and leave them in court-custody. (1871) 3 NWPHCR 334 (335) (DB).

(2) A garnishee may be directed to produce his books of account or other documents for finding out whether there are any dealings between him and the judgment-debtor making the existence of a debt probable. AIR 1938 Mad 771 (774).

R. 42. Attachment in case of decree for rent or mesne profits or other matter amount of which to be subsequently determined.—Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

[1882 and 1877, S. 255. See O. 21, Rr. 12, 15 and 16.]

R. 43. Attachment of moveable property other than agricultural produce, in possession of judgment-debtor.—Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

[1882 and 1877, S. 269; 1859, S. 233. See Ss. 2, 13, 62 and 145.]

ORDER 21, RULE 42

1. Scope.— (1) Although, unlike O. 38, Rule 5, this rule makes no specific provision for avoiding attachment by furnishing security, the Court will be justified in requiring security before acting under this rule. (1912) 6 Ind Cas 708 (710) (DB) (Cal) ** AIR 1917 All 153 (154) (DB).

(2) This rule treats the attachment as a proceeding in execution and the application for attachment may, therefore, be treated as one for execution. AIR 1941 Cal 357 (359): ILR (1941) 1 Cal 363 (DB).
[See also AIR 1965 Ker 288 (293): 1965 Ker LJ 111.]

(3) As soon as the amount is ascertained, the application for attachment becomes one for the execution of the decree for the realization of the ascertained sum of money and the applicant will also be entitled to share in a rateable distribution of assets under Section 73. AIR 1934 Mad 604 (605): 58 Mad 233 (DB).

(4) On an application under this rule the Court has no jurisdiction to enter into the an investingation of claims and obiections to the proposed attachment. Hence, an order disallowing an application on the strength of the investigation into claims is illegal. AIR 1941 Cal 357 (359, 360): ILR (1941) 1 Cal 363 (DB).

(5) The considerations which would govern an application for attachment before judgment do not apply to an application under this rule. AIR 1941 Cal 357 (360): ILR (1941) 1 Cal 363 (DB).

(6) Expression, 'any other matter:' — Does not include rendering of accounts by member of joint family — Petition for attachment of immovable property of other member — Not maintainable. ('61) 27 Cut LT 412.

(7) Attachment under Order 38, Rule 5 cannot be regarded as one under Order 21, Rule 42, even if Order 21, Rule 42 were the proper provision of law to apply. AIR 1965 Ker 288 (293): 1965 Ker LJ 111.

(8) The words 'decree for payment of money' include a decree for unascertained mesne profits. AIR 1966 Mad 460 (461): 79 Mad LW 276.

(9) Proceedings Order 21, Rule 42, available — It is no bar to proceed under Order 38, Rule 5. AIR 1965 Ker 288 (291, 292): 1965 Ker LJ 111.

2. Attachment under preliminary decree. — (1) An attachment of the property of a judgment-debtor under a preliminary decree fixing his liability can be validly made under this rule pending enquiry as to the amount due. (1867) 8 Suth WR 9 (10) (DB) ** AIR 1917 All 153 (154) (DB).

(2) Where the preliminary decree does not fix the liability but directs enquiry in order to ascertain the liability, this rule does not apply. AIR 1926 Sind 178 (179) (DB) ** AIR 1929 Mad 641 (648): 52 Mad 563 (FB) ** AIR 1937 Cal 4 (7) (DB).

(3) An operative decree obtained after the death of a defendant, by which the extent and quality of his liability, already declared in general terms, are for the first time ascertained, cannot bind the representative of the deceased, unless they were made parties to the suit which it was pronounced. To such a case the present rule can have no application. (1891) 13 All 53 (65): 17 Ind App 150 (PC).

3. Enquiry into state of account in suits under Section 92.— (1) This rule applies also to the case of trustee against whom a decree has been passed in a suit under Section 92 of this Code, with a direction to take accounts of the trust moneys. AIR 1917 All 153 (154) (DB).

ORDER 21, RULE 43

1. Scope. — (1) An order for attachment without specifying whether the property is

Order 21, Rule 43 — Note 1 (contd.)
in the possession of the judgment-debtor or of a third person is not proper. AIR 1941 Rang 347 (348): 1941 Rang LR 592.

(2) The attachment is legally effected only by actual seizure. AIR 1954 Bom 251 (254): ILR (1954) Bom 695 (DB) ** AIR 1939 Cal 316 (319) (DB).

[See AIR 1931 All 142 (142).]

(3) Where a claimant is found to have some share or interest in the property attached under this rule, the proper order is to release the entire property from attachment and attach only the interest of the judgment-debtor under Rule 47. ILR (1955) Mys 461 (462).

(4) Suit for arrears of rent decreed — Moveable property, left by defendant in house, attached — Decree satisfied by deposit in Court — Order to restore possession of house besides moveables is without jurisdiction and wholly unenforceable. AIR 1953 All 490 (490): 1953 All LJ 171 (1).

(5) Under Presidency Towns Insolvency Act, Section 52 (2) (c) after attachment the property cannot be considered to be in possession of the insolvent or under his order or disposition and that the Official Assignee cannot claim any rights over them. AIR 1953 Bom 101 (104, 105): 54 Bom LR 757.

2. "Moveable property".— (1) A decree is not treated as "moveable property" for purposes of attachment under the Code. AIR 1940 Nag 270 (272) (DB).

(2) The term "agricultural produce" as used in the Code is confined to growing crop standing on the land or cut crop lying on the threshing floor or fodder-stack. The grain as well as the straw can both be attached. AIR 1962 Raj 82 (83): 1961 Raj LW 477.

(3) Right to purchase shares exercisable by judgment-debtor is movable property. AIR 1966 Cal 134 (140): 69 Cal WN 815 (DB).

(4) Money decrees are not treated as movable property for purpose of special provisions of the Code relating to attachment. ILR (1967) 3 Mad 615 (623) (DB).

3. "Actual seizure".— (1) Unlike a prohibitory order under Rule 46, attachment by actual seizure involves a change of possession from the judgment-debtor to the Court. AIR 1914 Mad 126 (127): 38 Mad 972 (FB).

[See also AIR 1943 Lah 92 (96) (DB).]

(2) Actual seizure does not always imply the doing of something which would bring the property into physical contact with the person attaching. AIR 1930 Mad 670 (671) ** (1887) 11 Bom 448 (454) (DB).

(3) Any overt Act short of direct physical apprehension, sufficient to pass possession to the Court, amounts to actual seizure, as for example, the affixing of the Court seal to the outer door of a warehouse containing the property to be attached, or in the case of an attachment of cattle already tied and secured the announcement on the spot by the attaching officer of his intention to attach. (1904) 27 Mad 346 (347) (DB) ** AIR 1930 Mad 670 (671). (Attachment of cattle.)

(4) The seizure by a peon of the attaching officer is valid if done in the presence and under the instructions of such officer. AIR 1929 Mad 188 (189).

(5) Continuance of attachment necessarily involves continuance of Court custody. If such custody is once lost, there can be no further attachment without a fresh seizure. AIR 1930 Rang 247 (248): 8 Rang 491 (DB).

(6) The words "actual seizure" only mean the taking of physical possession and do not mean seizure by means of force or violence of the property on the person of the judgment-debtor. AIR 1946 Sind 166 (171): ILR (1946) Kar 57 (DB).

(7) Allahabad High Court Rules, Rule 116 — Property attached by actual seizure is in law in possession of Court, whether it is in custody of amin or sapurdar — If it is kept with decree-holder, he is bailee of the supurdar. **AIR 1961 SC 803 (805, 806): (1962) 1 SCR 75.**

(8) Orders prohibiting judgment-debtors from exercising his right to purchase shares and restraining other parties from receiving an assignment or transfer of that right is sufficient seizure. AIR 1966 Cal 134 (140): 69 Cal WN 815 (DB).

4. Effect of wrongful attachment.— (1) An attachment wrongly made under this rule instead of under R. 46 is not a nullity and it continues to be an attachment in law unless and until it is withdrawn. AIR 1956 Cal 373 (374) (DB).

(2) Attachment of movables — Judgment-debtor found co-owner — Attachment effected long ago — Total release at the stage of second appeal held not fair. AIR 1963 Ker 236 (238): 1963 Ker LJ 243.

(3) Moveable property in possession of third person — Application for execution lies under Order 21, Rule 46 (1) (c) and not under Order 21, Rule 43. 1956 MBLJ 1293 (1294): 1956 MBLR (Civil) 655.

(4) Seizure by attachment of goods in possession of a pledgee amounts to wrongful deprivation of goods — Government officers responsible for the illegal seizer, and Union of India were held liable for damages to the goods while in custody of Government. AIR 1966 Bom 134 (139, 140): 67 Bom LR 823.

5. "Shall be responsible for the due custody thereof."— (1) The attaching officer is primarily responsible for the safe custody of moveable property attached by him. AIR 1934 All 357 (358) (DB) ** AIR 1939 Cal 316 (319) (DB).

[See also (1953) 57 Cal WN 590 (596) ** AIR 1936 Rang 12 (14).]

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta—See Assam H. C. Order, 1948, Cl. (6) and Act 27 of 1962, Ss. 13 and 15 [w. e. f. 1-12-63.]

Bombay: Dadra and Nagar Haveli

In Order XXI, for the existing Rule 43 and its marginal note, substitute the following :—

43. Attachment of moveable property other than agricultural produce, in possession of judgment-debtor.—(1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of any of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once :

Provided also that when the property attached consists of live stock, or other articles which cannot be conveniently removed and the attaching officer does not act under the first proviso to this rule, he may, at the instance of the judgment-debtor, or of the decree-holder, or of any person claiming to be interested in such property, leave it in the village or at the place where it has been attached in the charge of the station pound-keeper, if any, or if this cannot be done, in the charge of the decree-holder or the judgment-debtor or the person claiming to be interested in such property, or of such respectable person who will undertake to keep such property, on his entering into a bond with one or more sureties, in an amount not less than the value of the property, that he will take proper care of such property and produce it when called upon to do so.

Order 21, Rule 43 — Note 5 (contd.)

(2) This rule deals only with the liability of the attaching officer so far as the Court is concerned. It does not affect in any way the liability of a surety who expressly takes charge of the attached property, either to the Court or to the decree-holder. AIR 1921 All 220 (220, 221).

(3) Where property is seized under this rule and entrusted to a sapurdar, the judgment-debtor's liability under the decree is not thereby put an end to or reduced and where the property is lost from the custody of the sapurdar, the decree-holder can execute the decree against the judgment-debtor for the full amount. AIR 1943 Lah 92 (96) (DB).

(4) Where the sapurdar returns the property to the judgment-debtor without an order of the Court, on the decree being satisfied, he cannot be proceeded against at the instance of persons who are strangers to the case. AIR 1941 Nag 339 (342): ILR (1942) Nag 198.

(5) Attachment of movable property before judgment — Property attached kept in custody of third party on his executing bond to return goods and to pay price of goods if he failed to do so — Goods destroyed by fire — Surety can plead that he was not liable as goods were destroyed by act of God. AIR 1962 Assam 23 (27): (1960) 1 Assam LR 243 (DB).

(6) Property attached kept in custody of supardar — Surety bond executed by supardar — A subsequent surety bond by another person for performance of the decree does not affect the liability of the supurdar under his surety bond. ILR (1963) 13 Raj 391.

(7) Attachment of judgment-debtor's property before judgment — Petitioner in possession as Supratdar — Execution of decree against judgment-debtor by the third person — Warrant issued on Supratdar is for delivery and not for attachment — Order 21, Rule 46 has no application. 1961 Jab LJ 272.

6. Security bond to produce attached property. — See Section 145.

7. Attachment of property — Time for.— (1) It is not against the law to attach the property at 6 P. M. or 6-30 P. M. if on the day, the sunset is after 6-30 P. M. AIR 1960 All 453 (455): 1960 Cri LJ 1040: 1959 All LJ 781.

Order 21, Rule 43 (A. P. and Madras) — Note 1

(1) Toda charges, paid to process-server for safe custody of atached property, not being authorised by law — Decree-holder cannot be directed to pay them. AIR 1966 Andh Pra 323 (324): (1966) 1 Andh WR 153.

(2) The attaching officer shall make a list of the property attached and shall obtain thereto the acknowledgment of the person in whose custody the property is left, and if possible, of the parties to the suit, and of at least one respectable person in attestation of the correctness of the list. If the property attached includes both live-stock and other articles, a separate list of the live-stock shall similarly be prepared and attested [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Calcutta : Andaman and Nicobar Islands

Read Rule 43 as follows :

"Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure at the identification of the decree-holder or his agent, and, save as otherwise prescribed, the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized does not, in the opinion of the attaching officer, exceed twenty rupees in value, or is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once" [3-11-1933 and 29-5-1941].

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Gujarat

Same as that of Madhya Pradesh [17-8-1961].

Kerala: Laccadive, Minicoy and Amindivi Islands[a]

For Rule 43, the following rule shall be substituted, namely :—

"43. Attachment of moveable property other than agricultural produce in possession of judgment-debtor.—(1) Where the property to be attached is moveable property other than agricultural produce in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and

Provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in Form No. 15-A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for; or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rule 55 or Rule 57 or 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

(3) **When attached property is kept in the village or place where it is attached.**—Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the properties seized.

(4) **Procedure when attached property is neither sold nor kept in the village or place where it is attached.**—If attached property is not sold under the first proviso to Rule 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

(5) **Where attached property kept in the village etc., is live-stock.**—Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor or any person claiming to be interested in such live-stock from making such arrangements, for feeding the same as may not be inconsistent with its safe custody.

(6) **Direction for sums expended by attaching officer.**—The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings" [9-6-1959].

[a] See Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 (2).

Madhya Pradesh

Substitute the following for Rule 43 :

"43. Attachment of movable property other than agricultural produce in possession of judgment-debtor.—(1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of any of his subordinates and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once; and

Provided also that when the property attached consists of live-stock, agricultural implements or other articles which cannot be conveniently removed, and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or any person claiming to be interested in such property leave it in the village or at the place where it has been attached—

(a) in the charge of the judgment-debtor or of the station pound-keeper, if any, or

(b) in the charge of the decree-holder, or of the person claiming to be interested in such property or of such respectable person as will undertake to keep such property, on his entering into a bond with one or more sureties in an amount not less than the value of the property, that he will take proper care of such property and produce it when called for.

Order 21, Rule 43 (M. P.) — Note 1

(1) See the following case. AIR 1943 Nag 172 (173): ILR (1943) Nag 699. (Rule 197 of the former Nagpur High Court contemplates that it is primarily the duty of the decree-holder to pay the supratdar the costs of custody and transport of heavy and bulky goods.)

(2) The attaching officer shall make a list of the property attached and shall obtain thereto the acknowledgment of the person in whose custody the property is left, and if possible, of the parties to the suit, and of at least one respectable person in attestation of the correctness of the list. If the property attached includes both live-stock and other articles, a separate list of the live-stock shall similarly be prepared and attested" [16-9-1960].

Madras and Pondicherry

Substitute the following rule for Rule 43 :

"43. (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once; and

Provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in Form No. 15A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for; or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rule 55 or Rule 57 or Rule 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment" [Dis. No. 166 of 1913]; see Act 26 of 1968, S. 3 and Sch., Pt. II [w.e.f. 5-9-68].

Mysore

Delete Rule 43 and substitute the following :—

"43. (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attachment officer shall keep the property in his own custody or in the custody of one of his subordinates and shall be responsible for the custody thereof :

Provided that, when the property seized is subject to speedy and natural decay or when expenses of keeping it in custody are likely to exceed its value the attachment officer may sell it at once, and

Provided also that, when the property attached consists of live-stock, or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debor or of the decree-holder or any person claiming to be interested in such property leave it in the village or place where it has been attached,—

(a) in the charge of the person at whose instance the property is retained if such person enters into a bond in the prescribed form with one or more sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at

such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rule 55 or Rule 57 or Rule 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before the attachment." (30-3-1967.)

Orissa

Same as that of Patna.

Patna

Substitute the following for Rule 43:

"43. Where the property to be attached is moveable property, other than agricultural produce in the possession of the judgment-debtor the attachment shall be made by actual seizure, and the attaching officer shall be responsible for the due custody thereof:

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once" [18-10-1933].

Punjab, Haryana and Chandigarh

Renumber the rule as sub-rule (1) and add the following further proviso and sub-rules (2) and (3):

"and provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in Form No. 15A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance, or

(c) in the charge of a village lambardar or such other respectable person as will undertake to keep such property, subject to the orders of the Court, if such person enters into a bond in Form No. 15B of Appendix E with one or more sureties for its production.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rules 55, 57 or 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

(3) When property is made over to a custodian under sub-clause (a) or (c) of Cl. (1), the schedule of property annexed to the bond shall be drawn up by the attaching officer in triplicate, and dated and signed by—

(a) the custodian and his sureties,

(b) the officer of the Court who made the attachment,

(c) the person whose property is attached and made over,

(d) two respectable witnesses.

One copy will be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered, one copy

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Order 21, Rule 43 (Patna) — Note 1

(1) See the following case. AIR 1957 Pat 209 (210, 211) (DB). (Attachment of movables have to be made by actual seizure — Attaching officer is responsible for custody of attached property — Judgment-debtor's factory attached — Judgment-debtor asking for leave to work factory — Court can put him on terms.)

will be made over to the person whose property is attached and one copy will be made over to the custodian" [13-12-1928]; see Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

Rajasthan

In Order XXI, Rule 43 :—

(a) the existing Rule 43 shall be renumbered as sub-rule (1) of that rule, and in sub-rule (1) as so renumbered, the following proviso shall be further inserted :

"Provided further that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may, at the instance of the judgment-debtor, the decree-holder or any person claiming to be interested in such property, leave it in the village or at the place where it has been attached —

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in Form No. 15A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for; or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided, and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court, be paid in advance; or

(c) in the charge of a village Patwari or such other respectable person as will undertake to keep such property subject to the order of the Court, if such person enters into a bond in Form No. 15B of Appendix E to this Schedule, with one or more sureties for its production."

(b) after sub-rule (1) as so renumbered, the following sub-rule shall be inserted :—

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rules 55, 57 or 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

(3) When property is made over to a custodian under paragraph (a) or (c) of the second proviso to sub-rule (1), the schedule of property annexed to the bond shall be drawn up by the attaching officer in triplicate, and shall be dated and signed by—

(a) the custodian and his surety;

(b) the officer or the Court who made the attachment;

(c) the person whose property is attached and made over; and

(d) two respectable witnesses.

One copy shall be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered, one copy shall be made over to the person whose property is attached and one copy shall be made over to the custodian" [11-3-1965].

HIGH COURT AMENDMENTS

Rules 43A to 43D

(Andhra Pradesh) Rules 43A and 43B

Same as those of Madras.

Rule 43A

Bombay: Dadra and Nagar Havelia

In Order XXI, after the existing Rule 43, insert the following with marginal note:—

"**43A. Attachment of live-stock.**—(1) When an application is made for the attachment of live-stock the Court may demand, in advance in cash at rates to be fixed half-yearly or oftener, if necessary, by the Courts with the sanction of the District Judge, the amount requisite for the maintenance of the live-stock from the probable time of attach-

ment to the probale time of sale, or may, at its discretion, make successive demands for portions of such period. The rates shall include cost of feeding, tending and conveyance, and all other charges requisite for the maintenance and custody of the live-stock.

(2) If the live-stock be entrusted to any person other than the judgment-debtor the amount paid by the decree-holder for the maintenance of the live-stock or a part thereof may, at the discretion of the Court, be paid to the custodian of the live-stock for their maintenance. The produce, such as milk, eggs, etc., if any, may either be sold as promptly as possible for the benefit of the judgment-debtor or may, at the discretion of the Court, be set off against the cost of maintenance of the live-stock" [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

(Delhi and Himachal Pradesh) Rules 43A to 43D

Same as those of Punjab, see Act 26 of 1966, Ss. 7 and 17 [31-10-66; 1-5-67].

(Gujarat) Rule 43A

Same as sub-rule (1) of R. 43A, inserted by Madhya Pradesh [17-8-1961].

(Madhya Pradesh) Rule 43A

Insert the following as Rule 43A:

"43A. Attachment of live-stock.—(1) When an application is made for the attachment of live-stock the Court may demand, in advance in cash at rates to be fixed half-yearly, or oftener if necessary by the Courts with the sanction of the District Judge, the amount requisite for the maintenance of the live-stock from the probable time of attachment to the probable time of sale, or may, at its discretion, make successive demands for portion of such period. The rates shall include cost of feeding, tending and conveyance and all other charges requisite for the maintenance and custody of the live-stock.

(2) If the live-stock be entrusted to any person other than the judgment-debtor the amount paid by the decree-holder for the maintenance of the cattle, or a part thereof may, at the discretion of the Court, be paid to the custodian of the live-stock for their maintenance. The produce, such as milk, eggs etc., if any, may either be sold, as promptly as possible for the benefit of the judgment-debtor, or may, at the discretion of the Court, be set off against the costs of maintenance of the live-stock" [16-9-1960].

(Madras and Pondicherry) Rules 43A and 43B

Insert the following as Rules 43A and 43B:

"43A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to R. 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

43B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the court-house.

Nothing in this rule shall prevent the judgment-debtor or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings" [Dis. No. 166 of 1913]; see Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-1968].

(Mysore) Rules 43A and 43B

After Rule 43 and before Rule 44 insert the following as Rules 43-A and 43B :—

43A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of property seized.

(2) If attached property is not sold under the first proviso to Rule 43 or retained in the village or place where it is attached under the second proviso to that rule it shall be brought to the court-house and delivered to the proper officer of the Court.

43B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and if he fails to do so and if it is in the charge of an officer of the Court it shall be removed to the Court-house. Nothing in this rule shall prevent the judgment-debtor or any person claiming to be interested in such live-stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums, which have been expended by the attaching officer or are payable to him if not duly deposited or paid, be recovered from the proceeds of the property if sold or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings [30-3-1967].

(Orissa) Rule 43A

Same as that of Patna.

(Patna) Rule 43A

Insert the following as Rule 43A :

"43A. (1) The attaching officer shall, in suitable cases, keep the attached property in the village or locality either :—

(a) in his own custody in any suitable place provided by the judgment-debtor, or in his absence by any adult member of his family who is present, on his own premises or elsewhere;

(b) in the case of live-stock and provided the decree-holder furnishes the necessary funds, in the local pound, if a pound has been established in or near the village, in which case the pound-keeper will be responsible for the property to the attaching officer, and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon;

(c) in the custody of a respectable surety, provided the decree-holder furnishes the cost of maintenance and other costs, if any.

(2) If in the opinion of the attaching officer the attached property cannot be kept in the village or locality, through lack of a suitable place, or satisfactory surety, or through failure of the decree-holder to provide necessary funds, or for any other reason, the attaching officer shall remove the property to the Court at the decree-holder's expense. In the event of the decree-holder failing to provide the necessary funds, the attachment shall be withdrawn.

(3) Whenever attached property is kept in the village or locality as aforesaid the officer shall forthwith report the fact to the Court, and shall with his report forward an accurate list of property seized, such that the Court may thereon at once issue the proclamation of sale prescribed by Rule 66.

Order 21, Rule 43-A (Patna) — Note 1

(1) See the following case. AIR 1957 Pat 209 (210, 211) (DB). (Attachment of movable has to be by actual seizure — Attaching officer is responsible for custody of attached property — Judgment-debtor's factory attached — Judgment-debtor asking for leave for working factory — Court can put judgment-debtor on terms.)

(4) If the debtor shall give his consent in writing to the sale of property without awaiting the expiry of the term prescribed in Rule 68, the officer shall receive the same and forward it without delay to the Court for its orders.

(5) When property is removed to the Court it shall be kept by the nazir on his own sole responsibility in such place as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the court-premises, or in the personal custody of the nazir, he may, subject to approval by the Court, make such arrangements, for its safe custody under his own supervision as may be most convenient and economical, and the Court may fix the remuneration to be allowed to the persons, not being officers of the Court, in whose custody the property is kept.

(6) When property remains in the village or locality where it is attached and any person other than the judgment-debtor shall claim the same, or any part of it, the attaching officer shall nevertheless, unless the decree-holder desires to withdraw the attachment of the property so claimed, maintain the attachment, and shall direct the claimant to prefer his claim to the Court.

(7) (a) If the decree-holder shall withdraw an attachment or it shall be withdrawn, under sub-rule (2) or sub-rule (9) the attaching officer shall inform the debtor, or in his absence any adult member of his family, that the property is at his disposal.

(b) In the absence of any person to take charge of it, or in case the officer shall have had notice of claim by a person other than the judgment-debtor, the officer shall, if the property has been moved from the premises in which it was seized, replace it where it was found at the time of seizure.

(8) Whenever live-stock is kept in the village or locality where it has been attached, the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer; but the latter shall, if required by the decree-holder, and on his paying for the same at the rate to be fixed by the District Judge and subject to the orders of the Court under whose orders the attachment is made, engage the services of as many persons as may be necessary, for the safe custody of it.

(9) In the event of the judgment-debtor failing to feed the attached live-stock in accordance with sub-rule (8), the officer shall call upon the decree-holder to pay forthwith, for feeding the same. In the event of his failure to do so, the officer shall proceed as provided in sub-rule (2) and shall report the matter to the Court without delay.

(10) When attached live-stock is brought to Court, the nazir shall be responsible for the safe custody and proper feeding of it so long as the attachment continues.

(11) If a pound has been established in or near the place where the Court is held, the nazir shall be at liberty to place in it such attached live-stock as can be properly kept there, in which case the pound-keeper will be responsible for the property to the nazir and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon.

(12) If there be no pound available, or if, in the opinion of the Court, it be inconvenient to lodge the attached live-stock in the pound, the nazir may keep it in his own premises, or he may entrust it to any person selected by himself and approved by the Court. The nazir will in all cases remain responsible for the custody of the property.

(13) Each Court shall from time to time fix the rates to be allowed for the custody and maintenance of the various descriptions of live-stock with reference to seasons and local circumstances. The District Judge may make any alteration he deems fit in the rates prescribed by Courts subordinate to him. Where there are two or more Courts in the same place, the rates shall be the same for each Court" [18-10-1933].

(Punjab, Haryana and Chandigarh)[a] Rules 43A to 43D

Insert the following as Rules 43A, 43B, 43C and 43D :

"43A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to Rule 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

(3) A custodian appointed under the second proviso to Rule 43 may at any time terminate his responsibilities by giving notice to the Court of his desire to be relieved of his trust and delivering to proper officer of the Court the property made over to him.

(4) When any property is taken back from a custodian, he shall be granted a receipt for the same.

43B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock, from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

43C. When an application is made for the attachment of live-stock or other moveable property, the decree-holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days, before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

43D. Any person who has undertaken to keep attached property under R. 43 (1) (c) shall be liable to be proceeded against as a surety under S. 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him" [13-12-1928].

[a] See Act 31 of 1966, Ss. 29 and 32 [1-11-66].

R. 44. Attachment of agricultural produce.—Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited,

and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the

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Order 21, Rule 43-D (Punjab) — Note 1

(1) See the following case. AIR 1958 Punj 348 (349, 350, 351). (Attached property in custody of sapurdar damaged — Petition against sapurdar for restoration of property is maintainable — Property attached and in custody of sapurdar ordered to be sold — Appeal by defendants — Defendants obtaining stay of execution — Property becoming unmarketable during appeal period — Appeal dismissed — Defendants are liable for deterioration — Damage to attaching creditor — Amount not capable of exact and accurate proof — Ascertainment of damages should be based on reasonable and just inferences.)

Order 21, Rule 44 — Note 1

(1) Agricultural produce, whether standing crop or severed from the soil, is moveable property. (1892) 14 All 30 (34) (DB) **(1882) 6 Bom 592 (593) (DB)**(1888) 11 Mad 193 (196) (DB).

(2) Unlike other moveable property agricultural produce of either description cannot be attached by actual seizure as provided in Rule 43. The custodia legis in

Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

[See Ss. 2 (13), 61.]

HIGH COURT AMENDMENTS

Assam and Nagaland

Same as that of Calcutta—See Assam H. C. Order, 1948, Cl. (6) and Act 27 of 1962, Ss. 13 and 15 [1-12-1963].

Calcutta: Andaman and Nicobar Islands

Insert the words "at the identification of the decree-holder or his agent," after the words "attachment shall be made" in R. 44 [29-5-1941].

HIGH COURT AMENDMENTS

Rule 44A

Bombay: Dadra and Nagar Haveli[a]

The following shall be inserted, namely:

"44A. Copy of the warrant of attachment to be sent to the Collector where agricultural produce is attached.—Where the property to be attached is agricultural produce, a copy of the warrant or the order of attachment shall be sent by post to the office of the Collector of the district in which the land is situate" [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Gujarat

Same as that of Bombay, except for the marginal note [17-8-1961].

R. 45. Provisions as to agricultural produce under attachment.—(1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor

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Order 21, Rule 44 — Note 1 (contd.)

the case of agricultural produce on attachment is only symbolical and is not validly created unless the rules of affixture herein provided are strictly complied with. AIR 1931 All 142 (142) ** AIR 1933 Rang 267 (268) ** AIR 1936 All 364 (365) ** AIR 1936 Sind 20 (23): 29 Sind LR 190.

(3) When it is proved that an attachment has been made it must be presumed, until the contrary is shown, that all the necessary formalities were duly observed. AIR 1935 All 436 (437). **(AIR 1934 PC 217: 15 Lah 836: 61 Ind App 371, Followed.)**

(4) This rule, like the preceding one, applies only when the property is in the possession of the judgment-debtor and not of a third party. AIR 1929 Lah 200 (201) ** AIR 1921 Sind 95 (95, 96): 15 Sind LR 128 (DB).

(5) The provisions of this rule do not apply to attachments effected under the **Madras** Revenue Recovery Act, 2 of 1864. AIR 1958 Ker 168 (169): ILR (1958) Ker 302: 1958 Cri L Jour 760 (DB).

Order 21, Rule 45 — Note 1

(1) The attachment of agricultural produce does not prevent the judgment-debtor from doing or continuing all necessary acts of husbandry with respect to the crop or produce, in default of any conditions imposed or orders passed by the Court to the contrary. AIR 1941 Pat 136 (137).

(2) In fact, the Court is bound, under this rule, to make proper arrangements for the custody, tending, cutting, gathering storing, maturing and preservation of the produce either at the instance of the judgment-debtor, or at the instance of the decree-holder or otherwise. The attached property continues to be in the possession of the Court during the process of husbandry. The right to cut and store does not entitle the judgment-debtor to take the produce away as under sub-rule (3) it continues to be under attachment although severed from the soil. AIR 1941 Pat 136 (137).

may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be cut or gathered.

[See S. 61.]

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as those of Calcutta—See Assam H. C. Order, 1948, Cl. (6) and Act 27 of 1962, Ss. 13 and 15 [w. e. f. 1-12-1963].

Bombay: Dadra and Nagar Haveli[a]

In Order XXI, Rule 45, for the existing sub-rule (1), and its marginal note substitute the following as sub-rule (1) and marginal note :—

"(1) **Provisions as to agricultural produce under attachment.**—Where agricultural produce is attached, the Court shall make such arrangement for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of growing crop shall specify the time at which it is likely to be fit to be cut or gathered, and the applicant shall deposit in Court at the time of the application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time." [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Calcutta : Andaman and Nicobar Islands

Add the following to sub-rule (1) :

"and the applicant shall deposit in Court such sum as the Court shall require in order to defray the cost of watching or tending the crop till such time" [2-3-1933].

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Gujarat

The following words shall be added to sub-rule (1) after substituting a semi-colon for the full stop :

"and the applicant shall deposit in Court at the time of the application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time" [17-8-1961].

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras [9-6-1959]; see Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 (2).

Madras and Pondicherry

Substitute a semicolon for the full-stop at the end of sub-rule (1), and add the following words :

"and the applicant shall deposit in Court within a date to be fixed by Court, such sum as the Court may deem sufficient to defray the cost of watching and tending the crop till such time" [13-10-1936]; see Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-1968].

Mysore

In Rule 45 delete sub-rule (1) and substitute the following :—

"45. (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient, and for the purpose of enabling the Court to make such arrangements, every application for attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered and the applicant shall deposit in Court within a date to be fixed by Court such sum as the Court may deem sufficient to defray the cost of watching and tending the crop till such time" [30-3-1967].

Orissa

Same as that of Patna.

Patna

Add to sub-rule (1) after deleting the full stop at the end of the sub-rule :

"and the applicant shall pay into Court such as he may from time to time be required by the Court to pay in order to defray the costs of such arrangements".

Punjab, Haryana and Chandigarh

Add the following to sub-rule (1) of Rule 45 :

"and with every such application such charges as may be necessary for the custody of the crop up to the time at which it is likely to be fit to be cut or gathered shall be paid to the Court" [7-4-1932]; see Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

R. 46. Attachment of debt, share and other property not in possession of judgment-debtor.—(1) In the case of—

(a) a debt not secured by a negotiable instrument,

(b) a share in the capital of a corporation,

(c) other moveable property not in the possession of the judgment-debtor, except property deposited in or in the custody of, any Court,

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ORDER 21, RULE 46 — SYNOPSIS

1. Attachment of debt, share, or other moveable property — General.
2. "Debt," meaning of.
3. Salary, whether a debt.
4. Attachment of mortgage debt.
5. Attachment of decree. See Rule 53.
6. Attachment of debt already paid by cheque.
7. Procedure where garnishee denies debt.
8. Set-off by garnishee of cross-debt.
9. Procedure where garnishee resides outside jurisdiction.
10. Procedure where garnishee admits liability but does not pay. See Note 7.
11. Attachment of shares.
12. Attachment of other moveable property.
13. Service of prohibitory order.
14. Effect of non-compliance with sub-rule (2).
15. Notice to debtor.
16. Effect of attachment.
17. Payment into Court — Sub-rule (3).
18. Absence of or irregularity in attachment — Effect.
19. Inherent power of Court to pass prohibitory orders in proper cases.

1. Attachment of debt, share, or other moveable property — General.— (1) There is a broad distinction between the attachment of moveable property in the possession of the judgment-debtor, and the attachment of debts (other than negotiable instruments), shares in a corporation or other moveable property not in the possession of the judgment-debtor; in the former case the attachment is effected by actual

the attachment shall be made by a written order prohibiting,—

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court;

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the Court-house and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under Clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

[1882, S. 268; 1877, Ss. 268, 301; 1859, Ss. 236, 239.]

Order 21, Rule 46 — Note 1 (contd.)

seizure while in the latter case it is done by a prohibitory order. AIR 1914 Mad 126 (127): 38 Mad 927 (FB) ** AIR 1932 Pat 279 (280, 281): 11 Pat 493 (DB).

(2) The service of prohibitory notice under this rule is enough for the attachment of the debt and it is not necessary that the money should be actually payable at the time to the judgment-debtor. AIR 1954 Mys 114 (115): ILR (1953) Mys 662 (DB).

(3) A debt, in order to be attachable under this rule, must be due individually to the judgment-debtor. AIR 1956 Mad 163 (163) **: AIR 1914 Nag 13 (13): 10 Nag LR 17 ** ILR (1937) 2 Cal 440 (443).

[See also AIR 1937 Cal 199 (220): ILR (1937) 2 Cal 48 (DB).]

(4) The debt should be described with reasonable certainty in the application for attachment. AIR 1918 Mad 541 (542) (DB) ** AIR 1961 Mad 189 (190): (1960) 2 Mad LJ 561.

[See however AIR 1942 Sind 87 (88): ILR (1942) Kar 173 (DB).]

(5) The Court cannot, on an application under this rule, direct the garnishee (judgment-debtor's debtor) to pay amount into Court; it can only pass a prohibitory order as mentioned in the rule. AIR 1942 Pat 508 (511): 21 Pat 287 (DB) ** (1910) 5 Ind Cas 145 (145) (DB) (Mad).

[See AIR 1929 Mad 347 (348).]

[See also (1910) 5 Ind Cas 820 (820) (DB) (Mad).]

(6) It is open to the garnishee to deposit the amount of the debt in Court and thereby obtain a valid discharge. See sub-rule (3).

(7) In the case of dispute as to the title to the amount in deposit, the Court must decide the question before ordering payment to the decree-holder. AIR 1916 Cal 241 (243, 244): 43 Cal 263 (DB).

(8) Rules 58 and 63 of this Order are applicable to attachments hereunder. AIR 1942 Mad 650 (651) ** (1904) 27 Mad 67 (71) (SB).

(9) A voluntary or collusive payment of the debt by the garnishee to the decree-holder without an order of the Court will not discharge the garnishee. See AIR 1941 Cal 579 (581): ILR (1941) 2 Cal 221.

(10) A debt due to a firm cannot be attached in execution of a decree against a partner in his individual capacity. AIR 1941 Cal 364 (366, 367): ILR (1941) 1 Cal 389 (DB).

(11) A subscription to provident fund, which is deducted from the salary of an employee at the time of payment and constitutes a compulsory deposit within the meaning of Section 60 (k), cannot be attached by means of a garnishee order under this rule, as it is exempt from attachment under Section 60. AIR 1939 Rang 432 (433): 1939 Rang LR 504.

[See however AIR 1949 Pat 337 (337, 338).]

(12) Where a cheque is issued in favour of a judgment-debtor, the amount of the cheque cannot be considered to be his property till it is actually paid to him. Hence such amount canot be attached by means of a prohibitory order on the bank. AIR 1942 Rang 59 (60): 1941 Rang LR 759.

(13) Under S. 50 of the Code, where a decree is executed against a legal representative he is liable only to the extent of the property of the deceased which has come to his hands. Hence, a debt due to the legal representative or moveable property of the deceased which has not yet come into the possession of the legal representative cannot be attached under this rule. AIR 1937 Rang 274 (274).

Also see Section 52.

(14) Where an attachment was made in accordance with the procedure outlined in

Order 21, Rule 46 — Note 1 (contd.)
this rule, which was the only provision applicable to the case, it must be taken to have been an attachment under this rule howsoever it was formally headed. AIR 1949 Pat 337 (338).

(15) Attachment of debt — Debt payable within jurisdiction of executing Court — Executing Court has jurisdiction to proceed against debt though debtor of judgment-debtor resides outside jurisdiction of the Court. AIR 1963 All 313 (316): 1963 All LJ 443 (DB).

(16) Where the decree obtained was not a decree against the partnership firm nor was against the partners as such, but in their individual capacity, the attachment made under Order 21, Rule 46 was irregular and ineffective. AIR 1960 Cal 81 (83): 63 Cal WN 21.

(17) Under Order 21, Rule 63-A the foundation of a garnishee proceeding is an attachment made under Order 21, R. 46. Garnishee proceedings, in respect of a debt, can be started only after the debt has been attached under Order 21, Rule 46. AIR 1960 Pat 132 (134).

(18) Attachment of money lying in Public Works Department to credit of judgment-debtor — Letter sent to Public Works Department that no payment due to judgment-debtors be made to him — Attachment is valid — Order 21, Rule 46 (2) is not applicable. MBLJ 1954 HCR 469: MBLR 1954 (Civ) 43.

2. "Debt," meaning of.— (1) Money, which may or may not become due, or the payment of which is dependent on the happening of an event or events which may not necessarily happen cannot be called a debt. AIR 1954 Bhopal 30 (31).

(2) Unpaid mortgage money is not "debt" due to the mortgagor. AIR 1942 Lah 234 (236) (DB) ** AIR 1934 All 449 (453) (DB).

(3) Unpaid purchase price left with vendee is debt, even though vendee claims to defer payment of same till vendor pays off other incumbrances. AIR 1942 Lah 275 (278): ILR (1943) Lah 17 (FB) ** AIR 1942 Mad 650 (651).

(4) Licensee depositing money with Government of India in connection with his licence for salt manufacture — Deposit is not debt. AIR 1941 Sind 193 (196): ILR (1941) Kar 50.

(5) Deposit made by member of association which is subject to forfeiture and lien and is within absolute control of association, is not debt, nor moveable property not in possession of judgment-debtor. AIR 1939 Bom 90 (91): ILR (1939) Bom 109 (DB).

(6) A dividend payable to a creditor in insolvency is not debt liable to be attached under Order 21, Rule 46. AIR 1939 Mad 811 (813).

(7) Amount payable to displaced person under Displaced Persons (Compensation and Rehabilitation) Act determined — It becomes debt payable to him and can be attached and sold in execution. AIR 1962 Bom 121 (123, 124): 63 Bom LR 684.

(8) Property saleable in execution — Debt is chose-in-action and therefore, attachable and saleable property — Movable is attached by actual seizure whereas debt is attached by prohibitory order. AIR 1966 Punj 479 (481): ILR (1965) 2 Punj 212.

(9) Where a mortgagee can claim the realization of his mortgage money or the mortgagor can claim the payment thereof, there is a debt. AIR 1960 Pat 196 (197 to 199): ILR 37 Pat 1465.

(10) See also under S. 60.

3. Salary, whether a debt.— (1) A pay or pension in private service becomes due on the last day of the month even though it is not paid till the first of the next month and can be attached on the last day of the month. AIR 1930 Rang 161 (161).

(2) Unlike the case of Government servants, the salary of the servants in a private firm can only be attached as a debt under Order 21, Rule 46 when it becomes actually payable. AIR 1953 Mys 127 (128): 33 Mys LJ 53.

(3) Salary of private servant cannot be attached before it becomes payable. AIR 1964 Andh Pra 395 (397): (1964) 2 Andh WR 1.

(4) The salary of a member of a Provincial Legislative Assembly is not the salary of a public officer and is not attachable before it becomes payable at the end of the month. AIR 1939 Cal 428 (429): ILR (1939) 1 Cal 523 (DB).

(5) Transfer of Provident Fund account to miscellaneous account E which was a compulsory deposit — Attachment not legal. AIR 1955 Cal 509 (510): 96 Cal LJ 126.

(6) See also under S. 60.

4. Attachment of mortgage debt.— (1) A mortgage debt due under a simple mortgage is a "debt" within this rule and can be attached by a prohibitory order. (1893) 15 All 134 (135) (DB) ** AIR 1915 Mad 209 (209): 37 Mad 51 (DB) ** AIR 1924 All 796 (798): 46 All 917 (DB) ** (1902) 26 Bom 305 (312) (DB).

(2) An attachment of simple mortgage debt by prohibitory order carries with it the security of the immovable property without further attachment of the property itself; the purchaser of the mortgage-interest in execution is entitled, therefore, to sue for the sale of the mortgaged property for the debt. (1902) 26 Bom 305 (310, 312) (DB) ** AIR 1924 All 796 (798): 46 All 917 (DB) ** (1893) 20 Cal 805 (809, 810) (DB) ** AIR 1934 Mad 498 (499).

[See also (1886) 9 Mad 5 (8) (SB) ** (1883) 9 Cal 511 (512) (DB).]

(3) A usufructuary mortgage in which there is a covenant to pay is also a "debt" which can be attached under this rule. AIR 1942 Pesh 66 (68) ** AIR 1916 Mad

Order 21, Rule 46 — Note 4 (contd.)
434 (435, 436): 39 Mad 389 (DB) ** AIR 1931 Pat 63 (64) (DB).

(4) A purely usufructuary mortgage without any liability to pay the mortgage amount is not a "debt" at all and cannot be attached under this rule. Such a mortgage should be attached under R. 54 as immovable property. AIR 1928 Mad 648 (651) ** (1911) 35 Bom 288 (292) (DB) ** AIR 1931 Pat 63 (64) (DB).

(5) The locality of a mortgage debt is where the mortgage bond is found and the Court within whose jurisdiction it is found can attach it even though the mortgagor or the property comprised in the mortgage is outside the jurisdiction of such Court. AIR 1933 Cal 379 (380): 60 Cal 782 (DB).

(6) For the purposes of execution, a mortgage debt is "moveable property" within the meaning of this rule. AIR 1933 Rang 61 (62) ** AIR 1933 Cal 379 (381): 60 Cal 782 (DB).

(7) Mortgage decree — Right to compensation under West Bengal Estates Acquisition Act cannot be enforced under Order 21, Rule 46. AIR 1967 Cal 56 (61).

5. Attachment of decree.— See Rule 53.

6. Attachment of debt already paid by cheque.— (1) Payment of a debt by delivery of a cheque extinguishes the debt. There is, therefore, no debt that can be attached in the hands of the garnishee where the latter has delivered a cheque for the debt to the judgment-debtor, even though the latter had not cashed the cheque. (1911) 12 Ind Cas 869 (870) (Low Bur.) * (1885) 1 TLR 454.

[See AIR 1949 Cal 144 (151): ILR (1945) 1 Cal 277.]

[See also (1872) 3 Bom 49 (52) (DB).]

(2) Where money due to a judgment-debtor from A, has been credited in A's account books to a third person, there is no debt due to the judgment-debtor from A, which can be attached in execution of a decree against the judgment-debtor. **AIR 1933 PC 150 (154): 69 Ind App 211: 57 Bom 474.** (On appeal from AIR 1932 Bom 206: 56 Bom 349.)

(3) Suit by Muhammadan woman against heirs of deceased husband for dower debt — Money deposited by husband in bank — Prohibitory order under Order 21, Rule 46 — Order to pay deposit amount to decree-holder amounts to valid discharge and will absolve bank — Succession certificate not necessary. AIR 1960 Pat 132.

(4) Debt already assigned equitably not attachable. AIR 1961 Mys 196: 39 Mys LJ 235.

7. Procedure where garnishee denies debt.— (1) Under sub-rule (3) a garnishee may, at his option, pay the amount of the debt into Court. But the Court has no jurisdiction to compel the garnishee to do so. AIR 1954 Trav-Co 243 (247): ILR (1954) Trav-Co 281 (FB) ** AIR 1942 Pat 508 (511):21 Pat 287 (DB) ** (1887) 10 Mad 194 (196) (DB) ** AIR 1924 Nag 98 (100, 101): 20 Nag LR 11.

(2) The Court cannot proceed against a garnishee or his property for the recovery of the debt though the Court, in practice, calls on him to pay. AIR 1936 Nag 218 (219) ** (1887) 11 Bom 448 (455) (DB) ** AIR 1927 All 41 (43) (DB).

(3) In case the garnishee denies the debt, it is not the duty of the Court to enquire and decide if the debt is due. (1906) 28 All 262 (263) (DB) ** AIR 1936 Mad 152 (153): 59 Mad 966 (DB) ** AIR 1936 Nag 218 (219).

[See AIR 1931 Bom 288 (290) (DB). (Quaere.)]

[See also AIR 1933 All 481 (482).]

(4) It is open to the garnishee to show that nothing was due and payable by him to the judgment-debtor. AIR 1958 Andh Pra 31 (32).

(5) The only course where the garnishee denies the debt is either to have a receiver appointed for the collection of the debt or to sell the debt notifying the fact of denial. AIR 1954 Trav-Co 243 (247): ILR (1954) Trav-Co 281 (FB) ** AIR 1956 Mad 163 (163) ** AIR 1924 Nag 98 (100, 101): 20 Nag LR 11 ** (1906) 28 All 262 (263) (DB).

[See however (1880) 4 Bom 323 (326) (DB) ** (1885) 10 Mad 194 (196) (DB).]

(6) An order so appointing a receiver or for sale does not debar the garnishee in a suit on the debt, from setting up the defence that no debt is due. AIR 1926 Mad 1011 (1011) ** AIR 1936 Mad 152 (153, 154): 59 Mad 966 (DB).

(7) A decree-holder who has attached future rents is not thereby entitled to sue the tenants for the amount of the rent due without his being duly appointed a receiver for the purpose. AIR 1925 Rang 318 (319): 3 Rang 235 (DB).

[See also 1874 Pun Re No. 24, p. 120 (FB) ** 1880) Pun Re No. 11, p. 25 (28) (DB).]

(8) Garnishee denying debt — Executing Court cannot embark upon enquiry into denial — Fact that he did not take steps to have attachment removed does not prevent him from raising that plea. (1965) 2 Mys LJ 136: (1965) 3 Law Rep 368 (DB).

(9) Moveables in possession of third party garnishee attached — Garnishee not producing moveables or their value — Abuse of process of Court—Power of Court to compel garnishee to do so under Section 151. AIR 1962 Andh Pra 137 (140): (1961) 2 Andh WR 327 (DB).

(10) If a garnishee served with prohibitory order wants to take advantage of Rule 46 (3) he should make the deposit in the attaching Court which issued the prohibitory order to him and in the proceedings in which the order has been issued. (1966) 1 Mys LJ 783: (1966) 7 Law Rep 257.

Order 21, Rule 46 (contd.)

8. Set-off by garnishee of cross-debt.— (1) The garnishee is entitled to a set-off in respect of any cross-debt due to him from the judgment-debtor, at the date of the attachment or of the sale. AIR 1952 Trav-Co 508 (509): ILR (1952) Trav-Co 358 (DB) ** AIR 1914 Bom 299 (299): 38 Bom 631 (DB) ** AIR 1937 Mad 848 (849) ** AIR 1923 Lah 261 (262): 3 Lah 414 (DB). (Cross-debt due at the date of sale.)

(2) In order that the garnishee may have a right of adjustment or a right of set-off, the debt due to the garnishee must be in existence on the date of attachment. Where the debt arises after the attachment is effected, the garnishee has no right to adjustment or set-off. AIR 1962 Ker 233 (234): 1962 Ker LJ 472 (DB).

9. Procedure where garnishee resides outside jurisdiction.— (1) The executing Court has no jurisdiction to pass any prohibitory order under this rule unless either the debt to be attached is payable or the garnishee is within its jurisdiction. AIR 1934 Nag 167 (168): 30 Nag LR 92 (DB).

[See also **AIR 1933 PC 150 (153): 60 Ind App 211: 57 Bom 474.**]

(2) "In its essential elements, a garnishment proceeding is a proceeding by the defendant in the suit against the garnishee, in the name and for the benefit of the plaintiff . . . . . Wherever the garnishee could be sued by the defendant for the payment, he may be charged as garnishee on account of it." (1912) 39 Cal 104 (116).

[See also AIR 1918 Pat 126 (128): 4 Pat L Jour 141 (DB) ** AIR 1932 Pat 148 (149): 11 Pat 473 (DB).]

(3) If the garnishee resides outside the jurisdiction of a Court and the debt is also payable outside its jurisdiction, no prohibitory order can be made against the garnishee unless specifically provided for by the Code. AIR 1956 Trav-Co 100 (101) (DB) ** (1881) 5 Bom 249 (252) (DB) ** AIR 1939 Cal 428 (429): ILR (1939) 1 Cal 523 (DB) ** AIR 1939 Mad 811 (812, 813) ** AIR 1929 Lah 645 (645). (Specific provision in Rule 48.) ** (1879) 3 Cal L Rep 30 (31) (DB).

[See however (1868) 10 Suth WR 447 (449) (DB).]

(4) A garnishee submitting, in the first instance, to a prohibitory order in ignorance of the want of jurisdiction, may refuse to abide by it subsequently. (1903) 30 Cal 713 (717) (DB).

(5) As to attachment of property outside jurisdiction, see Section 39.

(6) Debt due to judgment-debtor by person outside jurisdiction cannot be attached — Objection can be raised by judgment-debtor. 1961 Ker LT 827: 1961 Ker LJ 993.

10. Procedure where garnishee admits liability but does not pay.— See Note 7.

11. Attachment of shares.— (1) An attachment of shares in a corporation is made in the form required by Clause (ii) of sub-rule (1) and by sub-rule (2) of this rule. AIR 1923 Mad 241 (242): 45 Mad 537 (DB).

(2) Right to purchase shares — Attachment of right by prohibitory order is valid. AIR 1966 Cal 134 (140): 69 Cal WN 815 (DB).

(3) Attachment of shares under Order 21, Rule 46 — Transfer of shares pending attachment — Transfer is not wholly void. AIR 1965 All 135 (141): 1963-2 Com LJ 74 (DB).

(4) Judgment-debtor residing within limits of jurisdiction — Executing Court can attach shares — Fact that business of company is outside jurisdiction, is immaterial. AIR 1969 Mad 268 (269): (1968) 2 Mad LJ 634.

12. Attachment of other moveable property.— (1) A judgment-creditor does not, by virtue of his judgment, get a right to the property of the judgment-debtor in his hands or in the hands of a third party, and his remedy is not by way of suit but by attachment and sale in execution (1876) 3 Ind App 241 (248, 251, 252) (PC)

(2) Attachment of agricultural produce not in the possession of the judgment-debtor is covered by this rule. AIR 1921 Sind 95 (96): 15 Sind LR 138 (DB).

(3) Unpaid purchase-money due to the judgment-debtor is moveable property attachable under this rule. AIR 1926 Mad 903 (903, 904).

(4) Where money is deposited by a judgment-debtor with a railway company as security for the due performance of his duties as a servant of the company, an attachment of such deposit is subject to all the rights of the company on the deposit, though the interest, if any, payable to the judgment-debtor on the deposit amount may be made available to the decree-holder by virtue of the attachment. (1886) 9 Mad 203 (206) (DB).

[See also AIR 1939 Bom 90 (91): ILR (1939) Bom 109 (DB).]

(5) The attachment of rights under a patent cannot be effected by serving a prohibitory order on the Controller of Patents under this rule, because such rights cannot be said to be in the possession of the Controller. AIR 1939 Cal 283 (284, 285): ILR (1938) 2 Cal 618.

(6) This rule will apply though the property to be attached is only a share or interest in moveable property. Hence both this rule and Rule 47 apply to the attachment of a share in moveable property. AIR 1941 Nag 157 (158).

(7) Moveable property referred to in sub-rule (1) (c) should be capable of being in the possession of the judgment-debtor and, therefore, property of a tangible character. The money deposited by the judgment-debtor with a third person for the due performance of a contract entered into between them and for making good

Order 21, Rule 46 — Note 12 (contd.)
any loss sustained by the latter cannot be regarded as movable property belonging to the judgment-debtor within the meaning of sub-rule (1) (c) and, as such cannot be attached because the amount due, if any, to the judgment-debtor can only be ascertained after the performance of the contract. AIR 1958 Andh Pra 31 (32).

(8) Moveable property in possession of third person — Application for execution lies under Order 21, Rule 46 (1) (c) and not Order 21, Rule 43. MBLR 1956 (Civ) 655.

(9) There is distinction between Rr. 43 and 46 — Goods of assessee to income-tax in possession of pledgee attached and seized in execution of certificate under Section 46 (2) Income-tax Act by Revenue Officer under Sections 150 and 154 of Bombay Land Revenue Code — Attachment is illegal. AIR 1966 Bom 134 (138): 67 Bom LR 823.

(10) Where in a pending execution petition for arrest and attachment of movables the decree amount is still not realised, an application for the relief of attaching certain money due from a third party to the judgment-debtor (on the averment that the existence of this claim came to the knowledge of the executing decree-holder only recently and he could not move for garnishee proceedings earlier) must be allowed as no prejudice will thereby be caused to the judgment-debtor especially when the decree-holder undertook not to press the prayer for execution by way of arrest. AIR 1964 Mad 236 (237): (1963) 2 Mad LJ 180 (DB).

(11) The language of Order 38, Rule 5 and Order 21, Rule 46 does not impose any restriction on the power of the Court to levy attachment in regard to properties outside the local limits of the jurisdiction of the Court in which the suit is filed under Order 38, Rule 5, and Order 21, R. 46 read in the light of Section 136 makes it clear that a Court can attach the properties notwithstanding that they do not lie within the jurisdiction of the Court in which the suit is filed. AIR 1961 Andh Pra 417 (418) (DB).

13. Service of prohibitory order.— (1) A prohibitory order under this rule must be duly served on the garnishee. AIR 1954 Bhopal 30 (32) ** AIR 1928 Rang 36 (38): 5 Rang 685 (DB).

(2) A Small Cause Court can set aside an ex parte order passed against a garnishee in execution proceedings on sufficient grounds being shown for the garnishee's absence. AIR 1957 Mad 353 (354).

(3) Attachment of share in capital of Corporation — Should be made by written order — Provisions of sub-rule (2) are mandatory and must be strictly followed. AIR 1968 Pat 370 (372): 1969 BLJR 350 (DB).

(4) Prohibitory order can be sent to proper officer of Companies registered beyond High Court's jurisdiction. AIR 1968 Pat 370 (374): 1969 BLJR 350 (DB).

(5) Prohibitory order under — Must be made against existing person. AIR 1968 Pat 370 (372): 1969 BLJR 350 (DB).

(6) No evidence about non-affixation of prohibitory order — Presumption under Section 114 (e) of Evidence Act that Court proceedings were validly done would apply. AIR 1968 Pat 370 (372): 1969 BLJR 350 (DB).

(7) Where merely prohibitory order is issued under Order 21, Rule 46 (1) and attachment made in that manner, person to whom order is issued does not become surety for performance of decree. **AIR 1967 SC 1080 (1081): (1967) 1 SCR 207.**

(8) The prohibitory order issued by the Court will operate to bar the payment to judgment-debtor, by the garnishee of all accounts payable as upto the date of attachment. The order will not operate in respect of further earnings by the judgment-debtor beyond that date. AIR 1961 Mad 189 (190): (1960) 2 Mad LJ 561.

(9) Where there is no mention of the provision of law under which a prohibitory order was issued and Order 38, Rule 5 does not apply to the case, but Order 21, R. 46 applies, it must be presumed under S. 114 of the Evidence Act that the Court issued the order under Order 21, Rule 46 (1). AIR 1960 Pat 132 (134).

14. Effect of non-compliance with sub-rule (2).— (1) It can be presumed under Section 114 of the Evidence Act that the provisions of sub-rule (2) have been complied with if there is some order to that effect but in the absence of such order, no such presumption can be made. AIR 1954 Bhopal 30 (31).

(2) Want of affixture of the order as required by sub-rule (2) is fatal to the validity of the attachment and a bona fide assignee from the judgment-debtor after such attachment acquires good title. AIR 1953 Sau 127 (128) (DB). **(AIR 1928 PC 139: 51 Mad 349: 55 Ind App 256, Foll.)** ** AIR 1947 Pat 385 (387): 25 Pat 739 (DB). **(AIR 1928 PC 139: 51 Mad 349: 55 Ind App 256, Rel. on.)**

(3) The mere order to make an attachment does not amount to actual attachment unless it has been effected in the manner prescribed by this rule, i.e., served on the debtor by sending a copy of the order to him. AIR 1934 Pat 619 (622) ** AIR 1939 Mad 811 (813) (DB).

(4) The question whether the first part of Clause (2) of Rule 46 of Order 21 was complied with or not is purely a question of fact which has to be agitated and specifically pleaded and proved. In the absence of evidence to show that sub-rule (2) was not complied with, it must be held, relying on Section 114, Illustration (e) of the Evidence Act, that the provisions of law were complied with. AIR 1960 Pat 132 (135).

Order 21, Rule 46 — Note 14 (contd.)

(5) Third party disposing of property in breach of prohibitory order — Decree cannot be executed against him as surety. AIR 1961 Assam 121 (122) (DB).

15. Notice to debtor.— (1) Under sub-rule (2) a copy of the prohibitory order shall be sent to the debtor. When it is not so sent, the attachment is ineffectual and the garnishee remains liable to pay the debt to the judgment-debtor. (1867) 7 Suth WR 10 (11) (DB).

[See AIR 1916 Mad 434 (436): 39 Mad 389 (DB).]

[See also AIR 1952 Trav-Co 508 (509): ILR (1952) Trav-Co 358 (DB).]

(2) A notice to the judgment-debtor is not a condition precedent to the validity of the attachment. AIR 1953 Sau 127 (128) (DB) ** (1912) 15 Oudh Cas 289 (290).

[But see 1906 Pun Re No. 118, p. 453 (456).]

16. Effect of attachment.— (1) An attachment has merely the effect of preventing private alienations of the property to the prejudice of the claims enforceable under the attachment. It does not create any security, charge or lien in favour of the attaching creditor. AIR 1954 Trav-Co 243 (246): ILR (1954) Trav-Co 281 (FB) ** ILR (1956) 8 Assam 301 (308) (DB) ** AIR 1945 Nag 97 (101): ILR (1945) Nag 121 (DB).

[See also AIR 1952 Cal 58 (60): ILR (1953) 1 Cal 1 (DB). (Purchase of shares in a Company after service of prohibitory order upon judgment-debtor and the Company — Purchaser acquires no title to such shares.)]

(2) An attachment under this rule prohibits the creditor from collecting the debt, but does not prevent him from suing on the debt. (1891) 13 All 76 (78) (DB) ** (1895) 17 All 198 (210, 211): 22 Ind App 31 (PC).

(3) The attaching decree-holder gets no higher rights in the debt than what the judgment-debtor could give him at the date of the attachment and any disposition of the debt by the judgment-debtor prior to attachment binds the decree-holder. AIR 1954 Trav-Co 243 (246): ILR (1954) Trav-Co 281 (FB) ** AIR 1958 Andh Pra 31 (32) ** ILR (1956) 8 Assam 301 (308) (DB) ** AIR 1924 Cal 1068 (1068, 1069) ** AIR 1933 Cal 606 (608) ** AIR 1927 Bom 365 (366).

[See also AIR 1942 Pat 508 (511): 21 Pat 287 (DB).]

(4) If, on the day of attachment, there was no debt and the attachment was raised, a subsequent accrual of a debt does not by itself revive the attachment. AIR 1922 All 384 (385) (DB).

(5) Where a debt existed at the time of attachment, the attaching decree-holder is not precluded from realising the debt by the fact of the debt having been subsequently paid to judgment-debtor by the garnishee. AIR 1926 Mad 371 (371, 372, 376) (DB) ** AIR 1927 Mad 1147 (1148) (DB).

[See also AIR 1941 Cal 364 (368): ILR (1941) 1 Cal 389 (DB).]

(6) An attachment under this rule only prohibits the payment of the debt to the judgment-debtor. It does not preclude the judgment-debtor and his debtor from effecting a conciliation before the Debt Conciliation Board. AIR 1942 Nag 36 (37): ILR (1942) Nag 691 (DB).

(7) The rights of the decree-holder who has attached before judgment the deposit standing to the credit of the judgment-debtor, in a Bank, are subject to the scheme, subsequently framed and sanctioned under Section 153 (2) of the Companies Act, 1913, for the Bank, whereby the Bank was to pay only a percentage of the deposits of its creditors. ILR (1956) 8 Assam 301 (308) (DB).

(8) As against an Official Assignee in bankruptcy, the attaching decree-holder obtains rights in the property attached only on complete realization by him before vesting. AIR 1931 Mad 474 (477, 478): 54 Mad 727 (DB) ** (1903) 26 Mad 673 (679) (SB).

(9) The effect of attachment of money of judgment-debtor in Bank is to prohibit Bank from making payment to judgment-debtor. It does not give decree-holder higher right than judgment-debtor himself had against Bank. ILR (1956) 8 Assam 301.

(10) Attachment under Order 21, Rule 46 of movable property and not of debt — Order 21, Rule 63-A (Pat) does not apply — Application by party that notice issued by decree holder under Order 21, Rule 63-A be withdrawn — Application dismissed for default — Second application for same relief held barred by res judicata — Party, however, allowed to treat second application as plaint. AIR 1962 Pat 123 (124): 1961 BLJR 661 (DB).

(11) See also S. 64.

17. Payment into Court — Sub-rule (3).— (1) The payment contemplated by sub-rule (3) is payment into the attaching Court so as to be available to the attaching decree-holder. Where the rent due by a tenant is attached and the tenant pays such rent to the credit of some other suit against the judgment-debtor than the one in which it has been attached, the payment will not discharge the tenant from his liability for the rent. AIR 1936 Mad 251 (252).

18. Absence of or irregularity in attachment — Effect.— (1) The invalidity or absence of attachment does not invalidate an execution sale inasmuch as the order of attachment is only a prohibitory order issued in order to protect the interest of the execution creditor. AIR 1932 Cal 213 (214): 59 Cal 199 (DB).

[See also AIR 1956 Cal 373 (374) (DB).]

(2) Decree passed against some partners in partnership business in their individual

HIGH COURT AMENDMENTS

Rules 46A to 46I

Andhra Pradesh

Same as those of Madras [5-1-1961].

Assam and Nagaland

Same as those of Calcutta—See Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 (w.e.f. 1-12-1963).

Bombay: Dadra and Nagar Haveli[a]

Add the following heading and rules as Rules 46A to 46H.

GARNISHEE ORDERS

"46A. Garnishee Notice.—(1) The Court may in the case of a debt, other than a debt secured by a mortgage or a charge or by a negotiable instrument which has been attached under Rule 46 or 51 of this Order, upon the application of the attaching creditor, issue notice to the Garnishee liable to pay such debt calling upon him either to pay into Court the debt due from him to the judgment-debt or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so:

Provided that if the debt in respect of which the application aforesaid is made is in respect of a sum of money beyond the pecuniary jurisdiction of the Court, the Court shall send execution case to the Court of the District Judge to which the said Court is subordinate, and thereupon the Court of the District Judge or any other competent Court to which it may be transferred by the District Judge will deal with it in the same manner as if the case had been originally instituted in that Court.

Such application shall be made on affidavit verifying the facts alleged and stating that in the belief of the deponent the garnishee is indebted to the judgment-debtor.

46-B. Consequence of default in appearance of the garnishee.—Where the garnishee does not forthwith pay into Court the amount due from him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution or does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice and on such order execution may issue as though such order were a decree against him.

46-C. Where garnishee disputes liability, issue to be tried and determined as an issue in suit.—Where the garnishee disputes liability, the Court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit, and upon the determination of such issue shall make such order or orders upon the parties as may seem just.

46-D. Third person claiming the debt or interest therein to appear and prove his claim.—Where it is suggested or appears to be probable that the debt belongs to some third person or that any third person has a lien or charge on, or other interest in, such debt, the Court may order such third person to appear and state the nature and particulars of his claim (if any) to such debt and prove the same.

Order 21, Rule 46 — Note 18 (contd.)

capacities — Nazir seeking to execute decree against partnership property in which some other persons were partners — Facts pointed out to Nazir — Nazir giving one hour's time for payment and, on non-payment, starting attachment — Judgment-debtors on advice of pleader, asking Nazir to leave and snatching away article attached — Conduct of judgment debtors and pleader held not to amount to obstruction or resistance. 1963 BLJR 375.

19. Inherent power of Court to pass prohibitory orders in proper cases.— (1) Even in cases not strictly governed by O. 21, Rule 46, a prohibitory order can be passed under the inherent powers of the Court, where the ends of justice require it to be done. AIR 1932 Lah 295 (296) ** AIR 1937 Cal 199 (201): ILR (1937) 2 Cal 48 (DB).

(2) A prohibitory order can be issued against a person who is not a defendant to the suit under Order 21, Rule 46 — When there is a specific provision in the Code, no recourse can be had to the inherent powers of the Court under Sec. 151. AIR 1960 Pat 132 (134).

46-E. Orders to be passed after hearing third person or other person claiming the debt or interest therein, where such person appears.—After hearing such third person and any other person or persons who may subsequently be ordered to appear, or where such third or other person or persons do not appear when so ordered, the Court may make such order as is hereinbefore provided, or such other order or orders upon such terms, if any, with respect to the lien, charge or interest, if any, of such third or other person as may seem fit and proper.

46-F. Payment by garnishee under orders of Court to be valid discharge to the garnishee.—Payment made by the garnishee on a notice under Rule 46-A or under any such order as aforesaid shall be valid discharge to him as against the judgment-debtor or any other person ordered to appear as aforesaid for the amount paid or levied although such judgment may be set aside or reversed.

46-G. Costs.—The costs of any application made under Rule 46-A and of any proceeding arising therefrom or incidental thereto, shall be in the discretion of the Court.

46-H. Appeal.—An order made under Rules 46-B, 46-C or 46-E shall be appealable as a decree." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 (1-7-1965).

Calcutta : Andaman and Nicobar Islands

Same as that of Bombay except that there are no marginal notes in Calcutta.

In R. 46A, for 'or' appearing between 'judgment-debtor' and 'any other person', read 'and'.

Gujarat

Same as those of Bombay without the figures and letter "46B" in Rule 46H [17-8-1961].

Kerala: Laccadive, Minicoy and Amindivi Islands

After Rule 46, the following rules shall be inserted, namely :—

"**46A. Procedure when debt or any movable property not in the possession of the judgment-debtor.**—The Court may, in the case of any debt due to the judgment-debtor (other than debt secured by a mortgage or a charge or by negotiable instrument), or any moveable property in which he has an interest, but not in his possession, which has been attached under Rule 46 of this order, upon the application of the attaching creditor, issue notice to any person liable to pay such debt or deliver an account for such movable property (such person to be hereinafter called the "garnishee"), calling upon him either to pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so. Such application shall be supported by an affidavit verifying the fact alleging and stating that in the belief of the deponent the garnishee is indebted to the judgment-debtor :

Provided that if the debt or property in respect of which the application aforesaid is made is of value beyond the pecuniary jurisdiction of the Court, the execution case shall be sent to the District Court to which the said Court is subordinate and thereupon the District Court shall deal with it in the same manner as if the case had been originally instituted in that Court.

46B. Procedure when garnishee does not forthwith pay the amount.—Where the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from him or the property deliverable by him to the judgment-

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Order 21, Rule 46-A (Calcutta) — Note 1

(1) Under this rule garnishee proceedings cannot be taken in respect of debt which cannot be attached under Order 21, R. 46 or which even if attachable, had not been attached. Debt due to firm cannot be attached under Order 21, Rule 46 in execution of decree against partner in his individual capacity. Hence garnishee proceedings cannot be taken in respect of such debt. AIR 1941 Cal 364 (366, 367): ILR (1941) 1 Cal 389 (DB).

Order 21, Rule 46-B (Calcutta) — Note 1

(1) The executing Court has no power to directly attach the pay of the Chief Accounts Officer of the Railway on the ground that its order under Order 21, R. 48 against the judgment-debtor, a railway employee, was not being complied with. Even assuming that Order 21, R. 46-B applies to such case the Chief Accounts Officer is not the garnishee but the Government who is the employer of the judgment-debtor. AIR 1951 Cal 315 (315).

debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution, or does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order being made, execution may issue as though such order were a decree against him.

46C. Procedure where garnishee disputes his liability.—Where the garnishee disputes his liability, the Court may order that any issue or question necessary for the determination of the liability shall be tried as if it were an issue in a suit and upon determination of such issue shall make such order as may seem just:

Provided that where the garnishee admits his liability but disputes its extent and the decree-holder does not seek to recover from the garnishee any sum in excess of what he admits is due from him the Court shall not be bound to decide the dispute and may direct the garnishee to pay such sum or so much thereof as is sufficient to satisfy the decree and the costs of the execution proceedings.

46D. Procedure when debt or property belongs to a third person.—Where in any proceeding under these rules it is alleged or appears to the Court to be probable that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon or an interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, to such debt or property and prove the same.

46E. Order to be made on hearing such person.—After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided, or make such other order as it thinks fit, upon such terms, in all cases with respect to the lien, charge or interest, if any, of such third or other persons as may seem fit and proper.

46F. Payment or delivery under order to be a valid discharge.—Payment or delivery made by the garnishee on a notice under Rule 46A or under any such order as aforesaid shall be a valid discharge to him as against the judgment-debtor, and any other person ordered to appear as aforesaid, for the amount paid, delivered or realised, although such order or the judgment may be set aside or reversed.

46G. Procedure re: debt owing from a firm.—Debts owing from a firm carrying on business within the jurisdiction of the Court may be proceeded against under Rules 46A to 46E of this Order, although one or more members of such firm may be resident outside the jurisdiction:

Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee notice, an appearance by any member pursuant to such notice shall be sufficient appearance by the firm.

46H. Costs to be in the discretion of the Court.—The cost of any application made under Rule 46A and of any proceeding arising therefrom or incidental thereto or any order made thereon shall be in the discretion of the Court.

46I. Orders appealable.—An order made under Rules 46B, 46C or 46E shall have the same force as a decree and shall be appealable as such."

See Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 (2) for extension to Union Territory of Laccadive, Minicoy and Amindivi Islands.

Order 21, Rule 46-B (Kerala) — Note 1

(1) Final order passed under Order 21, Rule 46-B — Proceedings in execution of order are proceedings against garnishee. AIR 1965 Ker 47 (47, 48): 1964 Ker LJ 21.

Order 21, Rule 46-C (Kerala) — Note 1

(1) Order against garnishee under O. 21, Rule 46-C by Small Cause Court — Not appealable under Order 21, Rule 46-I — Revision alone maintainable. AIR 1962 Ker 233 (234) (DB). (AIR 1962 Ker 26, **Overruled.**)

Order 21, Rule 46-I (Kerala) — Note 1

(1) Order against garnishee under O. 21, Rule 46-C by Small Cause Court — Not appealable under Order 21, Rule 46-I — Revision alone maintainable. AIR 1962 Ker 233 (234): 1962 Ker LT 181 (DB). **(AIR 1962 Ker 26, Overruled.)**

Madras

Add the following rules :

"46A. The Court may in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge or a debt recoverable only in a Revenue Court, or a debt or a negotiable instrument the amount of which exceeds the pecuniary jurisdiction of the Court) which has been attached under Order XXI, Rule 46, and in the case of a negotiable instrument which has been attached under Order XXI, Rule 51, upon the application of the decree-holder, issue notice to the person liable to pay such debt (hereinafter called the garnishee) calling upon him to appear before the Court and show cause why he should not pay the debt due from him to such judgment-debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution.

46B. If the garnishee does not appear or show cause in answer to the notice issued under Rule 46A or if he does not dispute his liability or its extent, the Court may direct the garnishee within such time as it may allow to pay into Court the debt or the amount due under the negotiable instrument as the case may be or so much thereof as may be sufficient to satisfy the decree and the costs of the execution proceedings.

46C. If the garnishee disputes his liability or its extent, the Court may decide the dispute and thereafter direct the garnishee within such time as it may allow to pay into Court such sum as it has found to be due from him or so much thereof as may be sufficient to satisfy the decree and the costs of the proceedings :

Provided that where the garnishee admits his liability but disputes its extent and the decree-holder does not seek to recover from the garnishee any sum in excess of what he admits is due from him, the Court shall not be bound to decide the dispute and may direct the garnishee to pay such sum or so much thereof as is sufficient to satisfy the decree and the costs of the execution proceedings.

46D. If the garnishee alleges that the debt belongs to some third person or that a third person has a lien, or charge or other interest, upon or in it, the Court may order such third person to be served with notice to appear and state the nature and particulars of his claim.

46E. After hearing the garnishee or such third person and any other person who may subsequenty be ordered to appear, or in the case of such third or other person not appearing as ordered, the Court may pass such order as is provided for in the foregoing rules or such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third person or other person as shall seem just and reasonable.

46F. Any payment made by the garnishee in pursuance of or in execution of an order under these rules shall be a valid discharge to him as against the judgment-debtor or any other person ordered to appear as aforesaid, for the amount paid, or realized although such order or judgment may be set aside or reversed.

46G. If at any stage of the proceedings under Rules 46A to 46F the Court considers that the matter is too complicated to be dealt with under the abovesaid provisions, it may drop the proceedings leaving the other rights and remedies of the parties unaffected.

46H. The costs of any application made under the foregoing rules and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court.

Order 21, Rule 46-E (Madras) — Note 1

(1) Attachment before judgment — Garnishee proceedings — Proper procedure to be adopted — Practice — Court adopting new procedure with consent of parties — Parties would be bound by it. AIR 1964 Mad 49 (50, 51): (1963) 2 Mad LJ 90 (DB).

Order 21, Rule 46-G (Madras) — Note 1

(1) Attachment before judgment — Garnishee proceedings — Court adopting new procedure with consent of parties — Parties would be bound by it. AIR 1964 Mad 49 (50, 51): (1963) 2 Mad LJ 90 (DB).

46I. An order passed by the Court determining the liability of a garnishee or directing payment by him under Rules 46B, 46C and 46E shall be executed as if it were a decree and shall be appealable as such" [10-8-55].

Mysore

Same as those of Madras except that in R. 46A for the words "attached under O. XXI, Rule 46" and "attached under Order XXI, Rule 51" words "attached under Rule 46 of Order XXI of this Code" and "attached under Rule 51 of Order XXI of this Code", are to be read respectively [30-3-1967].

Orissa

Same as those of Patna.

Patna

For rules dealing with the same topic, see Rules 63A to 63H added by the Patna High Court.

R. 47. Attachment of share in moveables.—Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

R. 48. Attachment of salary or allowances of public officer or servant of railway company or local authority.—(1) Where the property to be attached is the salary or allowances of a [a][servant of the [aa][Government]] or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of Section 60, be withheld from such salary or allowances either in one payment or by monthly instal-

Order 21, Rule 47 — Note 1

(1) A share or interest in moveable property is incapable of actual seizure. AIR 1940 Nag 270 (271) (DB) ** Madh B LJ 1955 HCR 649 (652) (DB) **AIR 1932 Cal 408 (408): 59 Cal 808 ** AIR 1915 Mad 885 (886) (DB) ** AIR 1936 Mad 560 (560). (Share of Hindu coparcener in standing crops belonging to joint family.)

(2) Attachment by a prohibitory order is the only proper course where a share or interest is to be proceeded against. AIR 1940 Nag 270 (271) (DB) ** AIR 1932 Cal 408 (408): 59 Cal 808 ** AIR 1937 Lah 313 (313). (Attachment of share of judgment-debtor in shop.)

[See AIR 1932 Mad 538 (540): 55 Mad 1041.]

(3) Where movables are attached under Order 21, Rule 43, and it is found that a claimant owns or possesses some share or interest in the attached movables as co-owner of the judgment-debtor, the proper order to be made by Courts is to release all the properties from attachment and attach only the interest of the judgment-debtor in the said attached moveables under this rule and not to direct that the attachment with respect to the judgment-debtor's interest in the attached moveables should continue. ILR (1955) Mys 461 (462).

[See also AIR 1963 Ker 236 (238): 1963 Ker LT 681.]

(4) A "decree" is not moveable property within the meaning of this rule. AIR 1940 Nag 270 (272) (DB).

(5) Where the moveable property, the judgment-debtor's share in which is to be attached, is in the possession of another person, both this rule and Rule 46 will apply and prohibitory orders will have to be issued both to the judgment-debtor and the other person in whose possession the property is. AIR 1941 Nag 157 (158).

(6) A trustee and cestui que trust are not co-owners as the legal title to the property is vested in the trustee alone. Hence this rule does not apply to the attachment of moveable property held by a trustee on behalf of the cestui que trust. AIR 1940 Nag 270 (272) (DB).

(7) Scope of summary enquiry under Order 21, Rules 58 and 59 is narrow — Burden of proof under the Rules is on claimant or objector as the case may be — If such claimant or objector has no interest in or is not possessed of the attached property on date of attachment, then he has no locus standi to prefer objections. AIR 1967 Punj 350 (351, 352): 68 Pun LR 216.

Order 21, Rule 48

1. Attachment of salary of public officer, etc.— (1) The general power of the Government to object to the attachment on the ground that it does not wish to pay the salary to its servant is not taken away by anything contained in this rule. AIR

ments as the Court may direct; and, upon notice of the order to such officer as [b][the Appropriate Government may by notification in the Official Gazette] appoint [c][in this behalf, —

(a) where such salary or allowances are to be disbursed within the local limits to which this Code for the time being extends, the officer or other person whose duty it is to disburse the same shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be;

(b) where such salary or allowances are to be disbursed beyond the said limits, the officer or other person within those limits whose duty it is to instruct the disbursing authority regarding the amount of the salary or allowances to be disbursed shall remit to the Court the amount due under the order, or the monthly instalments, as the case may be, and shall direct the disbursing authority to reduce the aggregate of the amounts from time to time to be disbursed by the aggregate of the amounts from time to time remitted to the Court.]

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by [d][the Appropriate Government,] in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind [e][the Appropriate Government] or the railway company or local authority, as the

Order 21, Rule 48 — Note 1 (contd.)

1951 All 205 (218): ILR (1952) 2 All 467 (DB).

(2) This rule has no application to the attachment of salaries of judgment-debtors in private service. AIR 1953 Mys 127 (128): ILR (1954) Mys 5 ** AIR 1929 Nag 333 (334).

(3) This rule does not apply to the attachment of the salaries of a member of a Provincial Legislative Assembly. AIR 1939 Cal 428 (429): ILR (1939) 1 Cal 523 (DB).

(4) Where the Court orders the attachment of salary beyond the limits allowed by Section 60 it is open to the officer through whom the attachment is made to object to the attachment. AIR 1944 Cal 135 (136, 137): ILR (1944) 2 Cal 187 (DB) ** AIR 1941 Bom 389 (391): ILR (1941) Bom 415 (DB).

(5) A Court in India cannot issue a writ for the attachment of the salary of a servant of the Pakistan Government who is in Pakistan. AIR 1950 Cal 255 (256) (DB).

2. Sub-rule (2) and Section 64, Explanation.— (1) There is no inconsistency between the Explanation to Section 64 and sub-rule (2) of this rule. AIR 1941 Oudh 277 (278) ** AIR 1939 Cal 485 (485, 486): ILR (1939) 1 Cal 40.

(2) In the absence of a proper order under Section 73, the decree-holder at whose instance the attachment order was made under this rule is entitled to the whole amount attached. The Court has also no jurisdiction to cancel its attachment order and direct that the judgment-debtor should deposit a certain amount in Court every month and that this sum should be distributed pro rata among all his decree-holders. AIR 1940 Rang 201 (202): (1940) Rang LR 421 (SB).

(3) Under sub-rule (2) of O. 21, R. 48, the only duty of the disbursing officer is to return the order of attachment to the Court which issued it stating the ground of his objection and if after considering the objection by the disbursing officer, the Court refuses to withdraw the order of attachment, no liability attaches either to the disbursing officer or to the Government if he or it carries out the order of the executing Court. AIR 1959 Cal 666 (667, 668): 1958 Cal LJ 208 (DB).

(4) Return of process of attachment under — Decree-holder's right to claim rateable distribution not affected. ILR (1960) 1 Cal 177.

3. Sub-rule (3).— (1) Any sum paid by a disbursing officer in contravention of this rule can and should be recovered directly from the Government or the railway company or the local authority, as the case may be. But no order for recovery thereof can be made without bringing the Government or the railway company or the local authority on the record as a party. **AIR 1947 FC 23 (29): ILR (1947) Kar (FC) 52: 1947 FCR 89** ** AIR 1914 Low Bur 215 (216): 8 Low Bur Rul 62 ** 1912 Pun Re No. 93 (DB).

case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of [f][the revenues of the Central Government or a State Government] or the funds of a railway company carrying on business in any part of [g][India] or local authority in [g][India]; and [e][the Appropriate Government] or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

[h][Explanation.—In this rule 'Appropriate Government' means—

(i) as respects any [i][person] in the service of the Central Government, or any servant of [j][a railway administration] or of a cantonment authority or of the port authority of a major port, the Central Government;

(ii) [k][° ° °]; and

(iii) as respects any other [a][servant of the [aa][Government]] or a servant of any other [l][°] local authority, the [m][State] Government].

[1882, S. 268.]

[a] Substituted by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943) S. 3, for "public officer."

[aa] Substituted for "Crown" by A. L. O., 1950.

[b] Substituted by the Repealing and Amending Act, 1942 (XXV of 1942), S. 3 and Sch. II for "the Central Government or the Provincial Government may by notification in their Official Gazette."

[c] Substituted by the Code of Civil Procedure (Amendment) Act, 1939 (XXVI of 1939), S. 2 for "in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be."

[d] Substituted by the Repealing and Amending Act, 1942 (XXV of 1942), S. 3 and Sch. II for "the Central Government, or the Provincial Government as the case may be."

[e] Substituted, ibid, for "the Central Government or the Provincial Government."

[f] Substituted for "His Majesty's Indian Revenues" by A. L. O., 1950.

[g] Substituted by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 3, for the words 'the States' which were substituted by A. L. O., 1950.

[h] Explanation added by Act XXV of 1942.

[i] Substituted by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943), S. 3, for "public officer."

[j] Substituted for "a Federal Railway" by A. L. O., 1950.

[k] Clause (ii) of the Explanation was omitted by A.C.A.O., 1948. That clause was as follows :—

"as respects any person employed in connection with the exercise of the functions of the Crown in its relations with Indian States, the Crown Representative".

[l] The words "railway or" were omitted by A.L.O., 1950.

[m] Substituted for "Provincial" by A. L. O., 1950.

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Madras and Pondicherry

Substitute a comma for the period at the end of the last sentence of sub-rule (1) and add the following clause "such amount or instalment being calculated to the nearest anna by fractions of an anna of six pies and over being considered as one anna and omitting amounts less than six pies" [R. O. C. No. 1310 of 1926]; See Act 26 of 1968 S. 3 and Sch. Pt. II [w. e. f. 5-9-1968].

R. 49. Attachment of partnership property :— (1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within [a][India].

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within [a][India].

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

[Cf. R. S. C., O. 46, Rr. 1A, 1B.]

[a] Substituted by the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), S. 3, for the words 'the States' which were substituted by A. L. O., 1950.

Order 21, Rule 49

1. Attachment of partnership property.— (1) Execution can be taken against any partnership property only on a decree passed against the firm or against all the partners thereof as such. AIR 1952 Punj 340 (343).

(2) A decree-holder cannot proceed against the interest of a partner except in the manner laid down in sub-rule (2) and the subsequent sub-rules of this rule. AIR 1955 Cal 255 (256) (DB).

(3) Where the decree is only against an individual partner, the property of the partnership cannot be attached but an order creating a charge on the interest of the judgment-debtor, in the partnership can be obtained, with or without the appointment of a receiver. AIR 1941 Cal 364 (366): ILR (1941) 1 Cal 389 (DB) ** AIR 1931 Cal 167 (168): 58 Cal 624 (DB).

[But see (1893) 20 Cal 693 (696) (DB).]

(4) The interest of a partner in partnership business is moveable property although part of the partnership property may consist of immovable property. AIR 1947 Lah 13 (22): ILR (1947) Lah 417 (FB) ** AIR 1938 Lah 65 (67, 68) (DB).

(5) Decree passed against some partners of partnership business in their individual capacities — Attachment of partnership business in execution of decree against them is irregular — Officer executing decree obstructed in execution of decree — Question whether property attached belongs to partnership business is to be decided by executing Court and not left for decision in prosecution for offences under Sections 183, 186, Penal Code. 1963 BLJR 375.

(6) Attachment of partnership property — Procedure under Rule 49 not followed — Attachment is invalid. (1964) 1 Andh WR 300.

(7) The law entitles a creditor to proceed against all the assets of the partnership firm. If, however, what was the property of the partnership firm becomes the property of somebody else, the property will be liable for the debts only if it is impressed with a charge or a lien. Where there is a real change in the constitution and the new firm is a new identity there seems to be no justification for the view that whatever was the part of the property of the old firm continues to be its property in spite of such change. AIR 1959 Cal 262 (264) (DB).

(8) A decree against firm M and its partners cannot be executed against property belonging to another firm even though one of the partners is common to both. The proper remedy of the decree-holder is to apply under this rule. 1966 All LJ 264 (266): 1966 All WR (HC) 633.

2. Sub-rule (2).— (1) The interest of a partner on which a charging order operates

R. 50. Execution of decree against firm.—(1) Where a decree has been passed against a firm, execution may be granted—

(a) against any property of the partnership;

(b) against any person who has appeared in his own name under Rule 6 or Rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

(c) against any person who has been individually served as a partner with a summons and has failed to appear:

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of Section 247 of the Indian Contract Act, 1872.

Order 21, Rule 49 — Note 2 (contd.)

is his right to participate in the net assets of the firm, that is, in the value or proceeds of the assets less the liabilities to third parties and not less any liability to himself. AIR 1941 Cal 364 (366): ILR (1941) 1 Cal 389 (DB) ** AIR 1940 Rang 153 (154) (DB).

(2) An order for appointment of receiver cannot be made under this sub-rule unless the Court decides whether the judgment-debtor is a partner of the firm and whether any money is due to him from it. AIR 1940 All 250 (250).

(3) The receiver appointed by the Court under this sub-rule will not have during the continuance of the partnership, the right to interfere in the management or administration of the firm, or to require accounts of the partnership transactions or to inspect account books of the firm without an express order from the Court. AIR 1941 Cal 364 (366): ILR (1941) 1 Cal 389 (DB).

(4) No doubt Rule 49, Clause (1) prohibits the attachment and sale of property belonging to a partnership otherwise than in execution of a decree obtained in partnership or against the partners in the firm as such. But Clause (2) of that rule lays down the procedure for reaching such assets in execution of a decree obtained against a person who might be a partner in a partnership business, that is, either by issuing a charging order or appointing a receiver. AIR 1958 Mad 290 (291).

(5) The proper mode to proceed in execution of a decree obtained against co-owners who entered into a partnership agreement to carry on business with properties of which prior to the partnership they were co-owners simpliciter is that qua co-owner his share in the property is liable to attachment and sale in execution of the decree obtained against him personally. Qua partner, on the other hand his share in the partnership can only be proceeded against by way of a charging order and no share in any of the partnership properties can be attached and sold, as clearly indicated in Order 21, Rule 49. AIR 1963 Cal 500 (503).

(6) Decree against defendants in individual capacity — Proper mode of execution would be that prescribed by this rule. AIR 1960 Cal 81 (83): 63 Cal WN 21.

3. Decree against individual partner. — (1) The holder of a decree against an individual partner gets no higher rights in execution than what a voluntary assignee of a partner of his share in the partnership gets under such assignment. AIR 1941 Cal 364 (366): ILR (1941) 1 Cal 389 (DB) ** AIR 1932 Pat 15 (19, 20): 10 Pat 792 (DB).

4. Sub-rule (4) — Notice. — (1) An order passed under sub-rule (2) without any notice as required by this rule is irregular and can be set aside in revision. AIR 1940 All 250 (250).

(2) Where a person obtains a decree against the judgment-debtor personally and takes out execution against his share in a partnership business carried on by the judgment-debtor in partnership with A, a notice is required to A under Order 21, Rule 49 (4) in order to enable him to exercise option under Rule 49 (3). He is impleaded in the execution proceedings because of Order 21, Rule 49 (4). But he is not a party to the decree and no second appeal is competent, as far as he is concerned. AIR 1958 Mad 290 (290, 291).

ORDER 21, RULE 50 — SYNOPSIS

1. Scope.
2. Execution against persons other than those referred to in sub-rule (1) — Sub-rule (2).
3. Determination of liability under sub-rule (2) operates as a decree.

1. Scope. — (1) This rule should be read with the provisions of Order 30. AIR 1941 Pat 596 (598): 20 Pat 755 (DB) ** AIR 1932 Bom 334 (335).

(2) The intention of the Legislature in framing Order 21, Rule 50 was to obviate the necessity of the trial of any fresh action, so that the question may be settled in the execution proceedings. ILR (1960) 1 Cal 305.

(3) A decree against a firm can be executed against any one or more of the partners personally. AIR 1949 Cal 113 (118): ILR (1945) 1 Cal 102 (DB) ** AIR 1926 Lah 236 (236) (DB).

(4) Decree against firm — Execution against one partner — Order 21, Rule 50 (2) and not O. 30, R. 3 applies. AIR 1967 All 9 (10): 1967 All LJ 173 (DB).

(5) A decree against a firm can be executed personally against any person coming under Clauses (b) and (c) of sub-rule (1). AIR 1943 Bom 156 (157): ILR

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

[Cf. R. S. C., O. 48A, R. 8,]

HIGH COURT AMENDMENTS

Allahabad

In sub-rule (2), add the words "or to which the decree is transferred for execution" between the words "which passed the decree" and the words "for leave" [1-6-1957].

Orissa

Same as that of Patna.

Patna

In sub-rule (2), add the words "or to the Court to which it is sent for execution" after the words "passed the decree" and before the words "for leave".

Order 21, Rule 50 — Note 1 (contd.)

(1943) Bom 306 ** AIR 1938 Cal 316 (317, 318) (DB).

(6) Decree can be executed against personal property of partners. **AIR 1960 SC 388 (389, 390).**

(7) A decree against a firm can with the leave of the Court, be executed personally against any other person as being a partner of the firm. AIR 1925 Rang 317 (318) (DB) ** AIR 1938 Cal 316 (317, 318) (DB).

(8) Suit against firm — Summons served on partner — His appearance under protest — Decree obtained after obtaining fresh summons and served in manner prescribed by Order 30, Rule 3 — Decree so obtained against firm may be executed with leave of Court against firm as well as the person initially served with summons and who had appeared under protest. **AIR 1964 SC 581 (583): 1963 Supp 2 SCR 30.**

(9) Where the claim of the decree-holder that the decree should be against the partners personally has been decided against the decree-holder by the trial Court, the executing Court is bound by the limitation placed on the decree itself. AIR 1953 All 710 (711) (DB).

(10) Under sub-rule (1) of this rule the holder of a decree against a firm has three courses open to him, any of which he may pursue regardless of the order in which they are set out. AIR 1943 Bom 156 (158) ** AIR 1933 Lah 472 (472) ** AIR 1925 Lah 379 (379).

(11) Relying upon sub-clauses (b) and (c) of sub-rule (1) of Order 21, Rule 50, a plaintiff who has obtained a decree against a firm may execute it against any person who has been individually served with the summons as a partner and has failed to appear and also against any person who has appeared in his own name under Rule 6 or Rule 7 of Order 30. **AIR 1964 SC 581 (584): 1963 Supp (2) SCR 30.**

(12) Decree against joint family firm can be executed under this rule read with Order 30, Rule 1, Explanation (Punjab) in same way as contractual partnership. AIR 1959 Punj 362 (364) (DB).

(13) When application under this rule is an application made in execution proceeding its maintainability must depend upon whether the execution application was made within time. AIR 1966 All 409 (411).

(14) Application under Rule 50 (2) — It is for proceeding against individual property of partner and not for proceeding against partnership property. (1966) 70 Cal WN 131.

(15) Decree obtained against joint Hindu family trading firm and its members — One member dying before hearing of suit — Decree against heirs of deceased member cannot be executed unless proceedings are taken under this rule. AIR 1959 Pat 200 (201): 1958 BLJR 724 (DB).

(16) Suit against joint family firm through partners — All partners personally served — Execution against partner's property can be allowed. AIR 1959 Pat 484 (486): 1958 BLJR 516.

(17) Tax due from unregistered firm — Certificate under Section 46 only mentioning amount of arrears of tax due from

Order 21, Rule 50 — Note 1 (contd.)
assessee, the unregistered firm — Collector can execute certificate of demand against a "partner" under Order 21, Rule 50, which applies by virtue of proviso to Section 46 (2), Income-tax Act (1922). **AIR 1969 SC 667 (670): (1969) 2 SCJ 64.**

(18) Application under Rule 50 (2) (All) will be maintainable if execution application is not barred. AIR 1966 All 409 (411, 412).

2. Execution against persons other than those referred to in sub-rule (1) — Sub-rule (2). — (1) It is provided specifically in sub-rule (2) read with sub-rule (4) that in the case of persons not served in the suit, their liability under the decree, when disputed, may be heard and determined in execution. AIR 1932 Bom 516 (520, 521, 522) (DB).

(2) Where a person appears in answer to a notice issued to him under sub-rule (2) and admits that he is a partner in the firm against whom a decree is passed, he cannot at the same time urge that the decree is not binding on the firm. (1947) 51 Cal WN 488 (497) ** AIR 1934 Sind 135 (135).

(3) The question whether the decree has been passed against a firm at all cannot be raised in an enquiry under the sub-rule. AIR 1942 Cal 613 (616): ILR (1942) 1 Cal 161.

(4) Notwithstanding the wide language of the expression "where such liability is disputed" the only question for consideration by the Court is adjudging the person to be partner and no defence which seeks to negative the liability of the partnership to the decree or impugns the validity of the decree as against the partnership would be open when a person is served with a notice under this sub-rule. AIR 1955 Mad 154 (157): ILR (1955) Mad 1106 (DB) ** AIR 1958 All 176 (193) ** AIR 1956 Bom 513 (515, 516): ILR (1956) Bom 193 (DB).

(5) The sub-rule is wide enough to permit an enquiry as to whether a person though not actually a partner has held himself out to be one and hence incurred liability as such. AIR 1956 Bom 63 (64) ** AIR 1941 Sind 8 (9): ILR (1941) Kar 69 (DB).

(6) An application for leave under sub-rule (2) is only ancillary to an application for execution, and will not be barred by reason of its being made beyond three years from the date of the decree so long as the decree itself is otherwise kept alive according to law. AIR 1949 Cal 113 (121): ILR (1945) 1 Cal 102. (48 Cal WN 280, **Reversed.**) ** AIR 1932 Bom 516 (519) (DB) ** AIR 1935 Sind 12 (13): 29 Sind LR 236.

[See however AIR 1930 Sind 180 (180, 182): 24 Sind LR 132.]

(7) No separate application for leave is necessary as the application for execution itself implies a prayer for leave. AIR 1949 Cal 113 (115): ILR (1945) 1 Cal 102 (DB). (48 Cal WN 280, **Reversed.**) ** AIR 1945 Cal 303 (304): ILR (1945) 2 Cal 57 (DB).

[But see AIR 1930 Bom 412 (413) (DB).]

(8) Execution of decree against heirs and legal representatives of deceased partner of firm — Leave for — No express prayer for leave in tabular statement — Summons was, however, issued in usual form — **Held,** though no express prayer was made, leave could be granted on determination of summons. (1966) 70 Cal WN 131.

(9) It is not necessary that an application for execution under Order 21, Rule 11 should have been filed before an application for leave under this rule is presented. AIR 1940 Bom 330 (336, 339): ILR (1940) Bom 562 (DB).

(10) Application by plaintiff for leave to execute decree against person on footing that he was person other than person referred to in Clauses (b) and (c) of sub-rule (1) of Order 21, Rule 50 — Application made under incorrect appreciation of law — Plaintiff's right under Order 21, Rule 50 (1) (b) is not lost — He can abandon his application for leave and execute decree. **AIR 1964 SC 581 (584): 1963 Supp (2) SCR 30.**

(11) Suit against firm is suit against partners — Suit may be brought against firm of which a partner is not capable of being sued — One of the partners being Ruler of former Indian State — Suit instituted without consent of Central Government — Decree can be validly passed against other partners — Decree passed against firm can be amended and can be executed under Order 21, Rule 50 (2). **AIR 1965 SC 1718 (1721).**

(12) Creditor's right to proceed against assets of partnership firm — Extent of — Change in constitution of firm — Properties in hands of new firm cannot be attached. AIR 1959 Cal 262 (264).

(13) Under Order 21, Rule 50 (2) the liability of a person would arise not only on the ground that he was actually a partner in the defendant firm against which the decree was obtained but it might equally arise on the ground of his having held himself out as a partner of the firm. Therefore, in an application under that rule, the issue should be not only whether that partner was a partner of the firm but also whether he had held himself out to be a partner of the firm. ILR (1960) 1 Cal 305.

3. Determination of liability under sub-rule (2) operates as a decree. — (1) A person not coming under Clauses (b) and (c) of sub-rule (1) cannot be considered to be a party to the decree — The proceedings as against him under sub-rule (2) cannot fall under Section 47 — Hence, it is not a decree — In order, however, to confer a

R. 51. Attachment of negotiable instruments.—Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.

[1882 and 1877, S. 270; 1859, S. 238.]

R. 52. Attachment of property in custody of Court or public officer.—Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued:

Order 21, Rule 50 — Note 3 (contd.)

right of appeal which does not otherwise exist, from such adjudication, sub-rule (3) lays down specifically that the order shall have the force of a decree. AIR 1932 Bom 516 (518) (DB).

(2) Where the partner is ex parte and there is no trial and determination of the liability the order granting leave ex parte does not have the force of a decree. AIR 1929 All 390 (391, 392) (DB).

[But see AIR 1935 Pat 409 (411): 14 Pat 857 (DB).]

(3) The words "conditions as to appeal or otherwise as if it were a decree" include conditions imposed by orders or rules outside this Code. AIR 1933 Cal 546 (547): 60 Cal 530 ** AIR 1939 Sind 161 (163): ILR (1939) Kar 589 (FB).

(4) Proceedings under sub-rule (2) are a "suit" within the meaning of Section 38 of the Presidency Small Cause Courts Act. (1942) 44 Bom LR 120 (120) ** (1942) 44 Bom LR 124 (126).

(5) The expression 'such liability' in sub-rule (2) in the context means liability as a partner and as soon as it is found that the person was a partner of the firm, the decree would immediately be executed against him. AIR 1959 Bom 529 (532, 533): 61 Bom LR 651 (DB).

(6) Plaintiff stating that if partners deny that purchases were made by firm, personal decree against partners should be passed — No denial by defendants that purchases were made by firm but specifically denying their personal liability — Plaintiff cannot get personal decree against partners. MBLJ 1954 HCR 459 (461).

(7) Where an application is made under Order 21, Rule 50 (2), primarily the question to try would be whether the person against whom the decree is sought to be executed was a partner of the firm when the cause of action accrued. **AIR 1965 SC 1718 (1721, 1722): (1965) 3 SCR 421: 68 Bom LR 31.**

(8) An application under Order 21, R. 50 (2) can be entertained by the Court to which the decree is sent for execution. AIR 1963 Punj 393 (397): 65 Pun LR 297. (AIR 1932 Pat 323, **Dissented from and held no longer good law, in view of AIR 1956 SC 359** and AIR 1921 All 199 (2) and AIR 1931 Lah 507 (2) and AIR 1931 Lah 736 and AIR 1929 Lah 228, Rel. on; **AIR 1956 SC 359,** Foll.)

(9) 'The liability of such person' — Meaning of — Person admitting to be partner of the firm — He cannot raise issues between himself and his other partners. **AIR 1963 SC 243 (250): (1963) 2 SCR 190.**

(10) Transfer of decree against partnership firm for execution — Application for execution against partner personally — Transferee Court is competent to decide. AIR 1963 Punj 395 (396): 65 Pun LR 232 (DB).

Order 21, Rule 51 — Note 1

(1) An attachment of a negotiable instrument should be made by actual seizure. AIR 1949 Cal 144 (151): ILR (1945) 1 Cal 277 ** AIR 1923 Mad 317 (318, 319): 46 Mad 415 (DB).

(2) A prohibitory order is sufficient attachment as against the debtor or the promisor. AIR 1928 Mad 940 (942) (DB).

(3) Where it is desired to obtain in execution the proceeds of a cheque which has been issued in favour of the judgment-debtor the proper procedure is to attach the cheque itself by actual seizure under this rule. The amount of the cheque cannot be attached by means of a prohibitory order on the Bank in such a case. AIR 1942 Rang 59 (60): 1941 Rang LR 759.

ORDER 21, RULE 52 — SYNOPSIS

1. Scope.
2. Property in the custody of the Court or public officer.
3. Property in the hands of a receiver.
4. Determination of questions of title and priority — Proviso.
5. Appeal.
6. Revision.

1. Scope. — (1) There can be no attachment of an amount which is in the hands of the Court after an order for its payment out to a person other than the judgment-debtor has been made by that Court. AIR 1952 Mad 540 (541): ILR (1952) Mad 1019.

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

[1882, S. 272; 1877, S. 273; 1859, S. 237; Cf. R.S.C., O. 46, R. 12; See S. 73]

HIGH COURT AMENDMENTS

Andhra Pradesh

Same as that of Madras.

Madras and Pondicherry

Add the following as proviso (ii) and renumber the existing proviso as (i):

"(ii) Provided further that, where the Court whose attachment is determined to be prior receives or realizes such property, the receipt or realization shall be deemed to be on behalf of all the Courts in which there have been attachments of such property in execution of money decrees prior to the receipt of such assets.

Explanation.—Priority of attachment in the case of attachment of property in the custody of Court shall be determined on the same principles as in the case of attachment of property not in the custody of Court".

[P. Dis. No. 445 of 1935]; see Act 26 of 1968, Section 3 and Sch., Pt. II [w. e. f. 5-9-1968].

Mysore

Add the following proviso at the end of R. 52 :—

Same as Proviso (ii) of Madras without the word "Explanation" in Para. 2 [30-3-1967].

Order 21, Rule 52 — Note 1 (contd.)

(2) Where a decree-holder seeks to attach money of the judgment-debtor already deposited in Court, it is necessary that he should put in an execution application in his suit to that effect, and give notice to the judgment-debtor. AIR 1942 Bom 53 (54) ** AIR 1926 Mad 1104 (1105) (DB).

(3) The attachment is to be made by issuing a notice to the custody Court, to hold the property subject to the orders of the Court issuing the notice. AIR 1916 Cal 570 (573) (DB) ** AIR 1935 Lah 914 (915).

(4) This rule only deals with the mode of attachment of property in the custody of the Court. It does not deal with the leave necessary for proceeding under it. AIR 1942 Bom 53 (53).

(5) As this rule provides only for a mode of attachment of money in the custody of any Court and not for any application being made to such Court by anybody objecting to the attachment that Court on such application cannot make an inquiry into the objection. AIR 1956 Orissa 206 (207): ILR (1956) Cut 591: 1956 Cri L Jour 1345 (DB) ** AIR 1958 Raj 235 (236): ILR (1958) 8 Raj 292 (DB).

(6) The mode of attachment under this rule is by the issue of a notice to the Court or public officer having custody of the property. AIR 1951 Nag 52 (55): ILR (1951) Nag 422 (DB).

(7) The absence of notice would not render the sale void ab initio. **AIR 1958 SC 725 (727, 728): 1959 SCR 333.**

(8) Where the Assistant Collector receives a certificate under Section 46 (2) of the Income-tax Act and seeks to attach assets held by a Court the proper procedure for the attachment of such assets is in terms of Order 21, Rule 52, Civil P. C. AIR 1958 All 636 (639) (DB).

(9) Court can attach the property which is beyond its jurisdiction provided it is in the custody of Court or Public Officer. (1967) 1 Andh WR 226: (1967) 2 Andh LT 260.

(10) Order 21, Rule 52 is applicable to movable as to immovable property — Obiter. (1963) 67 Cal WN 916.

(11) Rule does not apply: where Court appoints receiver of rents and profits of immovable property — Obiter. (1963) 67 Cal WN 916 ** AIR 1969 Andh Pra 167 (173): (1969) 1 Andh WR 100 (DB).

(12) Rule has no application to decree-holder executing mortgage decree. (1965) 78 Mad LW 44: ILR (1964) 2 Mad 101.

(13) Sum payable as sales tax on earth work and carriage — Project authorities withholding payment to contractor under prohibitory order under Order 21, Rule 52, C. P. C. — Subsequent decision by Supreme Court holding such tax as not legally leviable — Contractor held entitled for refund. AIR 1962 Orissa 136 (188, 189): ILR (1961) Cut 159 (DB).

(14) Amount of ad interim payment becoming due at the end of each 6 months' period but not already paid under Section 33 of Bihar Land Reforms Act, 1950 can be attached. 1964 BLJR 234.

(15) Attachment of movables in custody of Court situated outside jurisdiction of executing Court is exception to general rule of territoriality and is valid. **AIR 1965 Raj 41 (42): 1964 Raj LW 560.**

Order 21, Rule 52 — Note 1 (contd.)

(16) Compensation bonds paid for resumption of Jagir — Bonds are property liable to attachment and sale. 1961 Raj LW 429.

(17) Receiver appointed to collect rents and profits of immovable properties — Provisions of Rule 52 of Order 21, are not attracted — Execution proceedings against such properties without leave of Court — Not illegal. AIR 1969 Andh Pra 167: (1969) 1 Andh WR 100 (DB).

(18) Suit for setting aside attachment and sale in execution under Rule 63 — Attachment not resulting in any injury to plaintiff — Sale being voidable attachment not set aside. AIR 1969 Andh Pra 167 (176): (1969) 1 Andh WR 100 (DB).

2. Property in the custody of the Court or public officer. — (1) The rule permits of attachment of property in the custody of a public officer, such as moneys in the hands of the official trustee or insured letters addressed to the judgment-debtor lying in the custody of the post office. (1889) 12 Mad 250 (252) ** ('90) 13 Mad 242 (247) ** AIR 1916 All 336 (336) (DB).

(2) Revenue or interest or dividends payable in future can also be attached under this rule. AIR 1915 Bom 313 (314): 39 Bom 80 ** (1890) 3 CPLR 147 (150).

(3) The rule applies to the attachment of immovable property in the custody of a Court or public officer. AIR 1951 Nag 52 (55): ILR (1951) Nag 422 (DB) ** AIR 1942 Bom 53 (55).

(4) It is only when an appropriation is made of the money deposited in Court under the orders of Court towards the decree that it ceases to be the property of the judgment-debtor and his creditors could not proceed against it either in execution of decree or in realisation of arrears of land revenue or taxes. AIR 1964 Andh Pra 74: (1963) 2 Andh WR 232 (DB) ** ILR (1966) Andh Pra 1268 (1272) (DB).

(5) A custody Court under Order 21, Rule 52 has no authority to make any rateable distribution, unless it is the attaching Court as well—Orders of disbursement of attached amount made ignoring the attachment are illegal. AIR 1966 Andh Pra 371 (373): (1966) 1 Andh WR 483.

(6) Order of attachment issued by civil Court directing the District Magistrate not to sell the articles in his possession until further order from the Court and order of stay of sale issued — Sale by District Magistrate of the articles under Section 516-A, Cr. P. C. in disregard of the prohibition is not justified. ILR (1968) 1 Ker 702 (706).

(7) Amount of provident fund in the custody of Accountant General transferred to lapsed deposit account on account of the heirs of the deceased subscriber not producing succession certificate — Decree-holder of the deceased subscriber applying for attachment under Order 21, Rule 52 on the ground that it was in the custody of the public officer — Held, Court could not issue the notice under Order 21, Rule 52 before the decree-holder obtained letters of administration of the estate of the deceased subscriber. AIR 1961 Mad 288 (289): 73 Mad LW 684.

3. Property in the hands of a receiver. — (1) Moneys in the hands of a receiver can be attached under this rule. The rule does not affect the prevailing practice as to the necessity of obtaining leave in such cases. AIR 1953 All 717 (718) (DB) ** AIR 1947 Pat 112 (112) ** AIR 1942 Bom 53 (53).

[But see AIR 1953 All 717 (718) (DB).]

(2) Proceedings taken in respect of a property which is in the possession and management of a Receiver appointed by Court under Order 40, Rule 1, C. P. Code, without the leave of that Court, are illegal in the sense that the party proceeding against the property without the leave of the Court concerned, is liable to be committed for contempt of the Court. **AIR 1958 SC 725 (727, 728): 1959 SCR 333.** (It was assumed that a sale of a property in the hands of the Court through its Receiver, without the leave of the Court, was only voidable and not void ab initio and could be declared illegal in a proper proceeding or a suit.).

(3) Where a receiver is appointed in a suit for administration of the estate of a deceased but no decree is passed, the receiver appointed in the suit ought not to be directed to pay a judgment-creditor who has obtained an attachment under this rule. (1930) 32 Bom LR 1315 (1318) (DB) ** AIR 1927 Bom 657 (659).

(4) Application for attachment of money in hands of Receiver — Application is in accord with Rule 11 (2) (j) (ii) — Rule 11 (2) (j) (v) does not apply — Merely because relief cannot be granted by executing Court as no permission was obtained from Court which appointed Receiver, application cannot be considered as inconsistent with Rule 11. AIR 1968 Andh Pra 113 (115): (1968) 1 Andh LT 89.

(5) Attachment of certain amount held by Receiver sent to attaching Court by cheque on 24-7-1962 — Cheque realised on 31-7-1962 — **Held,** assets should be deemed to have been received by attaching Court anly on 31-7-1962. AIR 1968 Andh Pra 113 (114): (1968) 1 Andh LT 89.

(6) Application for attachment of money in hands of Receiver on 20-7-1962 — Return of application on 23-7-1962 on ground that it was without permission from Court which appointed receiver — Application re-presented on 26-7-1962 after necessary amendments — **Held,** application should be deemed to have been presented on former date. AIR 1968 Andh Pra 113 (115): (1968) 1 Andh LT 89.

(7) Property in hands of Receiver is in custody of Court — Obiter. (1963) 67 Cal WN 916.

Order 21, Rule 52 — Note 3 (contd.)

(8) A in execution of his money decree against B attaching a deposit made by B in part satisfaction of C's decree — C refusing to take deposit — Objection by B that money deposited by him was not his and therefore, could not be attached — Objection not maintainable under Order 21, Rule 58 — Direction by High Court that money should remain in deposit till disposal of appeal between B and C is illegal. (1964) 2 Andh WR 298.

(9) Dividend declared by Receiver under Section 64 under Provincial Insolvency Act (1920) — Attachment of, under Order 21, Rule 52 before sanction for distribution under Rule 19, Madras Provincial Insolvency Rules (1922) — Attachment is effective as the creditor becomes entitled to the amount as soon as the dividend is declared. ILR (1962) Andh Pra 477 (479).

4. Determination of questions of title and priority — Proviso. — (1) Where Courts B, C and D have in execution of decrees obtained by X, Y and Z respectively, successively attached a fund in the custody of Court A, it is the latter Court that has to determine the priority between X, Y and Z:

(a) It has been held by the High Court of Madras that X is entitled, as being the first attaching decree-holder, to priority over the claims of Y and Z, and that the custody Court A is not entitled to award a rateable distribution among X, Y and Z. AIR 1921 Mad 218 (221): 44 Mad 100 (FB). (**Overruling** AIR 1916 Mad 792: 38 Mad 221.) ** AIR 1933 Mad 342 (343).

(b) The High Court of Calcutta has, on the other hand, held that attachment does not create any title in the attaching creditor and that the custody Court is bound to apply the rules of justice, equity and good conscience and distribute the fund attached rateably amongst the attaching decree-holders. AIR 1917 Cal 13 (17): 44 Cal 1072 (DB).

[But see (1881) 7 Cal 553 (555) (DB).]

(c) The same High Court has held that where the custody Court is different from the attaching Court, the custody Court has no authority to make any rateable distribution and that it could only determine the question of priority and thereafter act under the instructions of the attaching Court. AIR 1933 Cal 814 (814, 815) (DB).

(d) The High Court of Bombay has held with reference to the attachment of funds in the hands of a receiver appointed in a partnership action that one of several creditors cannot by attachment obtain priority over the other creditors and that a Court of Equity will refuse permission to attach except on terms which ensure equality among all the creditors. (1892) 16 Bom 577 (579).

[But see AIR 1927 Bom 405 (410) ** AIR 1927 Bom 394 (397, 398).]

(e) The same High Court has also held that a creditor who has obtained a charging order in his favour is entitled to priority over other non-attaching creditors. AIR 1930 Bom 451 (455): 54 Bom 667 (DB).

(f) The Lahore High Court has held that the decree-holder who attaches the money first is entitled to priority. AIR 1935 Lah 914 (915).

(g) The Andhra Pradesh High Court has held that custody Court cannot decide question of rateable distribution falling under Section 73 — It is attaching Court alone that can do it. AIR 1968 Andh Pra 113 (115): (1968) 1 Andh LT 89.

(2) Where X obtains a decree in Court B and in execution thereof attaches a fund in Court A and before the transfer of the fund to Court B to the account of X's suit, other decree-holders have applied for execution to Court B, the matter falls within Section 73, and X and other decree-holders will be entitled to rateable distribution. AIR 1952 Bom 222 (223): ILR (1952) Bom 502 ** AIR 1921 Mad 218 (222): 44 Mad 100.

(3) The enquiry under the proviso is of the same nature as an investigation of claim proceedings and a suit lies to set aside the order passed therein. AIR 1915 All 275 (276, 277): 37 All 575 (DB) ** AIR 1936 Lah 521 (523) (DB).

(4) A decision in a proceeding under the proviso between the decree-holder and a stranger will not be one under Section 47. AIR 1939 Cal 413 (414) (DB).

[But see AIR 1939 Mad 210 (213): ILR (1939) Mad 1004 (DB).]

(5) A claim that the property in the custody of Court is a trust property and cannot be attached under a personal decree against the trustee cannot be enquired into by the custody Court under the provisions of the proviso. AIR 1956 Orissa 206 (208): ILR (1956) Cut 591: 1956 Cri L Jour 1345 (DB).

(6) A Magistrate who has the custody of the property attached has no jurisdiction under this rule to enquire into a claim in respect of the property. AIR 1956 Orissa 206 (208): ILR (1956) Cut 591: 1956 Cri L Jour 1345 (DB).

(7) Expression "any other person" and "otherwise" includes claim of Income Tax department for determination of its interest. (1963) 67 Cal WN 266.

(8) Realisation of fine — Magistrate sending the case under Sec. 386, Criminal P. C. to Collector — Collector has to realise the amount in execution in accordance with civil process. AIR 1961 All 528 (529): 1961 (2) Cri LJ 585.

R. 53. Attachment of decrees.—(1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

(a) if the decrees were passed by the same Court, then by order of such Court, and

(b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until—

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring

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Order 21, Rule 52— Note 4 (contd.)

(9) Railway employyee directing that the amount of his provident fund be paid to him in England through the Bank of England in the form of sterling — Union Government sending the amount to the Reserve Bank of India for payment through the Bank of England — Amount attached by decree-holder of subscriber — **Held,** the Union Government had no interest in the amount to entitle it to object to the attachment under Order 21, Rule 52. AIR 1962 Cal 169 (172): 65 Cal WN 848 (DB).

5. Appeal.— (1) Where the custody Court has determined the question of priority under Order 21, Rule 52, proviso, between the decree-holder and a third person, the decision is not one under Section 47 and consequently no appeal lies from such an order. The remedy of the aggrieved party lies by way of a regular suit. AIR 1958 All 636 (638) (DB).

6. Revision.— (1) No revision lies from an order by the custody Court determining a question of priority under the proviso to this rule. AIR 1936 Lah 521 (523) (DB).

ORDER 21, RULE 53 — SYNOPSIS

1. Scope and applicability.
2. Decree for money.
3. "Decree for sale in enforcement of a mortgage or charge".
4. Other decrees.
5. Preliminary decree for accounts — Attachability of.
6. Decree passed by the same Court.
7. Decree passed by different Courts.
8. Effect of attachment.
9. Stay of execution — Sub-rule (1).
10. Execution of attached decree — Sub-rule (2).
11. Representative — Sub-rule (3).
12. Adjustment of attached decree — Sub-rule (6).

1. Scope and applicability.— (1) Where a decree for the payment of money or for sale in enforcement of a mortgage or charge is attached, the mode of realization of the attached decree is by execution thereof. AIR 1944 Nag 298 (301): ILR (1944) Nag 885 (DB) ** AIR 1924 Rang 21 (21): 1 Rang 360 (DB) ** AIR 1932 Pat 349 (350): 12 Pat 36 (DB).

(2) In the case of decrees, not specified in sub-rule (1), sub-rule (4) prescribes the manner of attachment thereof. But the rule is silent as to how they should be realised after attachment. Such decrees should therefore, be sold after attachment by Court auction as being "other saleable property of the judgment-debtor" under Section 60. AIR 1944 Nag 298 (301): ILR (1944) Nag 885 (DB) ** AIR 1932 Cal 80 (82): 58 Cal 934 (DB).

or charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached, and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

[1882 and 1877, S. 273. See S. 51 (b).]

HIGH COURT AMENDMENTS

Allahabad

(1) In sub-rule (1) (b) and in sub-rule (4), after the words "to such other Court" add the words "and to any other Court to which the decree has been transferred for execution".

(2) In sub-rule (6) for the words "after receipt of notice thereof," read the words "after receipt of notice or with the knowledge thereof."

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta—See Assam High Court Order 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 [w. e. f. 1-12-1963].

Order 21, Rule 53 — Note 1 (contd.)

(3) Rule 178 of the Madras Civil Rules of Practice is intended only for the protection of the holder of the attached decree and therefore, the judgment-debtor under that decree could not question the validity of its sale or the right of the auction-purchaser of the decree to execute it. AIR 1954 Mad 1070 (1072) (DB).

(4) Where one A obtained a mortgage-decree against B on the original side of the District Munsif's Court and C obtained a money-decree against A on the small cause side of the same Court, it was held that absence of notice did not invalidate the attachment of A's decree by C in execution of his decree. AIR 1944 Mad 353 (354, 355): ILR (1944) Mad 690 (FB).

(5) Ex parte decree attached in execution of another decree — Ex parte decree set aside — Fresh decree passed after trial on merits — Attachment is revived as soon as fresh decree is passed. AIR 1933 Rang 346 (347).

(6) The assignment of a decree by a decree-holder to defraud his creditors is no bar to the attachment of such decree under this rule. AIR 1942 Mad 714 (715).

(7) Attachment of preliminary decree for sale — Final decree in favour of attaching creditor — Subsequent final decree in favour of assignee of preliminary decree is invalid. AIR 1961 Bom 56 (59): 62 Bom LR 410 (DB).

(8) Sale and attachment of decree in contravention of the procedure laid down in Rule 53 (1) — Sale is not void ab initio — Contravention merely amounts to an irregular exercise of jurisdiction by the Court. (1963) 2 Mys LJ 135 (DB).

2. Decree for money. — (1) A decree for the payment of money is not attachable as a debt under Rule 46, but should be attached under this rule. AIR 1944 Nag 298 (301): ILR (1944) Nag 885 (DB) ** AIR 1944 Sind 68 (70): ILR (1943) Kar 393 (DB) ** AIR 1925 All 264 (265) (DB).

(2) Decree for mesne profits is attachable under this rule. AIR 1918 Pat 65 (67): 4 Pat L Jour 836 (DB).

(3) Decree for arrears of rent is attachable under this rule. AIR 1940 Nag 270 (270, 272) (DB) ** (1898) 25 Cal 322 (323).

(4) A certificate as to deficiency of price granted under Rule 71 of this Order is attachable under this rule. AIR 1926 All 379 (382) (DB).

3. "Decree for sale in enforcement of a mortgage or charge". — (1) Under the present rule decrees for sale in enforcement of mortgage are placed on the same footing as money decrees. AIR 1944 Nag 298 (301): ILR (1944) Nag 885 (DB) ** AIR 1921 Bom 127 (127): 45 Bom 343 (DB).

(2) In the case of a decree for maintenance charging immovable property also, the proper course for the decree-holder is to apply for execution, and not for the sale of the decree attached. AIR 1919 Mad 894 (896) (DB).

Bombay: Dadra and Nagar Haveli

(1) For sub-rule (1) of Rule 53 and its marginal note, substitute the following:

"53. Attachment of decrees.—(1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made—

(a) if the decree was passed by the same Court, then by order of such Court, and

(b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court and to any other Court to which the decree has been transferred for execution of a notice by the Court which passed the decree sought to be executed, requesting such other and the transferee Court to stay the execution of such decree unless and until—

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor, with the written consent of the holder of the decree sought to be executed or with the permission of the attaching Court, applies to the Court receiving such notice to execute the attached decree."

Order 21, Rule 53 — Note 3 (contd.)

[But see (1910) 5 Ind Cas 879 (879) (DB) (Mad).]

(3) If a decree for money or a mortgage-decree for sale is sold and not executed, after attachment, the sale cannot be regarded as a nullity which confers no rights on the purchasers. (1909) 34 Mad 442 (447, 448) (DB).

(4) A preliminary decree in a mortgage suit is neither a decree for the payment of money nor one for sale in enforcement of a mortgage and is not covered by sub-rule (1) of this rule. AIR 1937 All 652 (653): ILR (1937) All 828 (DB) ** AIR 1956 All 857 (858) (DB) ** AIR 1937 Oudh 365 (366): 13 Luck 237 (DB).

[But see AIR 1944 Nag 298 (302): ILR (1944) Nag 885 (DB).]

4. Other decrees. — (1) A decree relating to immovable property is not itself immovable property. Such a decree should therefore, be attached only under this rule and not under the next rule. AIR 1919 Nag 19 (20): 16 Nag LR 72 ** (1911) 12 Ind Cas 924 (924) (All).

(2) A decree for possession of immovable property is attachable under this rule. (1921) 64 Ind Cas 388 (389, 390) (DB) (Cal) ** (1881) 6 Cal 213 (217) (PC) ** (1881) 6 Cal 243 (246) (PC).

(3) A preliminary decree for partition is to be attached under this rule. AIR 1932 Cal 80 (82): 58 Cal 934 (DB).

(4) A decree for foreclosure should be attached under this rule. (1904) 26 All 91 (93) (DB).

(5) A decree for partition, mesne profits and costs comes within the purview of sub-rule (4). AIR 1951 Punj 324 (327): ILR (1950) Punj 170 (DB).

(6) Order for restitution of costs is a decree within Section 2 (2) and is attachable under Order 21, Rule 53 (1). AIR 1960 Andh Pra 544 (545): (1960) 1 Andh WR 29.

5. Preliminary decree for accounts — Attachability of.— (1) A preliminary decree for the dissolution of a partnership and for accounts is a decree for money within the meaning of this rule and can be attached. (1903) 27 Bom 556 (560) (DB).

[But see AIR 1937 Cal 4 (6, 7) (DB).]

(2) A preliminary decree in a suit for accounts is saleable property which is attachable under Section 60. AIR 1935 Cal 751 (752) (DB).

(3) A preliminary decree for accounts is attachable although it cannot be sold in execution. AIR 1954 Mad 471 (473) ** AIR 1941 Pat 43 (44): 19 Pat 935 (DB) ** AIR 1940 Pat 107 (108, 109): 18 Pat 688 (DB) ** AIR 1941 Pat 43 (44): 19 Pat 935 (DB).

6. Decree passed by the same Court.— (1) Where the decree sought to be executed and the decree sought to be attached are passed by the same Court, the attachment is made under sub-rule (1), Clause (a) by order of the Court. AIR 1954 Bom 251 (253): ILR (1954) Bom 695 (DB).

(2) Where a decree is passed by Court X and another decree passed by Court Y is transferred for execution to Court X the latter decree does not become the decree of the Court X so as to be treated as a decree passed by the same Court within the meaning of Rule 53 (1) (a). AIR 1948 Cal 74 (75): ILR (1948) 1 Cal 36.

7. Decrees passed by different Courts.— (1) An order of attachment under this rule in execution of a decree passed by Court X, of a decree passed by Court Y, can be made either by Court X or by the Court to which the decree is transferred for exe-

(2) For the existing sub-rule (4) substitute the following :—

"(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court and to any other Court to which such decree has been transferred for execution a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent." [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Calcutta: Andaman and Nicobar Islands

(1) In sub-rule (1) (b) after the words "to such other Court" insert the words "and to any Court to which it has been transferred for execution," also insert therein the words "or Courts" after the words "requesting such other Court."

(2) In sub-rule (1) (b) (ii) cancel the words "to execute its own decree" and substitute therefor the words "to execute the attached decree with the consent of the said decree-holder expressed in writing or the permission of the attaching Court."

(3) In sub-rule (4) insert after the words "by sending to such other Court" the words "and to any Court to which it has been transferred for execution."

Order 21, Rule 53 — Note 7 (contd.)

cution. AIR 1940 Pat 557 (559): 19 Pat 832 (DB) ** (1912) 17 Ind Cas 323 (326, 329) (DB) (Mad).

(2) The attachment of a decree for money passed by another Court is complete as soon as a notice under sub-rule (1), Clause (b) is served on the Court which passed such decree. AIR 1937 All 63 (64).

(3) The issue of a notice is a requisite condition of attachment of a decree under Rule 53 (1) (b) and the mere omission by the judgment-debtor to object to the attachment on the ground of want of such notice cannot validate the attachment. AIR 1948 Cal 74 (75): ILR (1948) 1 Cal 36.

(4) It is not necessary that any notice should be given by the Court which passed the decree to the judgment-debtor (decree-holder of the attached decree) in order to effectuate a valid attachment. AIR 1954 Mad 471 (473).

8. Effect of attachment.— (1) The effect of attachment of a decree under this rule is to stay execution of the attached decree until the conditions mentioned therein happen. AIR 1954 Bom 251 (253): ILR (1954) Bom 695 (DB) ** AIR 1957 Madh Pra 9 (10) ** (1912) 13 Ind Cas 907 (907) (DB) (Cal).

(2) The decree is not permanently rendered incapable of execution by reason of the attachment, nor is the decree-holder's interest destroyed. AIR 1916 Cal 620 (621) (DB) ** AIR 1933 Oudh 349 (349, 350).

(3) The addition of the words "or his judgment-debtor" in sub-rule (1), Cl. (b) gives legislative recognition to the right of the holder of the decree attached, to apply for execution after attachment. AIR 1934 Cal 140 (142) (DB) ** AIR 1935 Mad 413 (414) (DB) ** AIR 1935 Bom 416 (417).

(4) The execution of the attached decree by its holder would be subject to the condition that the amount realised by him would not be paid to him but would have to be deposited in Court for the benefit of his judgment-creditor. AIR 1957 Madh Pra 9 (10).

(5) It is not necessary for the holder of the attached decree to state in the body of his application for execution that it is made for the benefit of his judgment-creditor. AIR 1957 Madh Pra 9 (10).

(6) The transferee from the judgment-debtor is entitled to execute the decree notwithstanding the subsequent attachment inasmuch as his rights are prior to the attachment and Rule 16 confers a right of execution in his favour. (1912) 17 Ind Cas 323 (325) (DB) (Mad) ** AIR 1928 Rang 25 (26): 5 Rang 595 (DB) ** AIR 1927 Nag 132 (133): 23 Nag LR 20.

(7) A transferee of the decree even after attachment is entitled to apply for execution by virtue of Rule 16. AIR 1929 Pat 1 (3): 7 Pat 726 (DB).

(8) The right of the assignee to execute the decree is subject to the right of the attacher just as the assignor's right would be. (1912) 17 Ind Cas 323 (325) (DB) (Mad) ** AIR 1937 All 63 (64).

(9) Rights of transferee decree-holder cannot be better than those of his transferor. AIR 1962 Andh Pra 357 (363): (1962) 2 Andh WR 41 (DB).

(10) Clause (b) of Rule 53 (1) in O. 21, does not enact an absolute rule prohibiting the execution of the decree. It is a request to the Court, which passed the decree, to stay execution until the two events contemplated by Rule 53 (1) (b) happen. That being the position, it does not in any way affect the right of the assignee decree-holder to pursue the remedy available to him under Order 21,

(4) In sub-rule (6) substitute the words "in contravention of the said order with knowledge thereof" for the words "in contravention of such order after the receipt of notice thereof".

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as those in sub-rules (1) (i) and (2) of Madras [9-6-1959]; see Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 (2).

Madhya Pradesh

Substitute—

(1) "to such other Court and to any other Court to which the decree has been transferred for execution" for the words "to such other Court" occurring in clause (b) of sub-rule (1) and in sub-rule (4); and

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Order 21, Rule 53 — Note 8 (contd.)

Rule 16. AIR 1964 Andh Pra 1 (3, 6): (1963) 2 Andh WR 205 (FB) ** AIR 1964 Andh Pra 1 (3): (1963) 2 Andh WR 205 (FB). (ILR 20 Mad 157, ILR 33 Mad 62, and 5 Ind Cas 1010, 13 Ind Cas 659 (Mad), **Overruled.)**

9. Stay of execution — Sub-rule (1).— (1) The object of the stay is to prevent the holder of the attached decree from realizing and taking away the fruits of that decree. AIR 1944 Mad 353 (354), 355): ILR (1944) Mad 690 (FB) ** AIR 1954 Bom 251 (253): ILR (1954) Bom 695 (DB) ** (1897) 24 Cal 778 (782) (DB).

(2) The stay is not an absolute stay but a limited one and does not prevent the holder of the decree sought to be executed or his judgment-debtor from executing the attached decree. AIR 1944 Mad 353 (354, 355): ILR (1944) Mad 690 (FB) ** AIR 1924 Bom 383 (384): 48 Bom 485 (DB).

(3) The object of the rule is to prevent the holder of the attached decree from executing it and taking away the fruits of the decree. The rule is not intended to prevent other decree-holders from asking for the execution of the decree. **AIR 1940 PC 173 (176): ILR (1940) Kar (PC) 312: 67 Ind App 350: ILR (1941) Mad 1.**

(4) An order made under this rule by the attaching Court is no stay order contemplated by Section 15, Limitation Act (1908). AIR 1964 Andh Pra 439 (442, 443): (1964) 1 Andh WR 345 ** AIR 1966 Mys 17 (19): (1965) 1 Mys LJ 429 ** AIR 1961 Mad 299 (301): (1962) 1 Mad LJ 355.

(5) Attachment under Order 21, Rule 53 is not injunction — Neither it is a stay order within meaning of Section 15, Limitation Act. AIR 1969 Andh Pra 250: (1969) 1 Andh WR 455 (FB).

10. Execution of attached decree — Sub-rule (2).— (1) Under sub-rule (2) the attaching decree-holder is entitled to apply for execution of the attached decree. He can take the necessary steps for the realization of the proceeds of the attached decree and apply them in satisfaction of his decree. AIR 1944 Nag 298 (301): ILR (1944) Nag 885 (DB) ** (1893) 17 Mad 58 (60) (DB) ** 1900 All WN 99 (100).

(2) The Collector attaching a decree of a Court under a certificate sent to him under Section 46 of the Income-tax Act cannot file an application for the execution of the attached decree. AIR 1955 Andhra 229 (231): ILR (1955) Andhra 473 (DB).

(3) Application by attaching decree-holder for execution dismissed for default — Attachment does not cease — Fresh execution not barred. AIR 1963 Orissa 99 (102) ** (1963) 2 Mys LJ 398.

(4) Attachment of decree is no bar to execution — Execution can be subject to attachment. AIR 1965 Cal 473 (475) (DB).

(5) Attachment before judgment — Execution of attached decree and collection of proceeds by attaching creditor without obtaining any decree in suit in which attachment before judgment made — Refund of amount-realised can be ordered under Section 151. AIR 1963 Ker 195 (196): 1963 Ker LT 1179.

(6) Notwithstanding the attachment of a decree obtained by a judgment-debtor against his own judgment-debtor, it is always open to the judgment-debtor whose decree is attached, to execute that decree although the proceeds of that decree have to be applied towards the satisfaction of the decree which has been obtained against himself. AIR 1967 Mys 24 (25): (1965) 2 Mys LJ 85 (DB).

(7) Application for execution of attached decree — Period begins to run from date of attached decree. AIR 1963 Pat 209 (210).

(8) Simple money decree cannot be included in the category of movables for execution. ILR (1967) 3 Mad 615 (617) (DB).

11. Representative — Sub-rule (3).— (1) Sub-rule (3) makes it quite clear that once a decree has been attached by another decree-holder, the latter becomes a representative of the holder of the attached decree. AIR 1956 Trav-Co 13 (15): ILR (1955) Trav-Co 273 (FB) ** AIR 1947 Mad 121 (122): ILR (1947) Mad 515 (DB) ** (1895) 17 All 425 (426).

(2) the following as sub-clause (ii) of clause (b) of sub-rule (1) in place of the existing sub-clause :—

"(ii) the holder of the decree sought to be executed or his judgment-debtor with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court applies to the Court receiving such notice to execute the attached decree" [16-9-1960].

Madras and Pondicherry

(1) In sub-rule (1) (b) (ii):

(i) after the word "judgment-debtor" and before the word "applies" add the words "if he has obtained the consent in writing of the decree-holder or the permission of the attaching Court," and

(ii) for the words "its own," substitute the words "the attached" [13-10-1936]; see Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-1968].

(2) Add the following as sub-rule (1) (c):

"(c) If the decree sought to be attached has been sent for execution to another Court, the Court which passed the decree shall send a copy of the said notice to the former Court, and thereupon the provisions of clause (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it." [11-1-1918].

Mysore

In Rule 53 delete sub-rule (1) and substitute the following :—

"53. (1) Where property to be attached is a decree either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made—

(a) if the decrees were passed by the same Court then by the order of such Court, and

(b) if the decree sought to be attached was passed by another Court then by the issue to such other Court of a notice by the Court which passed the decree

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Order 21, Rule 53 — Note 11 (contd.)

(2) The attaching decree-holder is entitled to take out execution in the same way as the original holder thereof could have done. AIR 1956 Trav-Co 13 (15): ILR (1955) Trav-Co 273 (FB) ** AIR 1954 All 484 (486) (DB) ** AIR 1928 Mad 976 (977) (DB) ** AIR 1929 Oudh 413 (414) (DB) ** AIR 1939 Cal 465 (465, 466).

(3) The attaching decree-holder is entitled to take moneys deposited by the judgment-debtor and certify payment. AIR 1930 All 659 (661) (DB) ** (1939) 43 Cal WN 1076 (1078) (DB).

(4) Moneys brought into Court by the judgment-debtor become forthwith available for the satisfaction of the decree sought to be executed and interest ceases to run from the date of the deposit. AIR 1921 Cal 580 (581, 582) (DB).

(5) The attaching creditor has the same remedies as his judgment-debtor and can also proceed against any sureties for the decree amount. AIR 1919 Lah 275 (276): 1919 Pun Re No. 44 (DB).

(6) A question arising between a person attaching a decree under this rule and an assignee of such decree will be a question between persons claiming to be representatives of the same party and as such will not be within Section 47 of the Code. AIR 1927 Mad 1025 (1025, 1026) (DB).

[But see AIR 1916 Cal 471 (472) (DB).]

(7) The representative capacity of the attaching decree-holder is limited only to the specific purpose of executing the decree and he is not invested with all the powers of the original decree-holder. 1956 Andh LT 925 (934).

(8) The attaching decree-holder cannot adjust the decree by accepting a smaller sum and such an adjustment by him will not bind the holder of the attached decree. AIR 1948 Cal 126 (128) (DB) ** AIR 1940 PC 167 (170): 67 Ind App 360: ILR (1940) 2 Cal 493: ILR (1940) Kar (PC) 321.

[But see 1956 Andh LT 925 (932, 933.)]

(9) Decree attached in execution of several decrees by different decree-holders — One decree-holder can apply for execution without consent of others — Moneys realised will be subject to rateable distribution — Payment made to one of attaching creditors out of Court will not bind others under Section 64. AIR 1940 PC 173 (176): ILR (1940) Kar PC 312: 67 Ind App 350: ILR (1941) Mad 1.

(10) When a judgment-debtor of an attaching decree makes a payment to the attaching decree-holder whose decree is no longer in force, he must be deemed to have done it at his own risk and therefore full satisfaction of the decree against him could not be granted. It follows that the application under Order 21, Rule 2, is not sustainable. 1956 Andh LT 925 (936).

sought to be executed, requesting such other Court to stay the execution of its decree unless and until—

(i) the Court which passed the decree sought to be executed cancels the notice or

(ii) the holder of the decree sought to be executed or his judgment-debtor, if he has obtained the consent in writing of the decree-holder or the permission of the attaching Court applies to the Court receiving such notice to execute the attached decree;

(c) If the decree sought to be attached has been sent for execution to another Court the Court which passed the decree shall send a copy of the said notice to the former Court and thereupon the provisions of clause (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it." [30-3-1967].

Orissa

Same as that of Patna.

Patna

Substitute the following for sub-rule (1) (b):

"(b) If the decree sought to be attached was passed by another Court then by the issue to such other Court (or to the Court to which the decree may have been transferred for execution) of a notice by the Court before which the application has been made requesting such other Court (or the Court to which the decree may have been transferred for execution as the case may be) to stay the execution of the decree sought to be attached unless and until—

(i) the Court which has issued the notice shall cancel the same, or

(ii) the holder of the decree sought to be executed, or his judgment-debtor with the consent of the said decree-holder expressed in writing or the permission of the attaching Court, applies to such other Court (or to the Court to which the decree may have been transferred for execution) to execute the attached decree."

Punjab, Haryana and Chandigarh

(1) Add the following words to sub-rule (1) (b), after the words "to such other Court":

"and to the Court to which it has been transferred for execution."

Order 21, Rule 53 (contd.)

12. Adjustment of attached decree — Sub-rule (6).— (1) Clause (6) of the rule provides an exception to the general rule embodied in Section 64 of the Code, and is a special case of the application of the well-known principle of justice and equity intended for the protection of parties to a bona fide transaction. AIR 1927 Mad 728 (731): 50 Mad 677 (FB) ** AIR 1954 Bom 251 (253): ILR (1954) Bom 695 (DB) ** AIR 1931 Rang 185 (188): 9 Rang 140 (DB).

(2) Sub-rule (6) is not very happily worded and it has been held that the words "either through the Court or otherwise" refer to "payment or adjustment" and not to the "notice". AIR 1919 Mad 840 (843) (DB).

(3) The High Court of Allahabad has added the words "or with the knowledge" after the word "notice". So far as that Court is concerned, notice of the order through Court is not necessary. AIR 1933 All 82 (84) (DB) ** AIR 1937 All 63 (64).

(4) If a judgment-debtor should, in ignorance of the attachment, have made any payment or adjustment it should be regarded as a payment or adjustment properly made under the decree to the rightful person. AIR 1954 Bom 251 (253): ILR (1954) Bom 695 (DB) ** (1939)43 Cal WN 374 (377) (DB) ** AIR 1938 Cal 401 (402) ** AIR 1939 Nag 17 (18).

(5) The judgment-debtor under the attached decree cannot plead, as against the attaching decree-holder, an uncertified payment or adjustment made before the date of attachment. AIR 1933 Rang 239 (240): 11 Rang 420 (DB).

(6) The rule prohibits an adjustment between the judgment-debtor under the decree attached and the decree-holder thereof and not an adjustment between the attaching decree-holder and the judgment-debtor. AIR 1924 Pat 696 (698) (DB).

[But see AIR 1937 Cal 468 (473) (DB).]

(7) The provisions of Rule 57 of this Order do not apply to a default on the part of the attaching decree-holder in regard to the execution of the attached decree. AIR 1914 All 284 (285) (DB) ** AIR 1935 Lah 194 (195): 15 Lah 910 ** AIR 1927 Mad 1025 (1028) (DB).

(2) In sub-rule (1) (b) (ii), substitute the words "the attached" for the words "its own"; and insert the following words between the words "executed or" and "his judgment-debtor." :

"with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court".

(3) In sub-rule (6), substitute the words "with the knowledge," for the words "after receipt of notice" [7-4-32]; see Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

R. 54. Attachment of immoveable property.—(1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the District in which the land is situate.

[1882 and 1877, S. 274; 1859, Ss. 235, 239. See Section 64 and O. 21, R. 67.]

ORDER 21, RULE 54 — SYNOPSIS

1. Attachment of immovable property — General.
2. Immovable property.
3. Attachment of property belonging to a Hindu coparcener.
4. Attachment, when complete.
5. Service of prohibitory order.
6. Proclamation of order of attachment.
7. Beat of drum.
8. Affixing copy on conspicuous part of the property.
9. Affixing copy in Court-house.
10. Affixing copy in Collector's office.
11. Effect of attachment and re-attachment.
12. Absence of attachment and irregular and invalid attachment.
13. High Court amendments.

1. Attachment of immovable property — General.— (1) The word "attachment" in Section 64 of the Code means, with reference to immovable property, an attachment effected in the manner provided for by this rule. AIR 1917 Cal 832 (832) (DB).

(2) The requirements of Order 21, R. 54 (1) and (2) are mandatory and every one of the prescribed things must be done before an attachment could be said to have been made for Section 64, C. P. Code to come into operation. (1966) 1 Mad LJ 413 (424): ILR (1966) 1 Mad 600 (DB).

(3) Where there is only publication in local newspapers and the other formalities such as proclamation by beat of drum etc., are not done. The omissions do not constitute merely a material irregularity within Order 21, Rule 90 but it is a clear violation of the mandatory provisions and the sale becomes without proclamation and therefore void. AIR 1965 Andh Pra 215 (217): (1964) 2 Andh LT 190.

(4) An attachment is a necessary preliminary to execution proceedings. AIR 1942 Lah 153 (155): ILR (1942) Lah 559 (FB) ** 5 All 86 (91) (FB) ** (1891) 15 Bom 222 (228): 18 Ind App 22 (PC) ** (1880) 4 Bom 515 (520) (FB).

(5) Order 21, Rule 54 (1) does not speak of mode or manner making the attachment. It relates to the form in which order of attachment in execution should be made. AIR 1963 Pat 286 (287): 1963 BLJR 445 (DB).

(6) The object to the rule in prescribing a particular way of notifying the attachment is to give notice to the judgment-debtor not to alienate his property and to the public not to accept any alienation from him. (1885) 7 All 702 (707) (DB) ** AIR 1965 Andh Pra 215 (217): (1964) 2 Andh LT 190.

(7) The purpose of the Civil Court attachment is quite different from that of an attachment under Section 145 (4) Cr. P. C. Attachment of immovable property under Civil P. C. is to prohibit the judgment-debtor from transferring or charging the property in any manner. The Magistrate acting under Section 145, Cr. P. Code is concerned with actual possession with a view to prevent breach of peace. AIR 1969 Raj 82 (84): 1969 Cri LJ 441.

(8) There is nothing to prevent the Magistrate from taking recourse to Section 145, Cr P. C. in a suitable case where a civil suit is pending between the litigants in respect of the same subject-matter. AIR 1969 Raj 82 (85, 86): 1969 Cri LJ 441.

(9) Charge created by compromise decree — Charged property can be brought to sale in execution of decree — Fresh attachment under Order 21, Rule 54 is not necessary. AIR 1963 Tripura 46 (47, 48).

HIGH COURT AMENDMENTS

Allahabad

(1) At the end of clause (2) substitute a comma for the full stop and thereafter add the following :—

"and, where the property, whether paying revenue to Government or otherwise, is situate within Cantonment limits, in the office of the Local Cantonment Board and of the Military Estates Officer concerned." [27-9-1941.]

(2) Add the following as sub-rule (3).

"(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made."

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta — See Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 [w. e. f. 1-12-1963].

Bombay: Dadra and Nagar Haveli

For existing Rule 54 and its marginal note, substitute the following :—

"54. Attachment of immoveable property.—(1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. Such order shall take effect, where there is no consideration

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Order 21, Rule 54 — Note 1 (contd.)

(10) Attachment before judgment is not an attachment in execution of decree. AIR 1968 Punj 461 (462): 70 Pun LR 467 (DB).

(11) Where property attached before judgment is re-attached after the decree has been passed, the former attachment merges in the later re-attachment and a claimant whose application under Order 21, Rule 58 against the former attachment has been dismissed gets a fresh opportunity to file another application under Order 21, Rule 58. (1969) 1 Mad LJ 386: 81 MLW 523 (524).

2. Immovable property.— (1) The equity of redemption in a mortgage is immovable property. AIR 1921 Cal 801 (803) (DB) ** (1897) 21 Bom 226 (228) (DB).

(2) The life interest taken by a Parsee widow under her husband's will in the income of his immovable property has been held to be immovable property. (1899) 23 Bom 1 (11).

(3) A mortgagee's interest in a usufructuary mortgage is immovable property. AIR 1949 Pat 170 (171, 172): 27 Pat 114 (DB) ** AIR 1940 All 431 (432): ILR (1940) All 596 (DB).

3. Attachment of property belonging to a Hindu coparcener.— (1) An attachment of the share of an undivided coparcener in a joint Hindu family should be made in respect of his undivided share in the whole family property, and not of his share in each item of it. AIR 1920 Mad 1035 (1036) (DB).

(2) An attachment of the share of an undivided coparcener has the effect of preventing the accrual of title by survivorship to the other members, in the event of the member, whose share is attached, dying after attachment and before sale. AIR 1951 Nag 270 (274): ILR (1950) Nag 491 (DB) ** AIR 1914 Mad 68 (68) (DB) ** AIR 1926 All 157 (158): 48 All 4 (DB).

[But see AIR 1914 Bom 256 (257): 28 Bom 105 (DB).]

(3) If an attachment made during the execution of a decree ceases to subsist the interest of a coparcener who dies passes by survivorship to the other coparceners and the property which thus passes can no longer be attached. AIR 1951 Nag 270 (274): ILR (1950) Nag 491 (DB).

4. Attachment, when complete.— (1) An attachment under this rule is not complete unless the order of attachment has been issued and in execution of that order, the other formalities prescribed by the Code have been complied with. AIR 1952 Trav-Co 159(164) (FB) ** AIR 1949 Pat 170 (172): 27 Pat 114 (DB) ** AIR 1946 All 438 (442, 443): ILR (1946) All 788 (DB) ** AIR 1928 PC 139 (142): 51 Mad 349: 55 Ind App 250. (AIR 1922 Mad 447: 45 Mad 90, Reversed.) ** AIR 1967 All 136 (138, 143): 1966 All LJ 990 (DB) ** AIR 1963 Pat 286 (287): 1963 BLJR 445 (DB). (Mere order passed by the Court is not an attachment.) ** (1969) 1 Mys LJ 234: 17 LR 482.

(2) The question whether a valid order for attachment was made is one of fact. AIR 1956 Trav-Co 120 (121): ILR (1955) Trav-Co 1279 (DB).

(3) No notice is necessary before ordering an attachment of property. AIR 1936 Nag 77 (78).

(4) A mere order for attachment of a property does not raise any presumption that the property was actually attached. ILR (1955) 1 All 673 (676, 677) (DB).

for such transfer or charge, from the date of such order, and where there is consideration for such transfer or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged.

(2) Copies of the order shall also be forwarded to the Collector with a request that appropriate entries showing the attachment levied on the property may be caused to be made in the revenue records, city survey records or village panchayat records as may be required in the particulor case.

(3) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the District in which the land is situate, and also, where the property is situate within cantonment limits, in the office of the Local Cantonment Board and the Military Estates Officer concerned." [1-11-1966].

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-65].

Calcutta: Andaman and Nicobar Islands

(1) Add the following to sub-rule (2):

"and also, where the property is situated within Cantonment limits, in the office of the Local Cantonment Board and the Military Estates Officer concerned." [26-7-1941].

(2) Add the following as sub-rule (3):

"(3) Such order shall take effect, where there is no consideration for such transfer or charge, from the date of the order; and where there is consideration for such transfer or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged, or from the date when the order is proclaimed under sub-rule (2) whichever is earlier." [3-2-1933].

Order 21, Rule 54 — Note 4 (contd.)

(5) Mere admission of the parties, without anything more is not enough to constitute attachment and, therefore, no presumption that an attachment had in fact been made can be drawn on the basis of such admission. AIR 1954 Orissa 222 (223): ILR (1954) Cut 345 (DB).

(6) An order for attachment of the property directed under Order 38, Rule 5 (3) would be under Order 38, Rule 7, according to provisions of Order 21, Rule 54 and consequently relevant Form No. 24 in Appendix E would also be utilised for that purpose. AIR 1967 All 136 (139): 1966 All LJ 990 (DB).

5. Service of prohibitory order.— (1) The mere writing of an order is not enough. It must be published as required by Cl. (2) so as to give the judgment-debtor an opportunity of knowing that he is prohibited. AIR 1919 Mad 594 (595): 42 Mad 565 (DB) ** (1905) 27 All 258 (259).

(2) The order of attachment need not be served on the judgment-debtor. AIR 1941 All 41 (41, 42): ILR (1941) All 39 (DB).

[But see (1965) 6 Guj LR 328 (329): ILR (1965) Guj 899.]

6. Proclamation of order of attachment.— (1) A mere prohibitory order will not constitute a sufficient attachment unless the proclamation described in the second part of the rule is carried out. AIR 1955 Pat 231 (234): 33 Pat 256 (DB) ** AIR 1939 Bom 508 (511) ** AIR 1963 Pat 286 (287, 288): 1963 BLJR 445 (DB).

(2) The publication of the proclamation of attachment as required by the rule constitutes sufficient notice to the judgment-debtor. AIR 1943 Mad 322 (324) ** AIR 1941 All 41 (41, 42): ILR (1941) All 39 (DB) ** AIR 1939 Rang 434 (435): 1939 Rang LR 594 (SB).

(3) The proclamation is merely a ministerial act, and the delay on the part of the officer in effecting it, does not vitiate the proceedings. AIR 1919 Mad 752 (753): 42 Mad 1 (DB).

7. Beat of drum.— (1) A proclamation of attachment should be made by beat of drum at some place on or adjacent to the property attached. The omission to have the drum beaten as required by the rule is a material irregularity. ILR (1951) 1 Raj 199 (203) (DB) ** (1886) 10 Bom 504 (505) (DB) ** AIR 1932 Oudh 76 (76) (DB).

8. Affixing copy on conspicuous part of the property.— (1) A copy of the proclamation order must be affixed on a conspicuous part of the property. AIR 1956 Trav-Co 120 (121): ILR (1955) Trav-Co 1279 (DB) ** AIR 1935 Lah 57 (58) ** AIR 1936 Rang 403 (405) (DB).

(2) Failure to affix a copy on a conspicuous part of the property is a material irregularity. AIR 1923 Lah 671 (671) ** AIR 1918 Pat 266 (268) (DB).

(3) Where there are several properties ordered to be attached, a copy of the order must be affixed on each of the properties. AIR 1952 Trav-Co 159 (165) (FB)

Delhi and Himachal Pradesh

Same as that of Punjab. See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Gujarat

(1) Add the following to sub-rule (1):

"Such order shall take effect, where there is no consideration for such transfer or charge, from the date of such order, and where there is consideration for such transfer or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged."

(2) Substitute a comma for the full stop at the end of sub-rule (2) and add the following thereafter:

"and also, where the property is situate within Cantonment limits, in the office of the Local Cantonment Board and the Military Estates Officer concerned." [17-8-1961].

Kerala: Laccadive, Minicoy and Amindivi Islands

(i) for sub-rule (2), the following sub-rule shall be substituted, namely :—

"(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode and a copy of the order shall be affixed on a conspicuous part of the property and thereupon, a conspicuous part of the Court-house and also in the village office or, in case there is no such office, in the Taluk office of the place in which the land is situate and, where the property is situated within the limits of a Municipality or Panchayat, in the office of the Municipality or Panchayat within the limits of which the property is situate."

Order 21, Rule 54 — Note 8 (contd.)

** AIR 1948 Mad 191 (193) ** AIR 1943 Mad 712 (713): ILR (1944) Mad 262 (DB).

(4) Where the property is in several plots contiguous or otherwise the copy of the order need not be affixed on each separate plot. AIR 1956 Trav-Co 120 (121): ILR (1955) Trav-Co 1279 (DB) ** AIR 1949 Cal 320 (320).

9. Affixing copy in Court-house.— (1) A copy of the proclamation of sale must be affixed on a conspicuous part of the Court-house. AIR 1918 Nag 213 (214).

(2) An omission to affix a copy of the attachment order in a conspicuous part of the Court-house is a material irregularity. AIR 1920 Lah 24 (25).

[See however 1898 Pun Re No. 83, p. 291.]

(3) Where the process-server's report omits to mention that a copy of the attachment order was affixed on the Court-house, the attachment must be held to be invalid. AIR 1939 Lah 284 (285).

10. Affixing copy in Collector's office.— (1) Where the property attached is land paying revenue to the Government, the rule requires that the order of attachment should be affixed in the Collector's office. ILR (1955) 5 Raj 648 (649) ** AIR 1939 Bom 508 (511) ** AIR 1931 Pat 58 (59): 9 Pat 860 (DB).

(2) Though there is a house on a site which is assessed to revenue, the property is still land paying revenue to Government and omission to affix a copy of the order in the Collector's office constitutes a material irregularity under rule 90. AIR 1925 Lah 583 (584) (DB).

[But see AIR 1944 Lah 455 (457): ILR (1946) Lah 52 (DB).]

(3) Collector's office and District Judge's Court situate in same compound — Copy of sale proclamation affixed in District Judge's Court — Sale widely advertised — Omission to affix copy of sale proclamation in Collector's office is not material irregularity. **AIR 1945 PC 178 (181): 72 Ind App 287: ILR (1945) Kar (PC) 330: ILR (1946) Mad 379.**

(4) Attachment proved — Fixing of copy of order in Collector's Office may be presumed under Section 114, Evidence Act. **AIR 1934 PC 217 (218): 15 Lah 836: 61 Ind App 371.**

11. Effect of attachment and re-attachment.— (1) An attachment under this rule does not constitute dispossession of the party in actual possession. AIR 1939 Mad 456 (458): ILR (1939) Mad 803 (SB) ** AIR 1926 Mad 42 (43) (DB) ** (1880) 4 Bom 529 (535) (FB).

[See however AIR 1936 Nag 120 (120, 121): 31 Nag LR Sup 212.]

(2) An attachment under this rule does not confer any interest or title in the property in favour of the attaching party. AIR 1945 Nag 97 (100): ILR (1945) Nag 121 (DB) ** AIR 1942 Oudh 465 (471, 472) (FB) ** AIR 1938 Mad 360 (363): ILR (1938) Mad 744 (FB).

(3) An attachment under this Rule does not prohibit anyone from either receiving or making the payment. AIR 1960 Pat 196 (197, 198, 199): ILR 37 Pat 1465.

(4) An attaching creditor obtains by the attachment a right to have the attached property kept in custodia legis for the satisfaction of his debt. AIR 1956 Trav-Co 34 (35) (DB).

(5) An agricultural lease granted by a landlord in the ordinary course of manage-

(ii) after sub-rule (2) the following sub-rule shall be inserted, namely :—

"(3) The attachment shall be deemed to have taken as against transferees without consideration from the judgment-debtor from the date of the order of attachment and as against all other persons from the date on which they respectively had knowledge of the order of attacnment or the date on which the order was duly proclaimed under sub-rule (2) whichever is the earlier." [9-6-1959]; See Act 37 of 1956 S. 60 and Reg. 8 of 1965, S. 3 (2).

Madhya Pradesh

(1) In sub-rule (2) delete the full stop at the end and add the following words:

"and also where the property is situate within Cantonment limits in the office of the Local Cantonment Board and the Military Estates Officer concerned."

(2) Add the following as sub-rule (3):

"(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment-debtor from the date on which such order is made". [16-9-1960].

Madras and Pondicherry

(a) Substitute the following for sub-rule (2):

"(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode. A copy of the order shall be affixed on a conspicuous part of the property and on a conspicuous part of the Court-house. Where the property is land paying revenue to the Government, a copy of the order shall be similarly affixed in the office of the Collector of the district where the land is situated. Where the property is situated within Cantonment limits the order shall be similarly affixed in the office of

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Order 21, Rule 54 — Note 11 (contd.)

ment would not be prohibited under this rule. AIR 1936 All 265 (266) (DB).

(6) An attachment operates only when it is actually made and not from the date when the order for attachment is made, and it is only a transfer made subsequent to the actual attachment that is hit and not the one which has been made prior to the effecting of an attachment though an order of attachment was passed earlier. AIR 1955 Pat 231 (234): 53 Pat 256 (DB).

(7) An attachment order takes effect (Rule 54 (3) (All)) against transferees who are not purchasers for value in good faith, at the time when it is made. AIR 1964 All 369 (369, 370) (DB).

(8) A re-attachment of property ex majori cautela after decree does not imply an abandonment of the attachment obtained before decree. AIR 1915 Mad 386 (386) (DB) ** AIR 1916 Pat 353 (355) (DB).

12. Absence of attachment and irregular and invalid attachment.— (1) Attachment is a step in execution designed for the protection of the judgment-creditor and not for the benefit of the judgment-debtor. AIR 1934 Bom 241 (243) (DB).

(2) Where a sale takes place without the property sold having been attached, it is not a nullity and will not be set aside unless substantial loss or injury is proved to have resulted therefrom. AIR 1947 Mad 213 (215): ILR (1947) Mad 471 (DB) ** AIR 1918 Mad 1262 (1263) (DB) ** (1912) 16 Ind Cas 438 (438) (DB) (Mad) ** AIR 1916 Cal 465 (467, 468) (DB).

[But see (1888) 10 All 506 (511) (DB).]

(3) The absence of attachment is only an irregularity which does not affect the jurisdiction of the Court to sell. AIR 1954 Mys 142 (143): ILR (1953) Mys 530 ** (1899) 21 All 311 (314) (DB) ** AIR 1930 Lah 685 (686).

(4) Any defect or error in the mode of attachment is only an irregularity which does not render the sale ipso facto void. AIR 1954 Mys 142 (143): ILR (1953) Mys 530 ** 1910 Pun Re No. 40 (DB) ** AIR 1930 Cal 353 (355) (DB) ** (1891) 18 Cal 422 (426) (FB) ** AIR 1923 Nag 78 (79) ** AIR 1967 Ker 163 (170): 1967 Ker LT 238 ** AIR 1961 Orissa 22 (24, 25): ILR (1960) Cut 512 (DB).

(5) The execution of a warrant of attachment can be delegated to a subordinate officer. AIR 1940 Lah 30 (31) (DB).

(6) If no attachment comes into effect according to procedure prescribed, any step taken towards achievement of that property is a mere nullity and has no effect on property. AIR 1967 All 136 (138, 139, 140): 1966 All LJ 990 (DB).

(7) Bid at Municipal auction by partner on behalf of partnership — Part of sale price paid by partner and balance by partnership firm — Money decree against partner in individual capacity — Attachment of property in execution under Order 21, Rule 54 as if bidder was owner though the property belonged to Municipality, points

— the Local Cantonment Board and the Military Estates Officer concerned, and where the property is situated within the limits of a Municipality, in the office of the Municipality within the limits of which the property is situated".

(b) Add the following as sub-rule (3):

"(3) the order of attachment shall be deemed to have been made as against transferees without consideration from the judgment-debtor from the date of the order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment or the date on which the order was duly proclaimed under sub-rule (2) whichever is the earlier". [13-10-1936]; see Act 26 of 1968, S. 3 and Sch., Pt. II [w.e.f. 5-9-68].

Mysore

In sub-rule (2) of Rule 54 convert the full stop into a comma and add the words "and where the property is situated within the limits of a Municipality or other local authority also in the principal office of the said Municipality or the local authority" [30-3-1967].

Orissa

Same as that of Patna.

Patna

Same as (1) of Madhya Pradesh.

Punjab, Haryana and Chandigarh.

(1) At the end of sub-rule (2), substitute a semicolon for full stop and add:

"Where the property is land situated in a Cantonment, copies of the order shall also be forwarded to the Cantonment Board and to the Military Estates Officer in whose area that Cantonment is situated." [As amended on 30-7-1941].

(2) Add the following as sub-rule (3):

"(3) The order shall take effect, as against persons claiming under a gratuitous transfer from the judgment-debtor, from the date of the order of attachment, and as against others from the time they had knowledge of the passing of the order of attachment or from the date of the proclamation, whichever is earlier". [7-4-1932]; see Act 31 of 1966, Ss. 29 and 32 [1-11-1966].

Order 21, Rule 54 — Note 12 (contd.)

to abuse of process of Court — Non-compliance with provisions of Rule 49 of O. 21 made execution against suit property invalid. (1964) 1 Andh WR 300.

13. High Court amendments.— Allahabad.— (1) Sub-rule (3) is not only inconsistent with sub-rule (2) but is also repugnant to Section 64 by providing that an attachment is effective before it has actually been made. AIR 1946 All 438 (443): ILR (1946) All 788 (DB).

(2) Person taking transfer long before order of attachment had been proclaimed would not be bound by prohibition contained in the order, although order may have been passed on same date. Transferee is entitled to priority on equitable grounds as well. AIR 1939 All 154 (155, 156) (DB).

Andhra pradesh.— (3) Before a party can request the Court to consider the effect of non-fulfilment of the terms of Order 21, Rule 54 he must show that there was no affixture of the proclamation in the Municipal office. AIR 1965 Andh Pra 334 (336): (1965) 1 Andh WR 194 (DB).

Bombay.— (4) The object of adding the new sub-rule is to protect the transferee without notice during the interval between the date of making the order and the date of its proclamation and not thereafter. The order of attachment shall, therefore, take effect where there is consideration for the transfer from the date when such order comes to the knowledge of the person to whom the property is transferred or from the date when the order is proclaimed under sub-rule (2) whichever is earlier. AIR 1944 Bom 265 (266, 267) (DB).

Calcutta.— (5) The new sub-rule (Order 21, Rule 54 (3) (Cal).) is concerned with the rights of transferee from the judgment-debtor whose property had been attached. It is in a sense an explanation of the provisions of Section 64. The effect of that sub-rule is that, where the judgment-debtor has transferred the property, the order for attachment shall be deemed to be attachment in relation to the transferee from the judgment-debtor who had not paid consideration. ILR (1949) 1 Cal 267 (269) (DB).

Madhya pradesh.— (6) The word "purchaser" in sub-rule (3) to R. 54 of O. 21 is used in its technical English legal sense and includes a mortgagee. (1936) 19 Nag L Jour 94 (97) (FB).

R. 55. Removal of attachment after satisfaction of decree.—Where—

(a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or

(c) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

[1882 and 1877, S. 275; 1859, S. 245. See Rule 57 and Order 38, Rule 9.]

HIGH COURT AMENDMENT

Allahabad

Substitute the following for Rule 55.

"55. (1) Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under Section 73 (1) in respect of the property of the same judgment-debtor by persons other than the holder of the decree for the execution of which the original order was passed.

ORDER 21, RULE 55 — SYNOPSIS

1. Scope.
2. "Attachment shall be deemed to be withdrawn."
3. Revival of attachment.

1. Scope.— (1) On any of the three things mentioned in Clauses (a), (b) and (c) happening the attachment is automatically deemed to be withdrawn. No express order is necessary. AIR 1944 Bom 50 (54) (DB) ** (1909) 4 Ind Cas 97 (97) (DB) (Mad).

(2) The rule applies only where the decree is fully and entirely satisfied. (1912) 15 Ind Cas 677 (678) (All).

(3) An attachment cannot be partially raised by consent of parties without an express order of the Court. AIR 1927 Mad 648 (649).

(4) The words "amount decreed" mean, in the case of an instalment decree, the instalment which has become due and in respect of which the attachment has been made. AIR 1928 Nag 65 (66).

(5) The general provisions of this rule will not apply when the case is covered by the special provisions of Section 224 (2) and (3), Orissa Tenancy Act. AIR 1949 Pat 78 (78) (DB).

(6) The rule is not exhaustive of the modes in which attachment ceases. (1950) 55 Mys HCR 42 (47) ** AIR 1937 Cal 390 (392) (DB) ** AIR 1937 Pesh 90 (91) (DB).

(7) In the case of attachment of a sum of money, the attachment does not cease with the payment of the money into Court. The attachemnt continues till the sum is disposed of by the Court by paying it to the decree-holder or otherwise. AIR 1940 Oudh 360 (361): 16 Luck 76 (DB).

(8) Attachment of a property sold in execution of a decree does not cease until the sale becomes absolute by confirmation. AIR 1958 Mys 140 (143): ILR (1957) Mys 351 ** (1955) 33 Mys LJ 100: ILR (1954) Mys 187.

(9) Proceedings under Section 145, Criminal P. C. and attachment of land — Proceedings dropped — Attachment will not automatically cease. (1965) 31 Cut LT 132 (137, 138): ILR (1964) Cut 878.

(10) Attachment made final under Order 38, Rule 6 — Part of the property directed to be sold — Attachment of property not directed to be sold cannot be lifted. AIR 1969 Andh Pra 184 (187).

2. "Attachment shall be deemed to be withdrawn."— (1) Where a decree in execution by attachment of immovable property of the judgment-debtor, is satisfied, the attachment is deemed to have been withdrawn. AIR 1967 Andh Pra 148 (150) (FB).

(2) Where by reason of payment an attachment ceases, another decree-holder who has applied for execution against the same judgment-debtor, but who has not attached the properties, cannot have the property sold under the attachment that has ceased. (1911) 56 Bom 156 (163) (DB).

(3) Where the decretal amount is paid into Court under Clause (a) of this rule but owing to the claims of other decree-holders for rateable distribution, the attaching decree-holder gets only a portion of the money deposited, the attachment will not cease. AIR 1939 Pat 392 (396): 18 Pat 404 (DB).

(4) Judgment-debtor depositing amount shown in writ of attachment — Costs of judgment-creditor not ascertained and have not been deposited — Judgment-creditor solely responsible for delay in ascertaining his costs — Order continuing attachment of property cannot be sustained. AIR 1965 Cal 163 (166) (DB).

(5) Case under Order 21, Rules 55 and 57 (Cochin) — Attachment before judgment — Execution petition dismissed —

(2) Where—

(a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)] with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(b) satisfaction of the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)], is otherwise made through the Court or certified to the Court, or

(c) the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)] is set aside or reversed,

the attachment shall be deemed to be withdrawn, and in the case of immovable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense and copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule".

R. 56. Order for payment of coin or currency notes to party entitled under decree.—Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

[1882 and 1877, S. 277; 1859, S. 242. See S. 51 (e) and Rr. 64, 79 and 81; Cf. O. 39, R. 10.]

R. 57. Determination of attachment.—Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

[See Rr. 55, 60 and 63. Cf. O. 38, Rr. 8, 9 and 11.]

Order 21, Rule 55 — Note 2 (contd)

Decree-holder not taking any steps within three months after dismissal of execution petition — Attachment does not come to an end — Order 21, Rule 55 does not apply to attachment before judgment. (1964) 1 Ker LR 64 (66, 67).

(6) It is open to the parties by an agreement or compromise to take their case out of the deeming provisions contained in Order 21, Rule 55 but it would be a question of fact in each case to be determined on its own circumstances, whether or not it was intended that the attachment should be deemed to be withdrawn. AIR 1960 Punj 4 (5).

3. Revival of attachment.— (1) There will be no revival of attachment when the suit is subsequently decreed by the same Court or a superior Court. AIR 1952 Trav-Co 414 (418) (FB) ** AIR 1937 Lah 169 (170, 171).

[But see AIR 1918 Oudh 275 (278).]

Order 21, Rule 56 — Note 1

(1) Attachment of zamindari compensation bonds — The bonds are not current coins or currency and satisfaction of decree cannot be entered by endorsing the bonds in favour of decree holder — Analogy of R. 56 of Order 21 does not apply to case — Satisfaction of decree cannot be entered unless the bonds are sold. 1962 All WR (HC) 18 (20, 21).

ORDER 21, RULE 57 — SYNOPSIS

1. Scope and object.
2. "By reason of the decree-holder's default."
3. Effect of dismissal.
4. Execution removed from file for statistical purposes.
5. Responsibility of sapurdar.
6. Revival of attachment.
7. Attachment before judgment.
8. Default in executing attached decree.

See R. 53.

1. Scope and object.—(1) The rule prescribes the procedure to be followed, where after attachment in execution, the application for execution cannot further be proceeded with by reason of the decree-holder's default. AIR 1942 Bom 227 (231) (DB) ** AIR 1929 Cal 465 (466): 56 Cal 416 (DB).

(2) The object of the rule is to put an end to the practice of disposing of execution applications by such orders as "ap-

HIGH COURT AMENDMENTS

Allahabad

Substitute the following for Rule 57, namely—

"Where any property has been attached in execution of a decree and the Court for any reason passes an order dismissing the execution application the attachment shall, in the absence of any order passed by the Court, be deemed to subsist for a period of fifteen days after the dismissal of the application for execution and no fresh attachment of the same property shall be necessary if a fresh application for execution is made within such period of fifteen days. If no such application is made, the attachment shall cease:

Provided that in the case of movable property the attachment shall not be continued after an order dismissing the execution application has been passed unless the decree-holder has given his consent in writing and there is in deposit with the Court on his behalf a sum of money sufficient to meet the expenses of the attachment during the extended period" [1-6-1957].

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta; see Assam High Court Order, 1948, cl. 6 and Act 27 of 1962, Ss. 13 and 15 [w.e.f. 1-12-1963].

Bombay: Dadra and Nagar Haveli[a]

Substitute the following for Rule 57:

"57. Where any property has been attached in execution of a decree and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue or cease. If the Court omits to make an order, the attachment shall continue till the expiry of the period prescribed for filing an appeal, or where an appeal has been filed, until the appeal is finally disposed of." [1-11-1966.]

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963, S. 3 [1-7-1965].

Order 21, Rule 57 — Note 1 (contd.)

plication struck off" or "lodged", and to remove the doubt that existed under the old Code as to the effect of an order of dismissal upon attachment, by providing in explicit terms that the attachment should cease upon the dismissal, irrespective of any question of intention. AIR 1919 Lah 337 (339): 1919 Pun Re No. 154 ** AIR 1915 Mad 885 (886) (DB) ** (1911) 38 Cal 482 (485) (DB) ** AIR 1922 Lah 108 (109): 3 Lah 7 (DB).

(3) Under the rule, the Court should not "strike off" execution applications for default of the decree-holder. AIR 1930 Bom 16 (20) (DB).

(4) If the Court passes an order "striking off" execution, it will be deemed to be one of dismissal. AIR 1919 All 194 (196): 41 All 157 (DB) ** AIR 1924 Lah 645 (645, 646) (DB) ** AIR 1929 Nag 82 (82).

(5) The rule is of a penal nature and should, therefore, be construed strictly. Madh BLJ 1955 HCR 1894 (1898).

(6) The provisions of this rule have been held to have been no retrospective effect and do not apply to orders passed before the coming into force of the present Code. AIR 1915 Mad 1121 (1122) (DB) ** AIR 1916 Mad 1104 (1105) (DB).

2. "By reason of the decree-holder's default."— (1) Under this rule, the dismissal must be due to the Court being unable to proceed with the execution on account of the decree-holder's default. AIR 1957 Trav-Co 92 (94) (DB) ** (1950) 55 Mys HCR 240 (248) (DB).

(2) The default referred to by the rule is not confined merely to a default in appearance or in the payment of process fees, or in production of documents. It means failure to do what one is legally bound to do, that is, to go on with the application and have the property sold. AIR 1957 Andh Pra 991 (991, 992).

[See also AIR 1942 Bom 227 (231) (DB).]

(3) An omission to serve notice on the judgment-debtor as required by Rule 66 of this Order amounts to default. AIR 1941 Bom 395 (396): ILR (1941) Bom 652 ** (1911) 38 Cal 482 (485) (DB).

(4) Failure to furnish any information called for by the Court, amounts to a default within the meaning of this rule. AIR 1926 Mad 980 (983): 50 Mad 67 (DB).

(5) If the decree-holder withdraws his application, or does not press his application or requests the Court to strike it off, or consents to an application for adjournment of the sale made by the judgment-debtor, he thereby precludes himself from proceeding with the execution application and the Court can dismiss the same for default under this rule. AIR 1925 Mad 1113 (1114) (DB). (Withdrawal — Note — This case is **overruled** on a different point in AIR 1942 Mad 41: ILR (1942) Mad 336 (FB).) ** AIR 1957 Andh Pra 991

Order 21, Rule 57 — Note 2 (contd.)

(992). (Application not pressed.) ** AIR 1952 Madh B 139 (140). (Request to strike off.) ** AIR 1924 Lah 645 (646) (DB) (Do.) ** AIR 1929 Nag 82 (82). (Do.) ** AIR 1923 Pat 446 (447) (DB). (Consent to adjournment.)

(6) When the decree-holder accedes to the judgment-debtor's request for time or for instalments there is no default on his part. AIR 1944 Nag 324 (324, 325): ILR (1944) Nag 739.

(7) An omission to do anything which the decree-holder is not under an obligation to do, such as not being present at the time of the sale, or his failure to bid at such sale, does not constitute a default. AIR 1949 Mad 594 (595).

[See AIR 1938 Lah 728 (728, 729) (DB).]

(8) A dismissal of the application for want of bidders at the sale will not have the effect of putting an end to the attachment under this rule. AIR 1923 Mad 703 (703) (DB).

[But see AIR 1933 Rang 169 (171).]

(9) It is on the day of dismissal that the Court must have found it not possible to proceed with the case before it could be said that the dismissal was for default and that if the default was on a previous day, it is not default contemplated by the rule. (1950) 55 Mys HCR 240 (248) (DB).

(10) The default contemplated by this rule refers to a stage after the attachment and not before the attachment. In a case where, though there was an attachment, the parties as well as the Court were proceeding in ignorance of the attachment, as though there was none, the dismissal of the application at a stage when the Court thought that the attachment was yet to be effected, does not come within the scope of this rule. AIR 1923 Mad 703 (705) (DB) ** AIR 1938 Lah 728 (728, 729) (DB). (AIR 1938 Lah 123 **Reversed.**)

(11) Where an attachment has taken place before judgment or on a prior execution application and the Court rejects a subsequent execution application in limine under Order 21, Rule 17 for non-compliance with the formal requirements of the law, the attachment will not come to an end as the dismissal contemplated by the rule is one after an execution application has been taken cognizance of and execution has been ordered. AIR 1940 Mad 615 (617) (DB).

(12) The mere fact that the decree-holder has been restrained by an injunction from executing a decree does not mean that the Court is bound to dismiss an application for execution under this rule where, in spite of the injunction, the decree-holder goes on with the application. AIR 1943 Bom 273 (277).

(13) Where, after securing attachment of the property, a petition for execution is filed, but the decree-holder dies during the pendency of the execution proceeding and the petition is dismissed on the ground that the decree-holder is dead, it is doubtful whether the execution can be said to have been dismissed for 'default' on the part of the decree-holder to proceed with the execution proceedings and that the attachment is determined. (1963) 2 Mys LJ 352 (DB).

(14) Order consigning case to record passed under erroneous impression that no further steps are necessary — Order subsequently set aside by High Court — Neither of the orders put an end to attachment under Order 21, Rule 57 as they had not been based on any default of the decree-holder. AIR 1965 Raj 155 (159): 1964 Raj LW 59.

(15) When the lower Court directed that the attachment would continue for a period of three months it means that it was satisfied that it was dismissed not for the default of the decree-holder, and that is the reason why it allowed the attachment to continue for three more months. (1969) 1 Mad LJ 277.

3. Effect of dismissal.— (1) Where an execution application is dismissed for default of the decree-holder under this rule the attachment previously effected ceases forthwith. AIR 1952 Madh B 139 (140) ** Madh BLJ 1954 HCR 100 (100) ** AIR 1943 Bom 255 (256) ** (1913) 20 Ind Cas 149 (150) (DB) (Cal) ** AIR 1923 Pat 446 (447) (DB) ** (1968) 70 Punj LR 419 (421): 1968 Cur LJ 228.

[See AIR 1934 Lah 697 (698).]

(2) Even where the dismissal for default is due to a misapprehension by the Court, the attachment will cease. AIR 1941 Bom 395 (397): ILR (1941) Bom 652.

(3) For the attachment to cease the dismissal must be of the application for execution. The dismissal of an interlocutory application in a pending execution application will not entail the termination of attachment under this rule. AIR 1940 Mad 172 (173).

[See also AIR 1949 Mad 594 (595).]

(4) The dismissal of the application for execution must be forthwith or on any subsequent date to which it is posted. Where there is no immediate disposal in the case nor is the application posted to some later date for disposal, the order striking off the application six days after the default is not a judicial disposal and the attachment does not cease from the date of that order. AIR 1956 Trav-Co 119 (119) (DB).

(5) It is the dismissal of the execution application in which for the first time the attachment was effected that would result in the attachment being raised. The dismissal of a subsequent application cannot lead to the cessation of the attachment. AIR 1957 Andh Pra 991 (992).

(6) The obtaining of a fresh attachment by the decree-holder during the continuance of a prior attachment does not ter-

Order 21, Rule 57 — Note 3 (contd.)

minate the prior attachment. AIR 1940 Mad 172 (173).

(7) No question of any intention arises, under the present Code; a mistaken impression on the part of the decree-holder that attachment continued notwithstanding the dismissal of the application or the fact that he prays for sale only of the attached property in a subsequent petition will not have the effect of nullifying the imperative provisions of this rule. AIR 1915 Mad 337 (337) (DB).

(8) After the ceasing of the attachment upon dismissal of execution application on account of the default of the decree-holder, decree holder can only apply for a fresh attachment and then bring the property to sale, if he wants to proceed against that property. (1913) 20 Ind Cas 149 (150) (DB) (Cal).

[See ('14) AIR 1914 Mad 312 (312) (DB).]

(9) Where the Court passes an order "petition dismissed; attachment to continue," the direction regarding the continuance of the attachment is of no legal effect or consequence and the attachment ceases forthwith. AIR 1941 Bom 395 (396): ILR (1941) Bom 652 ** 1956 Andh LT 925 (931) ** (1911) 38 Cal 482 (485) (DB) ** AIR 1919 All 194 (195, 196): 41 All 157 (DB) ** AIR 1950 Mad 2 (5): ILR (1950) Mad 39 (DB).

[See however AIR 1935 Mad 17 (20).]

[But see AIR 1925 All 456 (456). (Order should be treated as order adjourning sine die.)]

(10) Under the rule as amended in Nagpur in 1930, the Court has power, while dismissing an application for execution to continue the attachment. AIR 1936 Nag 277 (278): ILR (1938) Nag 346.

[See also ILR (1955) Nag 698 (701) (DB).]

(11) See also the amendments made by the other High Courts and the followig cases. **AIR 1951 SC 447 (451): 1951 SCR 572.** (Under Rule 57 as amended in Calcutta the executing Court can dismiss the application but it can specifically keep alive the attachment by an express order.) ** (1950) 55 Mys HCR 240 (246) (DB). (Mysore amendment — Court must apply its mind at the time of dismissing application to the question, whether attachment should not subsist.)

(12) The rule applies, in terms, only to cases of dismissal by reason of the decree-holder's default. AIR 1956 Trav-Co 122 (123): ILR (1955) Trav-Co 1232 (DB) ** AIR 1953 Nag 200 (203): ILR (1952) Nag 684 (DB) ** AIR 1944 Mad 126 (127).

(13) Where the dismissal is not due to the default of the decree-holder, the question whether the attachment ceases by reason of the dismissal, depends upon the circumstances of each case. AIR 1940 Mad 733 (737) ** AIR 1917 Mad 705 (705) (DB) ** AIR 1933 Pat 609 (610) (DB).

[See also AIR 1942 Bom 227 (231) (DB).]

(14) Where the dismissal is due to a mistake of the Court or in consequence of an order of stay, or of injunction passed by a competent Court, the attachment is not put an end to by reason of the order of dismissal. AIR 1940 Mad 129 (130). (Mistake of Court.) ** (1912) 34 All 490 (490) (DB). (Do.) ** AIR 1928 Mad 453 (454) (DB). (Injunction order.)

[See however AIR 1941 Bom 395 (397): ILR (1941) Bom 652. (Dismissal due to misapprehension.)]

(15) The Court has power to direct by an explicit order, that the attachment should cease even where there is no default on the part of the decree-holder. AIR 1921 Oudh 176 (184) (DB).

(16) Even in cases where the dismissal of an application for execution is not for default the attachment will normally come to an end on the dismissal unless the Court otherwise directs or the attachment order otherwise provides. AIR 1943 Bom 255 (256).

(17) Where an execution application is finally dismissed the attachment made under it will cease although the dismissal of the application may not be for default of the decree-holder. AIR 1940 Mad 763 (765).

(18) A dismissal of an application for execution behind the back of the decree-holder on a date which was not fixed for its disposal and without an opportunity to the decree-holder to represent the facts cannot be a dismissal for default and such an order must be treated as a nullity. AIR 1949 Mad 352 (354). (Order under Rule 57 (Madras).)

4. Execution removed from file for statistical purposes. — (1) Even in cases to which the rule does not apply, there is no provision of law authorizing the Court to lodge an application or record it or strike it off from the file for what is commonly called statistical purposes. AIR 1952 Punj 118 (119) ** AIR 1940 Lah 78 (79): ILR (1940) Lah 516 ** AIR 1930 Mad 303 (305) (DB).

(2) The proper course in cases where execution has to be removed from file for statistical purposes, is to adjourn the application and not to strike it off the file. Where the Court does, however, pass such an order as "struck off" or "recorded" or "closed" or "consigned to the record room", etc., it would only amount to an adjournment sine die and the application will be deemed nevertheless to be pending. AIR 1956 Trav-Co 122 (123): ILR (1955) Trav-Co 1232 (DB) ** AIR 1957 Trav-Co 92 (94) (DB) ** AIR 1955 Mad 461 (465) (DB) ** AIR 1968 Delhi 101 (102): 69 Pun LR (D) 328 ** 1966 All LJ 376 (380, 381).

[See also AIR 1945 Nag 257 (261): ILR (1945) Nag 571.]

Order 21, Rule 57 — Note 4 (contd.)

[See however AIR 1936 Nag 277 (278): ILR (1938) Nag 346 ** AIR 1938 Lah 590 (592).]

(3) The removal for statistical purposes is not a judicial determination and no fresh application is necessary to continue the same. AIR 1920 Mad 358 (358) (DB) ** AIR 1916 Mad 937 (938) (DB).

[See also AIR 1915 All 410 (411): 37 All 518 (DB).]

(4) Whether the order is one having only the effect of adjourning the execution proceedings sine die or whether it is one judicially disposing of the application for execution has to be ascertained from the facts and circumstances of each case. AIR 1956 Trav-Co 122 (123): ILR (1955) Trav-Co 1232 (DB) ** AIR 1957 Trav-Co 92 (94) (DB).

(5) Execution struck off and consigned to record room by Nazim, for want of satisfaction — Powers of Nazim held terminated — Subsequent alienation held not hit by para. 11 of third schedule. 1953 Raj LW 601: ILR (1953) 3 Raj 551.

5. Responsibility of sapurdar. — (1) A sapurdar is responsible to the Court for the production of the property entrusted with him. He cannot escape liability by pleading that owing to the decree-holder's default the execution application was dismissed with the result that the attachment terminated under this rule and that therefore he handed over the property to the judgment-debtor. AIR 1940 Pesh 29 (30) ** AIR 1919 Lah 108 (108): 1919 Pun Re No. 60.

6. Revival of attachment. — (1) On the dismissal of an execution application for default, the attachment ceases. A revival of the execution proceedings, for instance, by an application for review, does not operate to revive the attachment, so as to prejudice the rights of a third party in the property acquired in the meantime. (1911) 12 Ind Cas 65 (67) (DB) (Cal) ** AIR 1925 Mad 1113 (1114) (DB). (Note — This case is **oevrruled** on a different point in AIR 1942 Mad 41: ILR (1942) Mad 336 (FB).)

[See AIR 1951 Nag 270 (275): ILR (1950) Nag 491 (DB).]

[See however AIR 1950 Mad 740 (742): ILR (1951) Mad 219 (DB).]

(2) If the judgment-debtor transfers the property after an order of dismissal under this rule, the transferee gets the property free from attachment. AIR 1952 Madh B 139 (140).

(3) Where there is no question of prejudice to third parties the attachment can be revived. AIR 1955 Nag 41 (44): ILR (1955) Nag 598 (DB) ** AIR 1936 Pat 126 (127).

[See also AIR 1944 Mad 126 (127).]

(4) Attachment ceases only upon the decree being fully satisfied — Property sold in execution of decree — Sale set aside subsequently on condition that, judgment-debtor should deposit decretal amount in Court in instalments — Failure of judgment-debtor to pay instalments — No fresh attachment is necessary before the property could be brought to sale again. AIR 1964 All 548 (552): 1963 All LJ 969 (DB).

7. Attachment before judgment. — (1) The present rule applies only to cases where the property is "attached in execution of a decree" as the rule itself expressly states, and that consequently, the dismissal of an execution application for default does not put an end to the attachment before judgment. AIR 1953 All 173 (174): ILR (1953) 1 All 654 (FB) ** AIR 1949 Cal 320 (321) ** Madh BLJ 1955 HCR 1894 (1898) ** AIR 1963 Ker 16 (17): 1962 Ker LT 264 (FB). (AIR 1962 Ker 60, **Reversed;** AIR 1924 Mad 494 and AIR 1952 Trav-Co 414 (FB), **Dissented from.**) ** ILR (1965) 2 Mad 662 (665) ** AIR 1963 Madh Pra 261 (263) (DB): 1963 MPLJ 201 (DB) ** AIR 1962 Bom 236 (240): 64 Bom LR 280 (DB). (Majority in AIR 1924 Mad 494 (FB) and AIR 1952 Trav-Co 414 (FB) and AIR 1960 Andh Pra 634 and AIR 1929 Bom 455 and ILR 12 Bom 400 and ILR 33 Cal 639 and ILR 29 Cal 773, **Diss. from** Observations to the contrary in AIR 1961 Bom 550. **Held, obiter:** minority view in AIR 1934 Mad 494 (FB), Approved and Foll.) ** AIR 1961 Assam 96 (96, 97).

[But see 1961 Ker LT 773 (774): (1961) 2 Ker LR 404 ** AIR 1960 Andh Pra 634 (635, 636): 1960 Andh LT 666 (DB) ** AIR 1950 Mad 2 (5): ILR (1950) Mad 39 (DB) ** AIR 1924 Mad 494 (500): 47 Mad 483 (FB) ** AIR 1952 Trav-Co 414 (421) (FB) ** AIR 1921 Nag 57 (59): 17 Nag LR 121 ** AIR 1922 Nag 81 (81) ** AIR 1941 Sind 13 (15): ILR (1940) Kar 454 (DB).]

(2) The dismissal of an execution application in relation to moveable property has not the effect of putting an end to an attachment of immovable properties. AIR 1940 Bom 250 (251). (AIR 1924 Mad 494 (FB), Followed.) ** AIR 1931 Bom 550 (551): 55 Bom 693 (DB). (Affirming AIR 1929 Bom 321: 53 Bom 543.)

(3) Where two properties have been attached before judgment the dismissal of an application for execution (after decree) with reference to one of them will not cause the termination of the attachment of the other. AIR 1943 Mad 322 (325).

(4) An attachment before judgment is not terminated by the rejection in limine of an execution application, for non-compliance with the formal requirements of the law. AIR 1940 Mad 615 (617) (DB).

(5) An attachment before judgment comes to an end on the date when the award of the Debt Settlement Board made under the Bengal Agricultural Debtors Act is registered. AIR 1951 Cal 551 (552).

8. Default in executing attached decree. — See Rule 53.

Calcutta: Andaman and Nicobar Islands

Add the following words at the end of the rule :

"unless the Court shall make an order to the contrary".

Gujarat

Same as that of Bombay without the words put in brackets at the end, for which read "any such direction the attachment shall be deemed to have ceased to exist." [17-8-1961].

Kerala: Laccadive, Minicoy and Amindivi Islands

Substitute the following for the last sentence in the rule, namely—

"If no steps are taken pursuant to the attachment within three months of such dismissal, the attachment shall cease." [9-6-1959.]

See Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 (2).

Madhya Pradesh

Substitute the following rule for Rule 57 :

"57. Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to have ceased to exist" [16-9-1960].

Madras and Pondicherry

Substitute the following for Rule 57 :

"57. (1) Where any property has been attached in execution of a decree and the Court hearing the execution application either dismisses it or adjourns the proceeding to a future date, it shall state whether the attachment continues or ceases:

Provided that when the Court dismisses such an application by reason of the decree-holder's default the order shall state that the attachment do cease.

Order 21, Rule 57 (Calcutta) — Note 1

(1) Order 21, Rule 57 as amended by the Calcutta High Court leaves three courses open to the executing Court in case of default of the decree-holder. It may (1) adjourn the proceedings for good reason which will automatically keep the attachment alive, or (2) simply dismiss the application which will automatically destroy the attachment or (3) dismiss the application but specifically keep alive the attachment by an express order. **AIR 1951 SC 447 (451): 1951 SCR 572.**

Order 21, Rule 57 (Madras) — Note 1

(1) Application dismissed by reason of decree-holder's default — No specific order that attachment ceased — Result contemplated in proviso would follow as necessary corollary. AIR 1957 Andh Pra 991 (991, 992) ** AIR 1960 Andh Pra 634 (635): 1960 Andh LT 666 (DB).

(2) Where an attachment ceases on any of the grounds mentioned in Order 21, Rule 57 as framed by the Madras High Court, it is the duty of the executing Court to record the cessation of attachment. AIR 1963 Mad 217 (220): (1963) 1 Mad LJ 113 (FB). (AIR 1942 Mad 306, **Overruled** on another point.) ** (1965) 2 Mad LJ 499 (502): AIR 1966 Mad 406 ** (1955) 68 Mad LW 241 (242). (Omission to state that attachment ceased — It would not prevent the attachment from coming to an end.)

(3) No dismissal of execution petition for decree-holder's default — Attachment continues especially when Judge directs it to continue till decree is fully satisfied. AIR 1950 Mad 314 (315, 316): ILR (1950) Mad 779 (DB).

(4) Dismissal of execution petition — Attachment made before judgment ordered to continue for specified period — Fresh attachment necessary if second application is filed after the period. AIR 1962 Mad 383 (384): (1962) 2 Mad LJ 132.

(5) Dismissal under first clause is not confined to dismissal for default — Court must state whether attachment ceases or continues — Rule applies also to attachment before judgment — Proviso — Failure to state in order rejecting execution for default that attachment ceased — Attachment is not continued. AIR 1950 Mad 2 (5, 7): ILR (1950) Mad 39 (DB).

(6) Where the decree-holder represented that he did not propose to press the application and requested the Court to continue the attachment and the Court passed an order, "Not pressed. Attachment to continue", the non-prosecution of the execution did not mean a default of the kind contemplated by the rule, and the attachment continued. AIR 1958 Mad 15 (17).

(7) When the decree-holder requests that the property should be attached by issuing

(2) Where the property attached is a decree of the nature mentioned in sub-rule (1) of Rule 53 and the Court executing the attached decree dismisses the application for execution of the attached decree, it shall report to the Court which attached the decree the fact of such dismissal. Upon the receipt of such report the Court attaching the decree shall proceed under the provisions of sub-rule (1) and communicate its decision to the Court whose decree is attached" [30-10-1936]; See Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-1968].

Mysore

In Rule 57, convert the full stop appearing at the end of the rule into a comma and add the words "unless otherwise specifically ordered" [30-3-1967].

Orissa

Same as that of Patna.

Patna

Delete the last sentence and add the following sub-paragraph :

"Upon every order dismissing an execution case in which there is an attachment, the attachment shall cease unless the Court otherwise directs" [7-1-1936].

INVESTIGATION OF CLAIMS AND OBJECTIONS

R. 58. Investigation of claims to, and objections to attachment of, attached property:— (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) **Postponement of sale.**—Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

[1882 and 1877, S. 278; 1859, S. 246. See Ss. 47 and 64.]

Order 21, Rule 57 — Note 1 (Mad) (contd.) notice to the decree-holder in the attached decree and the attachment is effected, there is nothing further to be done and the only course open to the Court is to close the application. That being so the expression 'closed' in respect of the application is not tantamount to "dismissed" so as to attract the applicability of R. 57. 1956 Andh LT 925 (932).

(8) Though no specific order is made that the attachment ceased, if the application was dismissed by reason of the decree-holder's default, the result contemplated in the proviso to sub-rule (1) would follow as a necessary corollary. AIR 1957 Andh Pra 991 (991, 992).

(9) It is the dismissal of the execution petition in which, for the first time, the attachment was effected that would result in the attachment being raised. The fact that subsequently another execution petition was dismissed could not lead to the cessation of the attachment because the expression "such an application" has reference only to "where any property has been attached in execution of a decree." AIR 1957 Andh Pra 991 (992) ** (1963) 1 Andh WR 26 (30).

(10) The dismissal of the application for execution need not be in the case of sub-rule (2) for default though for sub-rule (1) to become operative a dismissal for default would ultimately be the criterion. (1963) 1 Andh WR 26 (29, 30).

(11) **(Andhra Pradesh)** — Where the attaching Court is one of Small Causes and the executing Court is one of original jurisdiction there can be no difference when both these decrees are dealt with by the same Court — It would still be necessary to put on record a report for the purpose of finding out whether the particular dismissal was considered by the executing Court as one of dismissal for default or not. (1963) 1 Andh WR 26 (30).

ORDER 21, RULE 58 — SYNOPSIS

1. INVESTIGATION OF CLAIMS AND OBJECTIONS.
2. Attachment before judgment. See Rule 63.
3. PREFERENCE OF CLAIM OR OBJECTION.
4. Non-liability of property to attachment.
5. Objections after sale.

HIGH COURT AMENDMENTS

Allahabad

Add the following words to sub-rule (2):

"or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided".

Assam and Nagaland

Same as that of Calcutta—See Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 [1-2-1963].

Calcutta: Andaman and Nicobar Islands

Add the following words at the end of sub-rule (2):

"upon such terms as to security, or otherwise, as to the Court shall seem fit" [3-2-1933].

Delhi and Himachal Pradesh

Same as that of Punjab—See Act 26 of 1966, Ss. 7 and 17 [31-10-1966 and 1-5-1967].

Madhya Pradesh

Delete the full stop at the end of sub-rule (2) and add the following:

"or where the property to be sold is immovable property, the Court may, in its discretion, direct that the sale be held, but shall not become absolute until the claim or objection is decided" [16-9-1960].

See Act 26 of 1968, S. 3 and Sch., Pt. II [w. e. f. 5-9-1968].

Orissa

Same as that of Patna.

Order 21, Rule 58 — Synopsis (contd.)

6. Burden of proof is on claimant to establish possession in himself. See O. 21, R. 59.
7. ANY PROPERTY ATTACHED.
8. Debts attached in execution.
9. Decree attached in execution.
10. Property seized by receiver.
11. Properties ordered to be sold under a mortgage decree.
12. Property attached in execution of rent decree.
13. Property attached in execution of decree in favour of company in liquidation.
14. WHO CAN PREFER CLAIM.
15. Parties and representatives.
16. Trustees and shebaits.
17. Official Receiver or Official Assignee.
18. Third persons.
19. Transferee of property from the judgment-debtor.
20. Assignee of decree from the judgment-debtor.
21. Tenant of judgment-debtor. See O. 21, R. 61.
22. "SHALL PROCEED TO INVESTIGATE THE CLAIM."
23. Proviso.
24. Dismissal for default. See Rule 63.
25. Transfer of proceedings under this rule.
26. EFFECT OF ORDER — RES JUDICATA.
27. PROCLAMATION OF SALE PENDING CLAIM PETITION.
28. POSTPONEMENT OF SALE — SUB-RULE (2).
29. APPEAL.
30. REVISION.

1. Investigation of claims and objections. — (1) Where property is attached in execution of a decree, it is possible that third parties, or even the parties themselves, have objections to such attachment being made. Where a party or his representative has any such objection, the question is one falling also within Sec. 47 and therefore must be decided by the Court executing the decree and not by a separate suit. AIR 1956 Bhopal 62 (64) °° AIR 1951 Trav-Co 237 (328): ILR (1951) Trav-Co 788 (DB) °° AIR 1950 Cal 174 (176) (DB) °° AIR 1950 Pat 90 (92, 93) °° AIR 1946 Mad 209 (214): ILR (1946) Mad 707 (DB) °° AIR 1935 All 183 (184) (DB) °° AIR 1936 Bom 227 (231): 60 Bom 516 (DB) °° AIR 1939 Nag 183 (185): ILR (1939) Nag 548 (DB).

[But see AIR 1939 Pat 354 (356) (DB).]

(2) The objection by the legal representative of a deceased judgment-debtor will still be under Sec. 47 even though he became such legal representative after the claim to the property was preferred by him. AIR 1947 Cal 364 (365) (DB).

(3) The enquiry under Section 47 is a full enquiry and the determination of the question after such enquiry amounts to a decree. AIR 1951 Trav-Co 237 (238) (DB) °° AIR 1935 All 183 (185) (DB).

Order 21, Rule 58 — Note 1 (contd.)

(4) The remedy of the party aggrieved by the order in an enquiry under Sec. 47 is by way of appeal. AIR 1956 Bhopal 62 (64) °° AIR 1951 Trav-Co 237 (238) (DB).

(5) An objection by the judgment-debtor that he is not the owner thereof, does not bring it within terms of O. 21, R. 58. It is not open to the judgment-debtor to resist the attachment contending that the owner thereof is \someone else and not the judgment-debtor. (1964) 2 Andh WR 298 (300) (DB) °° AIR 1960 Madh Pra 76 (78) (DB).

(6) Order 21, Rule 58 is available to one who is not a party or a representative of the party. (1963) 67 Cal WN 916 (921).

(7) Since Sec. 47 overrides O. 21, R. 58, such objections should be preferred only under Sec. 47. Such objections however, may be treated as having been preferred under Sec. 47. AIR 1967 Punj 350 (351, 352): 68 Punj LR 216.

(8) Where a third party has a claim or an objection to the attachment of property attached in execution of a decree, there are two courses open to him. He may straightway file a suit claiming the appropriate relief, or he may file an application under this rule to the Court executing the decree. AIR 1948 Sind 24 (24) °° AIR 1942 Oudh 465 (471) (FB).

[See also AIR 1943 Nag 273 (275).]

(9) The third party objector cannot prefer an appeal against the order of attachment. AIR 1937 Lah 313 (313).

[See also Madh B LJ 1954 HCR 937 (DB)]

(10) The third party is not bound to prefer a claim or an objection under this rule. AIR 1942 Oudh 465 (471) (FB) °° (1913) 40 Ind App 56 (64) °° AIR 1964 Andh Pra 99 (101) (DB).

[See also AIR 1936 Pat 442 (443).]

(11) The remedy provided by this rule is a summary and concurrent remedy provided with the object of securing a speedy settlement of title raised at execution sales. AIR 1920 Mad 187 (190) (DB) °° ILR (1965) Cut 457 (464) (DB) °° AIR 1964 Pat 147 (150) °° AIR 1960 Madh Pra 130 (132).

[See AIR 1942 Cal 180 (202) (DB).]

[See also 1961 MPLJ 681 (683) (DB).]

[See however AIR 1935 All 183 (185) (DB).]

(12) The existence of a summary remedy does not bar a regular suit or other available remedy to the party aggrieved. (1896) 18 All 410 (412) (DB) °° (1899) 23 Bom 266 (270) (DB) °° (1895) 18 Mad 13 (17) (DB).

(13) Where third party prefers a claim under this rule the enquiry is only a summary investigation and not a full trial of the issues between the parties. AIR 1920 Mad 187 (189) (DB) °° AIR 1926 Nag 197 (198) °° AIR 1959 Bom 87 (88).

(14) Objection under O. 21, R. 58 in executing Court is not a suit. 1967 Mah LJ 877.

(15) Where a decree-holder applies for the attachment of a certain property as belonging to the judgment-debtor, it is not for the Court to anticipate proceedings under this rule and refuse to order attachment on the ground that the property does not belong to the judgment-debtor. AIR 1948 Sind 24 (24) °° AIR 1935 Lah 114 (114, 115).

(16) The pendency of a claim petition operates as stay of the execution of the decree in order to attract the provisions of Sec. 15 (1). Limitation Act. AIR 1955 Mad 67 (67) (DB).

(17) The rule applies where the Collector has attached property under the proviso to Sec. 46 (2) of the Income-tax Act, 1922. AIR 1957 Mad 376 (378, 379) (DB) °° AIR 1965 All 154 (158) °° (1963) 47 ITR 527 (528) (All).

(18) Order 21, Rules 58 to 63 are applicable to a case where an attachment is made under O. 21, R. 46. AIR 1962 Andh Pra 137 (139) (DB).

(19) The petitioners are not entitled to raise the question of bar of limitation to the execution of the decree and similar questions in a claim petition. It has to be decided entirely within the scope of Rules 58 to 61 of O. 21, C. P. Code. (1968) 1 Andh WR 452 (455).

(20) The nearest Indian equivalent of a pro interesse suo (for his own interest) application is the procedure prescribed in Rules 58 to 63, O. 21, C. P. C. dealing with investigation of claims and objections to attachment. AIR 1962 Cal 169 (171) (DB)

(21) A suit filed under O. 21, R. 63 is regarded for certain purposes as a continuation of claim proceedings which had given rise to that suit but there is no warrant for holding that such a suit is connected with the earlier suit itself. (1965) 2 Mad LJ 449.

(22) The provisions of the O. 21, Rr. 58 and 63 C. P. C. are made applicable to Presidency Small Cause Courts by reason of the rules made by the High Court under S. 9 of the Presidency Small Cause Courts Act. 1961 Bom 112 (113, 114): 62 Bom LR 935. (AIR 1936 Mad 551 and 35 Ind App 22 (PC), Rel. on. ILR 4 Mad 131, Dist.)

(23) Attachment of property by decree-holder — Subsequent sale of the property to 'P' for recovery of sales tax by the Revenue Dept. — P has a prior right over the right of the attaching decree-holder. (1965) 2 Ker LR 242 (246).

(24) Where a rent decree under Bihar Tenancy Act ceases to be a rent decree and is sought to be executed as a money decree. S. 170 Bihar Tenancy Act does not bar a claim under O. 21, R. 58. 1961 BLJR 38 (40).

(25) Where a collector on a request of a Magistrate to recover a fine moves a Civil Court for that purpose all the provi-

Order 21, Rule 58 — Note 1 (contd.)
sions relating to execution of a decree apply to such proceedings and therefore claims can be investigated under O. 21, R. 58. AIR 1961 All 528 (529): 1961 (2) Cri LJ 585.

2. Attachment before judgment. — See Rule 63.

3. Preference of claim or objection. — (1) The rule is very wide and comprises claims of third parties whether put forward by themselves or on their behalf by the parties to the suit or their representatives. (1899) 23 Mad 195 (202) (FB).

[See AIR 1941 Pat 240 (241).]

(2) Where upon the objection by the third party claimants, attachment before judgment was removed on the claimants' depositing certain amount as security for the claim of the plaintiff, subsequently the plaintiff's suit was decreed and the objection of the claimants was dismissed with costs, the deposit by the claimant is not a security for any claim of the plaintiff for costs against the claimant. ILR (1951) 1 Cal 341 (343, 344).

(3) Where the decree-holder does not object to the oral objections to the attachment, he cannot subsequently urge that no written objections were submitted. AIR 1933 Sind 126 (127) (DB).

(4) Where an earlier attachment merges into a later attachment a second claim petition would be competent notwithstanding the fact that an earlier claim petition preferred immediately after the earlier attachment had been dismissed. (1969) 1 Mad LJ 386.

4. Non-liability of property to attachment. — (1) The rule pre-supposes the existence of an attachment and the ground of the application is that the property is not liable to attachment. AIR 1954 Bhopal 30 (31) °° AIR 1923 Bom 381 (382) (DB) °° AIR 1924 Mad 889 (889) (DB).

(2) Where there is no attachment at all, an objection under this rule is incompetent. AIR 1923 Bom 381 (382) (DB) °° AIR 1935 All 343 (344, 345) (DB).

[See AIR 1954 Bhopal 30 (31).]

(3) Where a third party whose property is sought to be attached in execution in order to avoid the attachment, pays into the Court the decretal amount and then seeks for a refund of the money on the ground that his property was not liable to attachment, the Court has inherent power to order such refund, although the case may not fall under this rule. AIR 1940 Sind 191 (192).

(4) An objector cannot prefer an application under this rule merely on the ground that he has not been made a party to the execution proceedings. AIR 1926 Mad 355 (356) (DB).

(5) The words "on the ground that such property is not liable to attachment" have reference merely to a case where an objection is made to an attachment and not to a claim preferred to the property. AIR 1922 All 593 (596) (DB).

(6) It is open to a claimant to put forward his claim under this rule on the ground that there is no decree or that the Court which passed the decree had no jurisdiction to pass it or that the Court which executes the decree has no jurisdiction to do so. AIR 1929 Mad 383 (384).

(7) The objection that the attachment made is not legal or valid, can be raised under this rule by the claimant. AIR 1927 Mad 450 (455).

(8) It is not open to a claimant to attack the validity of the decree or the decree-holder's right to execute the same; it is thus not open to him to plead that the execution application is barred by limitation. AIR 1942 Cal 180 (202) (DB) °° AIR 1958 Pat 534 (535) (DB).

(9) Hindu Law — Joint family — Suit for partition pending — Creditor of co-parcener, attaching his share in undivided property — Items of property under attachment allotted to other members on final partition decree — Attachment on such items should be raised. 1962 Mys LJ (Supp) 477 (479).

5. Objections after sale. — (1-2) A Court has no jurisdiction to entertain a claim under this rule after the execution sale has taken place on the ground that the attachment is ipso facto determined after the sale has taken place. AIR 1942 Bom 263 (265) °° (1869) 11 Suth WR 54 (55) (DB) °° AIR 1937 Cal 390 (392) (DB) °° AIR 1938 Lah 568 (568) (DB) °° Madh B LJ 1954 HCR 335 (335) °° AIR 1952 Orissa 120 (126) (FB) °° AIR 1924 Pat 76 (78) (DB) °° AIR 1928 Rang 80 (80) °° AIR 1955 Trav-Co 51 (53) (FB) °° AIR 1937 Pesh 97 (99) (DB) °° (1950) 55 Mys HCR 42 (47) °° AIR 1962 Pat 403 (404) (DB) °° AIR 1964 Madh Pra 158 (159, 160) (DB).

(3) The other view is that a claim can be preferred after court auction sale but before confirmation of the same, on the ground that the attachment subsists till the confirmation of the sale. AIR 1931 Mad 782 (783). (But see observations in AIR 1942 Mad 41 (FB)) °° AIR 1958 Mys 140 (142, 143) °° AIR 1940 Nag 7 (7) °° AIR 1933 Sind 198 (200) (DB) °° ILR (1954) Mys 187 (191) °° AIR 1963 Raj 144 (145).

(4) The Patna High Court in a later decision and the Allahabad High Court have held that under the amendment of the rule by those Courts, a Court can deal with a claim petition under R. 58 even after a sale has taken place, provided that it has not been confirmed. AIR 1939 Pat 430 (431) °° AIR 1939 All 598 (599).

(5) Where as a result of the investigation of the claim the Court comes to the conclusion that the claim is well founded and the applicant-claimant is in possession of the property on his own account, then

Order 21, Rule 58 — Note 5 (contd.)
such order will have the effect of setting aside the sale and if it has been purchased by a third party in good faith, he may be compensated by the decree-holder or objector as the case may be. AIR 1968 Pat 184 (186). (AIR 1937 Cal 390 and AIR 1924 Pat 76, held no longer good law.)

(6) An objection by a party to the suit or his representative falls under Sec. 47 and can be raised even after the sale. AIR 1937 Pesh 82 (83).

(7) A third party whose property is being wrongfully sold for another's debt must prefer his objection or claim under this rule. He cannot apply under Rule 90 treating the case as one of irregularity in publishing or conducting the sale. AIR 1941 PC 45 (46).

6. Burden of proof is on claimant to establish possession in himself. — See O. 21, R. 59.

7. Any property attached. — (1) The rule applies to a claim to moveables, or to a fractional share of the immovable property attached, or to a share of the moveables seized in execution. (1910) 8 Ind Cas 77 (78) (DB) (Cal) °° (1870) 13 Suth WR 63 (67, 68) (FB).

(2) An objection by a third party to the attachment of any property can be entertained only after an attachment has been made. AIR 1935 All 343 (344) (DB).

(3) Order 21, R. 49 (2) does not contemplate levying of an attachment of property within the meaning of this rule but provides a process in substitution of the attachment. AIR 1946 Mad 176 (177, 178).

(4) The rule as amended by the Patna High Court, brings within its scope, not merely property attached in execution but also all property which was the subject-matter of the execution proceedings. AIR 1958 Pat 510 (511).

8. Debts attached in execution. — (1) The rule applies also to claims relating to the attachment of debts. A garnishee who has failed in his claim cannot, without filing a suit within one year from the date of the order against him, assert either as plaintiff or as defendant the right denied to him by that order. AIR 1914 Bom 299 (300) (DB) °° AIR 1924 Lah 367 (367) °° (1904) 27 Mad 67 (70, 71) (FB). (Overruling 24 Mad 20). °° AIR 1931 Mad 570 (571).
[But see (1874) 22 Suth WR 36 (37) (DB).]

(2) Where a garnishee denies the existence of the debt, he does not lay any claim to attached property and this rule does not apply to such a case. AIR 1954 Trav-Co 243 (247) (FB) °° AIR 1946 Mad 176 (178).

(3) Where the garnishee does not absolutely deny his obligation to pay but only claims to be entitled to defer payment, it is not a case of denial of the existence of the debt and Rr. 58 to 63 apply. AIR 1942 Mad 650 (651).

(4) The failure of the garnishee to show cause why he should not pay into the Court the debt in response to a notice under O. 21, R. 46A (Sind Amendment) will debar him from raising an objection at a later stage by means of an application under this rule. AIR 1943 Sind 23 (23).

9. Decree attached in execution. — (1) Where A obtains a decree against B for money and in execution thereof attaches a decree in favour of B, and C who had obtained before the attachment a transfer of the decree attached prefers a claim to the decree, his claim falls under this rule. AIR 1926 All 244 (245).

10. Property seized by receiver. — (1) Where a receiver in insolvency after adjudication of the judgment-debtor seizes properties as belonging to the insolvent, it is open to third persons to prefer their claims or objections, if any, to such property. But such claims fall u/s. 4 of the Provincial Insolvency Act and are triable by the Insolvency Court, although the procedure to be followed is that prescribed by this rule. AIR 1914 All 212 (212) (DB) °° (1911) 9 Ind Cas 344 (345) (Bom) °° AIR 1914 All 264 (265) (DB).

(2) The decision of the Insolvency Court under S. 4 of the Provincial Insolvency Act, on claims by third persons can be challenged by the aggrieved party only by way of appeal or otherwise as provided by the Insolvency Act itself, and not by way of a suit under Rule 63. AIR 1928 All 158 (159) (DB).

(3) Where a property has been attached in execution of a decree, the mere fact that subsequent thereto the judgment-debtor becomes an insolvent and his properties become vested in the Official Receiver or the Official Assignee, will not disentitle a claimant from preferring an objection under this rule. (1887) 9 All 232 (233, 234) (DB) °° AIR 1928 All 158 (159) (DB).

11. Properties ordered to be sold under a mortgage decree. — (1) Since attachment is necessary in the case of money decrees and not in the case of mortgage decrees, the provisions of this rule do not apply to claims or objections relating to properties ordered to be sold under a mortgage decree. AIR 1949 Pat 466 (469) (DB) °° (1880) 4 Bom 515 (520) (FB) °° AIR 1932 Mad 716 (719).

(2) The remedy of an objector in a case where property is ordered to be sold under a mortgage decree is by way of a separate suit. ILR (1954) Hyd 911 (914) (DB) °° (1887) 14 Cal 631 (633) (DB).

(3) Where, a mortgage decree-holder erroneously applies for, and gets an attachment effected on the properties and a claim is thereupon preferred, this rule will apply and the order on the claim will be conclusive within the meaning of Rule 63. ILR (1954) Hyd 911 (911, 912) (DB) °° AIR 1928 Mad 525 (527) (DB) °° AIR 1915 Low Bur 136 (137) (FB).